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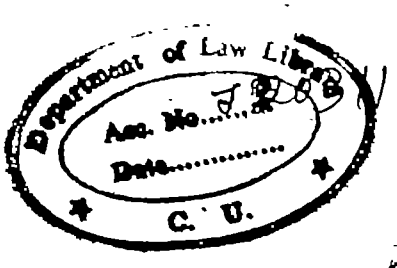
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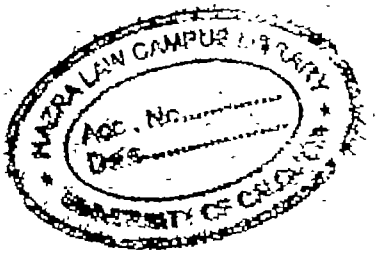
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THE
MADRAS LAW JOURNAL

I] JANUARY. [1951

OURSELVES

The Madras Law Journal which is the oldest non-official legal Journal in India, has completed sixty years of its service to the profession and is entering upon its sixty first year with this issue. The Madras Law Journal has now come to be looked upon as an institution in the Legal World. Thanks to the generous support that has been uniformly extended to us through all these years by the members of the Bench and the Bar, we have been able to carry on the good work inaugurated by the illustrious founders of the Journal. We are very much indebted to the Honourable Judges of our High Court for the facilities that have been extended to us in obtaining copies of judgments which have enabled us to report decisions promptly and accurately. While it has been our constant endeavour to maintain the high ideals which inspired the founders of the Journal and the traditions set up by them we have tried to meet also the contemporary requirements. The volume of reportable decisions has of late increased enormously and it has been no easy task to discriminate, for invariably every judgment does contain some new point of view, some new method of approach to a question of law or some some new interpretation of existing precedents. On the whole we have tried to carry on the Journal along the old lines laid down by the founders and shaped by those eminent men who have been in charge of the Journal. The Notes of Indian Cases which has been a much appreciated and outstanding feature of the Journal ever since its beginning, continues to be an exhaustive and critical

review of the important decisions of the Supreme Court and our High Court. The Madras Law Journal has been discharging its duties to the profession in spite of various difficulties and will continue to do so in the days to come and we hope that the generous support and patronage which it has been receiving all along would be forthcoming in more abundant measure in the future.

We propose to publish in the course of the year a Souvenir Number of our Journal in commemoration of this occasion.

THE

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THE MARCH OF LAW : 1950.

With India becoming an Independent Republic with its own Supreme Court and the new constitution coming into force, the value and importance of precedents has been pushed more to the front than ever before. The citizen whose Fundamental rights have been guaranteed by the constitution for the first time should know the nature and extent of his rights as interpreted by the Courts of the land and the appropriate procedure for the enforcement of those rights. As in previous years, an attempt is made to give in the following pages a resume of the case law of the year that has just passed. The decisions rendered by the Supreme Court and our High Court have been collected under familiar topical headings to enable the reader to get a connected idea as to the development of particular branches of law.

High Court—Its Powers and Jurisdiction.

The jurisdiction of the High Court to direct the Chief Controlling Revenue authority and the Superintendent of Stamps at Bombay to state a case for the opinion of the Court under section 57 of the Stamp Act came to be recognised by the Supreme Court in *The Chief Controlling Revenue Authority and the Superintendent of Stamps* v. *The Maharashtra Sugar Mills, Ltd.*[1]. It was pointed out that the order of the High Court to a Revenue Authority to do his statutory to state case would not be in the exercise of Original Jurisdiction in any matter concerning the revenue and that section 226 of the Government of India Act, 1935, is not a bar to the exercise of such a jurisdiction. In, In the matter of *Venkateswarlu*[2], it was held that Article 226 of the Constitution provides the High Court with all the powers which a High Court of Justice in England has under the common law for the issuing of prerogative writs and that the High Court has the power to issue in appropriate cases, even to the Government, directions, orders, or writs including writs in the nature of *habeas corpus*, etc., for the enforcement of any of the rights conferred by Part III of the Constitution, namely, Fundamental rights and for any other purpose. The actual decision in the case was that if the arrest and detention of a person contravened the rights or privileges or immunities which he enjoyed as a member of the Legislature, the High Court would issue the writ and direct his release. In *Shanmugha Mudaliar*, In re[3], it was pointed out that a writ of mandamus to the Board of Revenue to refer the question

1. (1950) 2 M.L.J. 564 : 1950 S.C.J. 444.
2. (1950) 2 M.L.J. 207.
3. (1950) 2 M.L.J. 399.

of liability of a document to stamp duty cannot issue from the High Court as under section 57 of the Stamp Act it is left to the discretion of the Board to refer or not to refer such a question and as such it cannot be said that the Board has failed to exercise any "statutory duty" when it refuses to make a reference. In *Nathamooni Chetti* v. *Viswanatha Sastri*[1], it was held that though there was no specific period of limitation, it was the accepted practice of the High Court not to exercise the extraordinary power by way of the issue of prerogative writs where there has been a long delay since the passing of the order sought to be quashed.

Constitutional Law.

The power of the Governor to promulgate retrospective Ordinances under the Government of India Act, 1935, came to be discussed in *Velayudam*, In re[2], and it was pointed out that the Provincial Legislature can pass a law creating a crime for the first time and giving it retrospective effect, and a Governor exercising the power of promulgating an Ordinance, if he conforms to the provisions of section 88 of the Government of India Act, 1935, can also do likewise and such an Ordinance will have the same effect as an Act of the Provincial Legislature. It was further pointed out that there was no reason why a Governor should not be at liberty to promulgate retrospective Ordinances having the effect even of reopening transactions which have been adjudicated upon by Courts of law. In considering the validity of the Bihar Maintenance of Public Order Ordinance, IV of 1949, the Federal Court in *Lakhi Narayan Das* v. *The Province of Bihar*[3], was called upon to decide as to the powers of the Governor to promulgate an Ordinance under the Government of India Act, 1935 and as to when section 107 of the Government of India Act, 1935, comes into operation. It was clearly pointed out therein that the language of section 88 of the Government of India Act showed that it is the Governor and Governor alone who has got to satisfy himself as to the existence of circumstances necessitating the promulgation of an Ordinance and that the existence of such necessity is not a justiciable matter which Courts could be called upon to determine by objective test. The conditions necessary to be established to attract the operation of section 107 of the Government of India Act, 1935, were held to be two, namely, that the impugned enactment and those of an existing law must be in respect of the same subject-matter and the subject-matter must be covered by one of the items in the Concurrent List and that there must be repugnancy between the two provisions. In dealing with the relative scope of the Legislative Lists, their Lordships have said that the Concurrent List is not a forbidden field for the Provincial Legislature and the mere fact that the Provincial Legislature has legislated on any matter in the Concurrent List is not enough to attract the mischief of section 107 of the Government of India Act and that there must be repugnancy between such legislation and an existing law. Finally in pointing out the province of the Court when dealing with legislation regarding "preventive detention" they said that the Court has got to decide on a consideration of the true nature and character of legislation whether it is really on the subject of preventive detention or not and that once that point is decided in favour of the legislative authority and it is held that it has not trespassed beyond the limits of its assigned powers, it is not for the Courts to criticise the wisdom and policy of the Legislature. In the *Province of Bombay* v. *Khushaldas S. Advani*[4], two of the Judges of the Supreme Court have held that a writ of *certiorari* will lie against the Provincial Government while the other Judges considered that it was unnecessary to decide the point in the appeal. But all the Judges have dealt at length on the conditions on which a *certiorari* will issue. All agree in stating that wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, a writ

1. (1950) 2 M.L.J. 448.
2. (1950) 1 M.L.J. 508.
3. (1950) 1 M.L.J. 760 : 1950 S.C.J. 32.
4. (1950) 2 M.L.J. 703 : 1950 S.C.J. 451.

of *certiorari* may issue. But in applying the principle to the case before them the Judges differed and the majority held that the writ of *certiorari* would not be available to an aggrieved party to remove or quash an order made by Government of Bombay requisitioning certain premises under section 3 of the Bombay Land Requisition Ordinance, V of 1947, because the decision of the Provincial Government as to the existence of a public purpose in regard to requisitioning of property is not a judicial or quasi-judicial decision. The judgments contain elaborate discussions as to judicial, quasi-judicial decisions and administrative acts. The Chief Justice has pointed out that inconvenience or want of adequate remedy does not create a right to a writ of *certiorari*. The scope of the Fundamental right guaranteed to a citizen by Article 15 (1) of the Constitution and whether it was violated by the Madras Communal Government Order regarding admission to educational institutions was elaborately discussed and forcibly stated by a Full Bench in *Sri Champakam Dorairajan* v. *The State of Madras*[1]. It was held that the Madras Communal Government Order which states that only a limited number of seats in educational institutions are allotted to a particular caste, namely, Brahmins, discriminates very markedly against members of that caste and shuts out students having high qualifications solely on the ground of their caste or religion and as such violates Article 15 (1) of the Constitution and so cannot be given effect to. The question whether preventive detention came within the purview of Article 19 of the Constitution came up for discussion and decision before the Supreme Court in *A. K. Gopalan* v. *The State*[2]. It was held by the majority that the Preventive Detention Act, IV of 1950, is not invalid as in anyway affecting the Articles of the Constitution. While the Chief Justice and the majority have held that on a true construction of Article 19, both preventive and punitive detention are outside the scope of Article 19, Fazl Ali and Mahajan, JJ., have held that preventive detention amounts to a complete deprivation of the right guaranteed by Article 19 (1) (*d*). The judgments of their Lordships deal elaborately with the scope of the Fundamental rights guaranteed by the Constitution. All the Judges agreed in holding that section 14 of the Preventive Detention Act which prohibited the disclosure of the grounds of detention contravenes or abridges the right given under Article 22 (5) of the Constitution and is therefore invalid but that as the section can be severed from the rest of the Act it did not affect the rest of the Act. The word "law" in Article 21 and the omission of the word "due" from that Article has come in for a good lot of useful discussion. In *Romesh Thappar* v. *The State of Madras*[3], the majority of the Judges of the Supreme Court have held that an order under section 9 (1-A) of the Madras Maintenance of Public Order Act prohibiting entry and circulation in the State of Madras of a Weekly Journal violates the Fundamental rights of freedom of speech and expression guaranteed under Article 19 of the Constitution. They point out that unless a law restricting of speech and expression is directed solely against the undermining of the security of the State or the overthrow of it, such law cannot fall within the reservation under clause (2) of Article 19. Freedom of speech and expression were held to include freedom of propagation of ideas and that that freedom is ensured by the freedom of circulation. The case under notice also has stated in clear terms the relative scope of Articles 32 and 226 of the Constitution. It is pointed out that Article 32 does not merely confer power on the Supreme Court as Article 226 does on the High Courts to issue certain writs for the enforcement of the rights conferred by Part III of the Constitution or for any other purpose as part of its general jurisdiction. Article 32 was held to provide a "guaranteed" remedy for the enforcement of those rights and that this remedial right itself is made a Fundamental right by being included in Part III. They held that the Supreme Court was thus constituted the protector and guarantor of fundamental rights and that it cannot consistently with the responsibility so laid upon it refuse to entertain applications

1. (1950) 2 M.L.J. 404.
2. (1950) 2 M.L.J. 42 : 1950 S.C.J. 174.
3. (1950) 2 M.L.J. 390 : 1950 S.C.J. 418.

seeking protection against infringement of such rights with the result that a citized can resort directly for such relief to the Supreme Court in the first instance and neen not resort to the High Court under Article 226 of the Constitution. In *Sakthi Velu*, In re[1], it was held that the question as to whether an appellate Court, at the time of hearing an appeal under section 411-A of the Criminal Procedure Code is entitled to go into the validity or otherwise of the order granting leave by the trial Judge, is a question of importance regarding procedure uncovered by authority and as such was a fit case for appeal to the Supreme Court. In *Mandalappu Paddayya*, In re[2], it was pointed out that the Supreme Court will not interfere with the course of justice in criminal cases in the free fashion of a fully constituted Court of criminal appeal and that it will interfere only in cases of great public or private importance or if injustice of a serious and substantial character has occurred and that where it is not so the High Court cannot grant a certificate that the case is a fit one for appeal to the Supreme Court. In *Ramaswami Chettiar* v. *Ramanathan Chettiar*[3], it was held that an appeal against the judgment and decree of the High Court delivered prior to the commencement of the Constitution would lie to the Supreme Court if an appeal lay to the Federal Court having regard to provisions of sections 109 and 110 and Order 45 of the Civil Procedure Code. The scope of the power conferred on the High Court by Article 226 of the Constitution was the subject-matter of decision in three cases. In, In the matter of *Venkateswarlu*[4], it was held that Article 226 of the Constitution provides the High Court with all the powers which a High Court of Justice in England has under the common law for the issuing of prerogative writs and that the High Court has the power to issue in appropriate cases, even to the Government, directions, orders or writs including writs in the nature of *habeas corpus*, etc., for the enforcement of any of the rights conferred by Part III of the Constitution, namely, Fundamental rights and for any other purpose. It was further held that if the arrest and detention of a person contravened the rights and privileges or immunities which he enjoyed as a member of the Legislature, the High Court would issue the writ and direct his release. The circumstances and against whom a writ of prohibition can be issued was decided in *Nagabhushana Reddi*, In re[5]. It was held that the writ, which is only available to an aggrieved party as against inferior Courts, tribunals and bodies with powers by the law of the land to affect rights of parties cannot issue in the case of private bodies like the Election Sub-Committee of All India Congress Organisation. It was further held that the general rule that writs will not issue if there is another adequate remedy should apply to the issue of a direction, order or writ under Article 226 (1) in spite of the apparently wide language employed. In *Mahammad Beary* v. *Hassan Kutty*[6], it was held that Article 226 of the Constitution cannot operate to take away a vested right which had accrued to a party prior to the coming into force of the Constitution by reason of the opposite party not having appealed against an adverse order and having allowed it to become final.

(*To be continued.*)

1. (1950) 2 M.L.J. 245.
2. (1950) 2 M.L.J. 569.
3. (1950) 2 M.L.J. 400.
4. (1950) 2 M.L.J. 207.
5. (1950) 2 M.L.J. 278.
6. (1950) 2 M.L.J. 623.

CRIMINAL LAW.

Where an accused knows fully that he is committing homicide and he also knows that the act which he was doing was both wrong and contrary to law, he cannot seek the help of section 84, Penal Code, to support a plea that he had not committed the crime of murder was the point decided in *Kulandai Thevar*, In re[1]. In *Manickam*, In re[2], it was held that when a person was not insane but was only unbalanced and excited and probably in some kind of obsession or hallucination when he cut off the deceased, it cannot be said he did not know the nature of the Act or that he was doing a wrong act and so section 84 of the Penal Code could not be invoked in such a case. That abetment of an abetment would be an offence even though the second abetment is ineffective was the point decided in *Rajaratnam Reddi*, In re[3]. It was pointed out therein, that the expression "abetment of such abetment" in the latter half of Explanation IV to section 108, Penal Code, would include also the instigation of a person who refuses to instigate the commission of an offence. In *Pachiappan*, In re[4], it was pointed out that it was neither desirable nor expedient to commit all cases of sedition in the Madras City to the High Court irrespective of its nature. That a person who submits passively to a beating by others cannot be convicted under section 160, Penal Code, was the point of the decision in *Ramakudumbam*, In re[5]. It was pointed that an affray requires two sides fighting and unless at least there is a challenge or war cry or even active non-violent resistance by the person beaten, the latter cannot be convicted under section 160, though he might be howling in pain and not doing anything to resist the beating. For the prosecution of a Public Servant for an offence under section 161, Penal Code, sanction under section 197, Criminal Procedure Code, was not necessary according to the decision of the Privy Council in *Lumbardar Zutshi* v. *The King*[6]. In *Devanugraham*, In re[7], it was held that in order to constitute proper sanction to prosecute an accused for an offence under section 161, Penal Code, there should be evidence either from the order granting sanction or other documentary authority placed before the Court or even oral evidence that the facts were placed before the officer from whom sanction was sought. In holding that a landlord disobeying the order of the Collector under section 3 (2) of the Madras Buildings (Lease and Rent Control) Act is liable to conviction under section 188, Penal Code, it was pointed out in *Mrs. B. Gervase*, In re[8], that the Penal Code will apply wherever its application is not expressly or by necessary implication excluded, and where the requirements prescribed under the Penal Code for the offence charged are satisfied. Where there is evidence of murder by witnesses in whose presence it was alleged to have been committed, according to the decision in *Maya Basuva*, In re[9], the accused can be convicted under section 302, Penal Code, even in the absence of the *corpus delicti* because it is not obligatory for proving the death of a person that his dead body should be recovered. The question of law whether police constables can be subjected to criminal force by persons arrested by them for a non-cognisable offence after their escape from custody and in revenge fell to be decided in *Public Prosecutor* v. *Munuswami and others*[10]. It was held that while under our law, a person is entitled to inflict the necessary minimum injuries, even on constables and other public officers illegally arresting them, in order to release himself from such unlawful custody, he is not given any right to beat them or pelt stones at them or use criminal force towards them in revenge after escaping from their custody and if they do so they could be convicted under section 353 of the Penal Code. In *Dasan Gangaraju*, In re[11], it was held that if the accused gives an explanation as to how he came by the possession of certain stolen articles which explanation may be true, the onus lies on the prosecution to prove the guilt of the accused and that where the prosecution does not discharge its onus and the only evidence is the production of the stolen articles by the accused with an explanation, he cannot be convicted under section 380,

1. (1950) 1 M.L.J. 465.
2. (1950) 1 M.L.J. 819.
3. (1950) 2 M.L.J. 201.
4. (1950) 1 M.L.J. 26.
5. (1950) 1 M.L.J. 106.
6. (1950) 1 M.L.J. 302 (P.C.).
7. (1950) 2 M.L.J. 333.
8. (1950) 1 M.L.J. 201.
9. (1950) 1 M.L.J. 428.
10. (1950) 1 M.L.J. 27.
11. (1950) 1 M.L.J. 792.

Penal Code, by drawing a presumption under section 114, Evidence Act. That a person who has been convicted for unlawfully entering into or upon property in the possession of another cannot be convicted under section 414, Penal Code, for continuing to remain after that unlawfully was decided in *Ponnuswamy* v. *Mahipathy*[1]. As pointed out therein, his continuing to remain unlawfully will be an offence only if it falls under the second part of section 411, Penal Code, and that for the second part it will be an offence only if he having lawful entry unlawfully remains on the property. The limits of the privilege of a caste panchayat in cases of alleged defamation came to be defined in *Ellappa Goundan* v. *Ellappa Goundan*[2]. It was recognized that while a caste, like the Vania Caste, will have a customary right to go into the allegations of immorality against a woman of their tribe, in order to safeguard caste purity and prestige, no such customary right is given for composite assembly of different castes holding an assembly wherein defamatory statements are made and acted upon and a Vania is outcasted. A Full Bench in *Narayana Aiyar* v. *Veerappa Pillai*[3], has held that when an offence falling under both section 193 and section 500, Penal Code, is committed, a complaint by the person defamed would be maintainable and a complaint by the Court concerned under section 195, Criminal Procedure Code, is not necessary to enable the Magistrate to take cognizance of the case and the case in *Nallappa Goundan* v. *Chinnamal*[4], was approved.

EVIDENCE.

The question of the admissibility of a Judgment of a French Court in regard to the validity of an adoption in proceedings before Courts in British India came up for decision before the Lordships of the Privy Council in *Nataraja Pillai* v. *Subba Raya Chettiar*[5], and it was held that it would be admissible under section 13 of the Evidence Act, even though one of the parties to such proceedings was not a party to the proceedings in the French Court. In considering the value to be attached to it, it was pointed out that the weight to be given to it must depend on all the circumstances and that it cannot be said that it must be followed. But in the case under notice as it was a judgment of the Court of the domicile in relation to the validity of the adoption both in law and as regards the facts necessary to its validity in the French territory, it was cogent evidence of the French Law itself and ought in such circumstances to be given weight in all matters with which it deals. Where an accused charged in the alternative with breaking into a house and stealing a bicycle and dishonestly possessing a light forming part of the cycle stolen, made a statement to the police that " I gave the dynamo and light to *V*. . . . . I got back from *V* the dynamo light . . . . . and the dynamo stolen from my next house and sold them to *X* for Rs. 15 ", it was held in *Vellingiri*, In re[6], that the portion of the statement " I sold the dynamo to *X* " was admissible in evidence as the statement led to the discovery of the sale and the conviction of the accused for possession of the dynamo would be justified on the admissible portion of the statement. But it was held that " I gave the light and dynamo to *V* " was not admissible in evidence since the requirements of section 27 of the Evidence Act were not satisfied. In *Karunthambi*, In re[7], it was pointed out that though section 29 of the Evidence Act makes a confession made by an accused person who had not been warned according to the provisions of section 164, Criminal Procedure Code, admissible in evidence, it would not validate it when the necessary pre-requisites validating a confession and making it acceptable in Court are absent. That a recital in a will that the property dealt with thereunder is the property of the testator is relevant evidence under the Evidence Act was decided in *Periaswami* v. *Varadappa*[8]. It was also held in the same case that the recital can be taken as a statement made in the course of a transaction under section 13 of the Evidence Act. In *Savitri Devi* v. *Ran Bijoy Prasad Singh*[9], their Lordships of

1. (1950) 2 M.L.J. 668.
2. (1950) 1 M.L.J. 194.
3. (1950) 2 M.L.J. 686.
4. (1941) 2 M.L.J. 618 : I.L.R. (1942) Mad. 158.
5. (1950) 1 M.L.J. 172 (P.C.).
6. (1950) 1 M.L.J. 467.
7. (1950) 1 M.L.J. 659.
8. (1950) 1 M.L.J. 325.
9. (1950) 1 M.L.J. 163 (P.C.).

the Privy Council pointed out that the principle upon which hearsay evidence is admitted under section 32 (3) of the Evidence Act is that a man is not likely to make a statement against his own interest unless true but that this sanction does not arise unless the party knows the statement to be against his interest. Where a document sought to be summoned is itself a notice sent by one party to the other and a copy of the notice is produced by the sender, then according to the decision in *Sundaresa Iyer*, In re[1], under section 66 of the Evidence Act it is not obligatory to summon production of the original notice and that the non-summoning of the original notice would not make a copy of it inadmissible. As to when the signature of a scribe can be regarded as attestation, it was pointed out in *Murugesa Mudaliar* v. *Gopalakrishna Mudaliar*[2], that the signature of a scribe may itself in certain circumstances be regarded as an attestation which stands duly proved by his evidence and that it is a question in each case which turns upon its own circumstances. A scribe may be an attesting witness as well as the writer, but the fact that he signed as an attesting witness must be duly proved. That the presumption of genuineness under section 90, Evidence Act, cannot be made in the case of copies was decided in *Venkata Ratnam* v. *Sitaramayya*[3]. In *Subbamma* v. *Venkata Reddi*[4], it was held that the presumption under section 112 of the Evidence Act, shall be drawn by all Courts Civil, Criminal and Revenue, governed by the Evidence Act. When there is an explanation as to possession of certain stolen articles, and the prosecution does not prove the guilt of the accused, he cannot according to the decision in *Dasan Gangaraju*, In re[5], be convicted of an offence under section 380, Penal Code, by drawing a presumption under section 114 of the Evidence Act. That an advocate who has acted for a client is debarred under section 126 of the Evidence Act from disclosing the instructions given to him by his client with the result that the client cannot be convicted on the evidence of the lawyer as to the instructions given to him on the strength of which he has put certain defamatory questions to a witness was the point decided in *Appayya* v. *Subbayya*[6]. There is a good statement of the law as to estoppel by representation in *Veeraraghava Reddi* v. *Kamalamma*[7]. It was held that to invoke the doctrine of estoppel by representation it is necessary that in acting upon it, the party to whom it was made shall have altered his position to his prejudice, and that it involves a combination of several essential elements, the representation or statement to be acted upon, action on the faith of such statement and in the manner intended and resultant prejudice or detriment to the person acting. It was further pointed out that estoppel though a branch of the law of evidence is also capable of being viewed as a substantive rule of law in so far as it helps to create or defeat rights which would not exist or be taken away but for that doctrine. In *Chokkalingam Pillai* v. *Ganesa Shanmugha Sundaram Pillai*[8], it was held that for a threat of eviction by title paramount to constitute a good defence to an action for rent, the party evicting must have good title and the tenant must have quitted against his will.

Torts.

The principles in regard to the liability of an occupier of premises for injuries caused to an invitee was examined in *Nagin Lal Hira Lal Javeri* v. *Pushpa Ben J. Patel*[9]. In that case it was held that visitors to a cinema theatre were invitees and that where they are injured by the collapse of a wall and the occupier is found to be aware of the defect in the wall, he would be liable and that his liability would not be in no way less than that of the owner.

Hindu Law.

The law in regard to the power of a widow with reference to the authority conferred by the husband has come in for a clear statement in *Lakshminarayana Sastri* v. *Sundararamayya*[10]. It was held that if the husband when giving authority

1. (1950) 1 M.L.J. 314.
2. (1950) 2 M.L.J. 262.
3. (1950) 1 M.L.J. 720.
4. (1950) 1 M.L.J. 158.
5. (1950) 1 M.L.J. 792.
6. (1950) 1 M.L.J. 654.
7. (1950) 2 M.L.J. 575.
8. (1950) 2 M.L.J. 605.
9. (1950) 2 M.L.J. 572.
10. (1950) 1 M.L.J. 537.

to the widow directs that a particular boy should be adopted, the widow would have no power to make an adoption of another boy unless the boy mentioned by her husband was not available in which case the widow has power to make adoption of another if there is a general intention manifest in the document that the widow should make the adoption. The general law being that in spite of the conferment of an authority to adopt by her husband, the widow is not under an obligation to make an adoption, it was held that there is no reason why even if the widow postpones making an adoption, till the boy indicated by her husband whom she does not like, is no longer available, an adoption made of another boy after the former ceases to be available should be held to be invalid. In conclusion, it was pointed that the motive of the widow is immaterial and that the doctrine of fraudulent exercise of power cannot be imported into the region of Hindu Law of adoption so far as the widow is concerned. In *Nataraja Pillai* v. *Subbaraya Chettiar*[1], the Privy Council had to consider the question of the competency of a widow domiciled in French India to adopt a son to herself and the status of such an adopted boy and his right to succeed to her properties in British India. It was held that her capacity to adopt a son to herself and the status of the son so adopted as adoptive son are matters to be determined in accordance with the law of her domicile (*i.e.*) French law. As under that law she can validly adopt a son to herself, a son so adopted being entitled to her estate would be entitled to succeed to her properties in British India both moveable and immoveable even though such an adoption would not be valid in British India. In *Basangowda* v. *Yellappa Gowda*[2], the Privy Council has held that a son adopted by a widow of a predeceased coparcener subsequent to an adoption made by the widow of the last surviving coparcener would be entitled to a share of the joint family property along with the earlier adopted son. Closely following the above decision, the Privy Council again in *Krishna Rao Kulkarni* v. *Shrinivas Kulkarni*[3], has laid down that though a widow of a coparcener adopts a son after the coparcenary had come to an end by a partition, that adopted son is nevertheless entitled to claim his share in the family properties. In *Nagarmal* v. *Bajranglal*[4] the Privy Council has held that though the Manager of a Hindu joint family has general authority to keep alive by acknowledgment a debt which is not yet statute-barred, he is not as such manager competent to bind the other members of the family by a promise to pay a debt already statute barred. Where an alienation by the manager of a Hindu joint family is sought to be supported on the ground that it was for a necessity (*i.e.*) for the marriage expenses of a daughter of the family, it was pointed in *Pethu Reddiar* v. *Kandaswami Pillai*[5], that it is incumbent on the lender who asserts that he knew that the borrowing was for a specific purpose to show that the money was utilised for the particular purpose and that there was necessity to borrow the money for such a purpose. In *Ramamurthi Iyer* v. *Kuppuswamy Ayyar*[6], the Court had to consider the liability of minor sons on an indemnity clause in a sale executed by the father on behalf of the minor sons, along with a major son. The covenant provided that if there should be loss sustained by the vendee by reason of any dispute in respect of the property sold, the vendors shall make good the loss on the liability of the family properties and on their personal liability. The sale was set aside as regards a minor's share. It was held that the liability arising out of such a covenant is not an *avyavakarika* debt and the vendee would therefore be entitled to recover damages for breach of indemnity against the interests of the sons in the joint family property. In *Venkatappayya* v. *Raghavayya*[7] the question as to the nature of the estate taken by a son under a gift by the father and as to whether a right to challenge a gift by a coparcener is limited to other coparceners only fell to be decided. It was held that any words in a document of gift or bequest by a Hindu father in favour of his son which empower the donee or the legatee to give or will away the property as he likes would necessarily indicate an intention on the part of the donor or testator

1. (1950) 1 M.L.J. 172 (P.C.).
2. (1950) 1 M.L.J. 288 (P.C.).
3. (1950) 1 M.L.J. 292 (P.C.).
4. (1950) 1 M.L.J. 289 (P.C.).
5. (1950) 1 M.L.J. 469.
6. (1950) 1 M.L.J. 499.
7. (1950) 2 M.L.J. 466.

that the property should be taken by the donee or legatee otherwise than as ancestral property. It was further held that it cannot be said that the validity of a gift by a coparcener is not a matter for challenge at the instance of the very coparcener who had executed the deed, the ground being, that the maxim that a man shall not derogate from his own grant is not applicable to a case in which the personal law of the parties renders altogether void a grant by him which must therefore be treated in the eye of law as altogether *non-est*. Accordingly, there being no rights created by a void transaction of such a kind there is no estoppel or any other kind of personal bar akin thereto which precludes the executant of such a gift from asserting the right to recover the property and have a declaration that the gift is void. The effect of one member of a Hindu joint family separating himself from the others and the status of the other members were the points decided in *Seethamma* v. *Veeranna Chetty*[1]. It was held that when a member of Hindu joint family separates himself from the other members of the joint family and his share in the property is partitioned off for him, the remaining coparceners do not necessarily become separate in status and they may continue to be coparceners wirhout any special agreement among themselves and to enjoy as members of a joint family what remained after such a partition of the family property and that the question whether the remaining members continue to be joint or not is a question of fact to be decided *inter alia* from the way in which they carried on their affairs after the departure of the previous coparcener. The rights of coparceners *inter se* in the case of a family engaged in trade was the subject-matter of the decision in *Lakshmanaswami* v. *Sitaramamurthi*[2]. It was pointed out therein that as between coparceners, the fact the family is engaged in trade does not convert that relationship and the trade into a partnership and that if the family becomes severed, the family trade is held by the manager who has in respect of it the same duties to perform as in respect of any other item of coparcenary property, and that after disruption, the powers of the manager are not those of a surviving partner but of a co-owner or tenant-in-common in management. It was pointed out that principles of partnership law cannot be applied in their entirety to the partition of joint family business as such and the settlement of the accounts of such business. Another point decided in the same cause was that when interest is realised by the member of a Hindu joint family in possession of family funds, it is to be considered as an accretion to the family by way of income, and a share therein must be given to the member suing for partition and where that member succeeds in showing that such income has been realised from the family funds, he can have a claim for interest just as in any other part of the family income. Where a partition deed creates an interest in immoveable property, it was held in *Radhakrishnayya* v. *Sarasamma*[3], that the mere fact that a provision was inserted enabling the parties to get a proper partition deed written up on stamp paper and get the same registered will not take away the document from the mischief of sections 17 and 49 of the Registration Act and that the document would be inadmissible in evidence unless registered. Another point decided in the same case was that a partition is really a process in and by which a joint enjoyment is transformed into an enjoyment in severalty and that accordingly it is not a transfer within the meaning of section 53-A of the Transfer of Property Act. In *Jagadambal* v. *Saraswathi Ammal*[4], it was held that where the competition is between a dasi daughter and a married daughter of a dasi the only rule of Hindu law which can reasonably apply in the absence of a custom and consistent with rules of justice, equity and good conscience is the rule of propinquity (*i.e.*) proximate relationship and that therefore both would take property in equal shares. Their Lordships point that the rule that in regard to Stridhanam property, Hindu law prefers an unmarried daughter to a married daughter does not apply to such a case and that there is no rule of preference based on degradation as no such rule has been proved to have been evolved by custom or analogy of Hindu law. That

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1. (1950) 2 M.L.J. 21.
2. (1950) 1 M.L.J. 31.
3. (1950) 2 M.L.J. 338.
4. (1950) 1 M.L.J. 50.

a contract for the sale of the property of a minor entered into by his mother and guardian for the purposes considered necessary and proper in Hindu law would be binding on the minor from the time when the contract is entered into and is capable of being enforced against him was decided in *Ramalingam Reddi* v. *Babanammal Ammal*[1]. Its enforceability against the minor has to be judged by the same tests as are applicable to a transfer of the ward's property by the guardian. In *Parisa Mudaliar* v. *Nataraja Udayar*[2], it was held that an alienation of the properties of the last male owner by a limited owner for the purposes of meeting the expenses of the marriage of a daughter's son will be binding on the reversioners irrespective of the circumstance whether the father was in a position or not to meet the expenses of the marriage provided it is shown that the limited owner acted not with extravagance but with the best of motives. The right of a Hindu female limited owner to convey her own limited interest, the quantum of interest conveyed and the effect of lapse of time in regard to burden of proof where the alienation is challenged has come in for a good and exhaustive discussion and decision by a Full Bench in *Subramanyam* v. *China Soorayya*[3]. It was held that a Hindu female limited owner has a right to convey her own limited interest in the property irrespective of any legal necessity or benefit to the estate and that there was no presumption that she has conveyed an absolute estate and not merely her own interest. The quantum of the interest conveyed would depend upon the terms of the sale-deed, the purpose for which the sale is effected and the evidence of legal necessity or benefit or at least of a reasonable and *bona fide* enquiry as to the necessity or propriety of the sale. In considering the effect of long lapse of time on the question of onus, it was pointed out that where there are not even recitals of necessity in the deed of sale, mere lapse of time will not have the effect of shifting the onus from the alienee or his representative to the reversioner who impugns the sale, and that neither would it stamp the alienation as a valid alienation of the absolute interest in the property. According to the Full Bench, lapse of time does not alter the incidence of the burden of proof, nor does it dispense with evidence, direct or circumstantial, positive or presumptive, to prove justifying necessity for an alienation by a limited owner under Hindu law and that it may only save an alienee from an adverse inference arising from the scanty nature of the evidence adduced by him. Their Lordships sound a note of caution against applying wholesale the principles enunciated by the Judicial Committee in *Magniram Sitaram* v. *Kasturbhai Manibhai*[4], to a consideration of the binding character of alienation made by a Hindu limited owner on the reversioners without bearing in mind the distinction between the position of a Hindu limited owner and a shebait. One other point decided by the Full Bench was that the consent of a reversioner is only presumptive evidence of the propriety of an alienation consented to and when that consent is purchased its probative value is lost. Where it is found that a surrender by a widow and a gift by the surrenderee to the widow's nominees, who are her relations, of part of the surrendered property are parts and parcels of a single and indivisible scheme, neither of the transactions would be valid according to *Akkamma* v. *Brahmudu*[5]. The status of a Hindu widow of a deceased member of a Hindu joint family governed by the Mitakshara under the provisions of the Hindu Women's Rights to Property Act was stated in *Seethamma* v. *Veeranna Chetty*[6], to be not that of a coparcener, but that of a member of the joint family with certain special rights and that the death of a coparcener does not effect a severance or disruption of the joint family, merely because he leaves behind him a widow who has certain statutory rights under the Act. As the widow cannot be regarded in any sense as the widow of a divided member, and as the joint family continues, she cannot demand from the kartha an account of the management of the joint family except in special circumstances, like fraud, misappropriation, etc.

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1. (1950) 2 M.L.J. 597.
2. (1950) 1 M.L.J. 90.
3. (1950) 1 M.L.J. 527.
4. (1921) 42 M.L.J. 501 (P.C.).
5. (1950) 1 M.L.J. 750.
6. (1950) 2 M.L.J. 91.

MAHOMEDAN LAW.

In *Jayanabibi* v. *Jayarabi*[1] it was held that where a Mahomedan executes a settlement deed in respect of property in the hands of tenants and reserves to himself the right to receive rents during his lifetime and also undertakes to pay Municipal taxes, it cannot be said that in spite of these, there is sufficient delivery of possession as required by Mahomedan law by the mere declaration to that effect in the document "I have delivered possession of the property to you even now" without its being followed by any attornment of the tenants to the donee or any perception of the rents and profits by the donee. That a District Court has no jurisdiction to appoint a muthavalli to a wakf in an application when there is already one in *de facto* management thereof even though without colour of title was the point decided in *Abdul Lazeez* v. *Kondoth Pakkar*[2], where it was further held that such a relief can be asked only in a suit under section 92, Civil Procedure Code.

INSOLVENCY LAW.

In laying down the law as to the scope of the inherent powers of an Insolvency Court it was held in *Venkatakrishna Iyer* v. *The Official Receiver*[3], that the Official Receiver can invoke the inherent jurisdiction of the Insolvency Court to rectify any error or mistake committed by him and that the Court has ample power to prevent an injury to the estate resulting from any act or decision of the receiver. The liability of the Official Assignee for costs where a suit by the insolvent for recovery of damages for breach of contract which is financed by the Official Assignee is dismissed, came up for decision in *Indian Sugars and Refineries, Ltd.* v. *Malaiperumal Pillai*[4]. It was held that in such a case the Official Assignee must be held to have effectively intervened and interfered in the suit and would be liable at least to the extent of the assets in his hands. Where in a creditor's petition, the debt was mentioned as being due to the petitioner which in fact was due to a firm of which the petitioner was only a partner and an amendment to clarify the exact nature of the debt was made three months after the act of insolvency, on a question whether the amendment could be allowed, it was held in *Karuppiah Nadar* v. *Veerabhadran Chettiar*[5], that the test to be applied in such cases was to see whether the effect of the amendment sought for is to introduce a debt which, after the same period has elapsed, would not be a debt upon which the petition could be founded. Applying the test it was held on the facts that there was really an identical debt which continued to be the foundation of the petition and that the amendment which was only to make it clear that the petition was on behalf of the firm with respect to the partnership debt and that therefore it can be allowed. After an exhaustive discussion of the case-law a Full Bench in *Lakshmi* v. *The Official Assignee of Madras*[6], has stated that the scope of section 36 of the Presidency Towns Insolvency Act is to obtain information regarding the insolvent's property and after information is obtained if there is an admission in the course of that proceeding, to make a proper order regarding delivery of possession or payment of the debt where there is an admission. The actual decision in the case was that where proceedings under section 36 (5) of the Act are taken against the insolvent's wife who was alleged to be only a benamidar for the insolvent unless she consented to the question of her title being decided by the Insolvency Court, the Official Assignee would have to file a suit against the wife in the ordinary course and that a petition under section 7 of the Act against the wife for deciding the question of title will be barred. In *Chunduru Krishnayya* v. *Rangarayakulu*[7], it was held that the transferees of properties of the insolvent are entitled under rule 21 (3) of the Rules framed under the Provincial Insolvency Act to notice of the petition filed under section 19 (1) of the Act and that an order of adjudication passed without notice

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1. (1950) 1 M.L.J. 209.
2. (1950) 2 M.L.J. 804.
3. (1950) 1 M.L.J. 15.
4. (1950) 1 M.L.J. 117.
5. (1950) 2 M.L.J. 761.
6. (1950) 1 M.L.J. 123 (F.B.).
7. (1950) 1 M.L.J. 113.

to them would be unsustainable. Section 28-A of the Provincial Insolvency Act, introduced by Act XXV of 1948 was held to be not applicable to cases of insolvency of a manager other than the father of a joint Hindu family in *Arasappa Pillai* v. *Thandavan Pillai*[1]. In *Bonthala Baliah* v. *Sivarudrappa*[2], it was decided that where a majority in number and three-fourths in value of all the creditors, whose debts were proved, do not resolve to accept a scheme of compensation, a Court would be justified in dismissing an application by the insolvent under sections 35 and 38 of the Provincial Insolvency Act. It was also pointed out that under section 50 (2) of the Act a debtor's right to apply depends upon the existence of the composition or the scheme under the provisions of the Act. The question as to when an insolvent would be entitled to apply to the Court as "person aggrieved" under section 68 or appeal under section 75 of the Provincial Insolvency Act questioning the acts of the Official Receiver was referred to and decided by a Full Bench of five judges in *Narasimhaw* v. *Ramayya*[3]. After stating that in view of the explicit and all embracing language of sections 68 and 75 of the Act it cannot be maintained that the insolvent can never apply to the Court under section 68 questioning the acts of the Official Receiver or appeal under section 75 from an adverse order of the Court passed on such application, their Lordships proceed to give several instances by way of illustration when the insolvent could have recourse to the Court. To the extent that the decision in *Hari Rao* v. *Official Assignee of Madras*[4] held to the contrary was held to be not good law. The whole discussion turned on the question when the insolvent can be deemed to be a "person aggrieved". For instance he would be "person aggrieved" by an order passed under sections 38 to 40 of the Act and he would have a right of appeal against such orders under section 75 of the Act. Again if the Court passes an adverse order under section 50 (2) the insolvent has a right to appeal under section 75 as person aggrieved by the order. In *Tirupathi Rao* v. *Veeraswami*[5] it was held that it is unnecessary under section 70 of the Provincial Insolvency Act to establish before launching a prosecution, the various offences referred to in section 69 of the Act and that it is not necessary and the Court is not bound to make a preliminary enquiry even. In explaining the scope and nature of the right of appeal under section 75 of the Provincial Insolvency Act it was held in *Venkata Reddi* v. *Narayana Reddi*[6], that in respect of orders not falling within Schedule I of the Provincial Insolvency Act, the party aggrieved has not an unqualified right of appeal; he has to obtain the leave either of the District Court, or of the High Court. It was also pointed out that the leave referred to in section 75 (3) of the Act is leave granted by a Judge of the Court and not by any of the administrative officers. So the routine admission of an appeal by the office would not make the appeal a competent one.

PROPERTY LAW.

In *Srinivasa Mudaliar* v. *Abraham Pillai*[7], it was pointed out that the mischief of section 6 (*e*) of the Transfer of Property Act would not be attracted where what is transferred under a will is a half share in the partnership of a rice mill with all its assets and liabilities and also a right of continuing an appeal in regard to the mill and enjoyment of the profits arising therefrom because what is transferred is the tangible interest in the property and a transferable right to sue and is not a mere right to sue. Where property is sold in execution of a decree creating both a personal and charge liability for payment of money, a purchaser prior to be auction sale but after the decree, though without notice of the charge would be affected by the doctrine of *lis pendens* according to the decision in *Rajagopala Chetty* v. *Abdul Shukkoor Sahib*[8]. As remarked in that case no complete satisfaction

1. (1950) 2 M.L.J. 173.
2. (1950) 2 M.L.J. 162.
3. (1950) 1 M.L.J. 484 (F.B.).
4. (1926) 50 M.L.J. 358 : I.L.R. 49 Mad. 461 (F.B.).
5. (1950) 2 M.L.J. 630.
6. (1950) 1 M.L.J. 89.
7. (1950) 1 M.L.J. 309.
8. (1950) 1 M.L.J. 83.

or discharge of even a declaratory charge decree (which is the point of time up to which the *lis* continues according to the Explanation to section 52, Transfer of Property Act) can be predicated so long as the possibility of the enforcement of the charge by way of a separate suit remains. In *Chinna Subba Rao* v. *Mattapalli Raju*[1] the Federal Court has enunciated the requirements necessary for the applicability of section 53-A of the Transfer of Property Act. As section 53-A requires that the transferee had either to be put into possession or had to continue in possession in *part performance of the agreement* which is sought to be enforced under the section it was held that where the transferees were never in possession either actual or constructive and have not been put in such possession or allowed to continue in such possession in pursuance of any agreement, the section can have no application. The question of part-performance in relation to an agreement to lease was the subject of an authoritative decision by the Supreme Court in *Manaklal Mansukhbhai* v. *Hormusji Ginwalla and Sons*[2]. After pointing out that in cases of lease the Legislature has recognized that the equity of part-performance is an active equity as in English Law and is sufficient to support an independent action by the plaintiff (as is clear by section 27, Specific Relief Act), their Lordships say that there can be no manner of doubt that the defence of part-performance under section 53-A, Transfer of Property Act, would be available to a person who has an agreement of lease in his favour though no lease has been executed and registered in his favour. It was further held that an agreement of lease creating a present demise but not registered is admissible under section 47 of the Registration Act as evidence of part-performance. In laying down the requirements to attract the application of section 53-A, Transfer of Property Act, it was pointed out that a formal lease is not necessary for that purpose and all that is required is that an agreement in writing signed by the transferor should be capable of being gathered from the evidence. That as partition is not a transfer within the meaning of section 53-A, the doctrine of part-performance cannot be invoked by a party claiming to be in possession by virtue of a partition under an unregistered deed was the point decided in *Radhakrishnayya* v. *Sarasamma*[3]. In *Gurizala Vuddandam* v. *Venkata Kameswara Rao*[4], it was held that when a vendor is not in a position to give possession of the property agreed to be sold by him to the purchaser, the latter will be entitled by virtue, of section 55 (1) (*f*) of the Transfer of Property Act read with section 39 of the Contract Act to rescind the contract and claim the advance that has been paid by him. Under section 55 (4) (*b*) of the Transfer of Property Act as amended by the Amending Act X of 1929, the vendor has no absolute right to interest on the purchase money irrespective of equities and that interest on the purchase money cannot be claimed so long as the vendor remains in possession of property sold was decided in *Doraiswamy Naidu* v. *Muhammad Abbas Sahib*[5]. In considering the question whether a memorandum delivered along with the title deeds deposited with another did require registration, the Supreme Court in *Rachpal Maharaj* v. *Bhagwandas Daruka*[6], held that as the parties did not intend thereby to create a charge (a mortgage under section 58 (*f*) of the Transfer of Property Act) and that therefore it would be admissible in evidence to prove the creation of the charge. The nature of the right of redemption and as to when and how it is extinguished and whether a second suit for redemption is barred were all decided by the Supreme Court in *Chinna Subba Rao* v. *Mattapalli Raju*[1]. It was pointed by their Lordships that the right of redemption is an incident of a subsisting mortgage and it subsists so long as the mortgage itself subsists and that it can be extinguished only as provided in section 60 of the Transfer of Property Act and when it is alleged to have been extinguished by a decree, the decree should run strictly in accordance with the form prescribed for the purpose and the equity of redemption is so extinguished, a second suit for redemption by the mortgagor, if filed within the period of limitation, would not therefore be barred. Their Lordships further held that if the right of redemption

1. (1950) 1 M.L.J. 752 : 1949 F.L.J. 398.
2. (1950) 2 M.L.J. 344 : 1950 S.C.J. 317.
3. (1950) 2 M.L.J. 338.
4. (1950) 2 M.L.J. 807.
5. (1950) 2 M.L.J. 773.
6. (1950) 2 M.L.J. 350 : 1950 S.C.J. 361.

is not extinguished, the provisions like Order 9, rule 9, Order 23, rule 1, Civil Procedure Code, will not debar the mortgagor from filing a second suit for redemption, because, as in a partition suit, the cause of action in a redemption suit is a recurring one and that the cause of action in each successive action, until the right of redemption is extinguished or a second suit for redemption is barred, is a different one. The Bombay view[1] was accepted and the Madras view[2] was held to be incorrect. According to the decision in *Vasudevayya* v. *Bhagirithi Bai*[3], section 72 of the Transfer of Property Act as it now stands amended can only support an equity in favour of the mortgagee if there is a compliance with the proviso in the section and not otherwise and that it is not permissible to give effect to any equitable charge or lien *de hors* the statute. It was also held that the right of the mortgagee who had paid up a prior charge decree on the hypotheca in order to avert an imminent sale in execution of the decree to add such money to the principal will not exclude the personal right of suit under section 69 of the Contract Act although if a personal decree has been obtained the amount cannot be tacked to the mortgage. Where not merely did the parties intend that the period of notice should be one month, but also that the one month's notice could be given at any time, it was held in *Arunachala Naicker* v. *Ghulam Muhammad Sahib*[4], that there is a contract to the contrary as contemplated by section 106 of the Transfer of Property Act and that where the lessee was allowed to extend his cultivation according to his own pleasure and at his convenience and except as to rent the parties intended to be governed by the original contract, then it would follow that only one month's notice was necessary and the lessor could give that month's notice at any time he chose. In *Kuppuswami Ayyar* v. *Mahadeva Chettiar*[5], it was pointed out that section 116 of the Transfer of Property Act can have no application to a state of affairs governed by the Rent Control Act and that when section 116 of the Transfer of Property Act speaks of the determination of a lease it must have reference to a determination of the lease as is contemplated in section 111 of that Act which sets out the various methods by which a lease may be determined.

(To be continued.)

1. (1947) 50 Bom. L.R. 45.
2. (1945) 1 M.L.J. 212 : I.L.R. (1945) Mad. 803.
3. (1950) 1 M.L.J. 5.
4. (1950) 2 M.L.J. 535.
5. (1950) 1 M.L.J. 72.

MADRAS AGRICULTURISTS RELIEF ACT.

A Full Bench considered the effect of scaling down of a debt against a principal debtor on the liability on a surety who is not an agriculturist in *Subramania Chettiar* v. *Narayanaswami Goundar*[1] and laid down that a non-agriculturist surety will not be liable for the entire debt when the principal debt has been scaled down under the provisions of the Madras Agriculturists Relief Act, but that he would be liable only to the extent of the scaled down debt due by the principal debtor and overruled the decision in *Subramanian Chettiar* v. *Batcha Rowther*[2]. In *Kamala Bai Ammal* v. *Theethachari*[3], it was held that under section 4 (*h*) of the Madras Agriculturists Relief Act to get an exemption, it would be enough if the debt was due to a woman on 1st October, 1937, provided she does not possess property of the value mentioned in that clause. As pointed out therein, if once that condition is satisfied at its origin the Court need not concern itself with the character or status of the creditor, at the time when the debt is sought to be enforced. The meaning of the terms "different creditor" and "renewal" in Explanation III to section 8 of the Act added by the Amending Act of 1948, fell to be decided in *Ramaswami Pillai* v. *Sankara Mudaliar*[4]. It was held that the words "different creditor" are not comprehensive enough to include even a third person in whose favour the debtor executed a document requesting him to discharge an earlier debt and that the meaning to be attached to those words is necessarily controlled by the clause "where a debt has been renewed or included in a fresh document". It was decided that a mortgage with a direction to the mortgagee to pay the prior debts of the mortgagor would not be "renewal" in favour of a "different creditor". Another point decided was that the rule of appropriation provided for in Explanation I to section 18 of the Act cannot be applied to a case of receipt of money from Court under directions in a decree by the mortgagee. In *Suryaprakasa Rayanimgar* v. *Balarami Reddi*[5], it was held that a non-agriculturist donee of a hypotheca would not be entitled to relief in respect of the mortgage debt under the Act when the agriculturist mortgagor was not at the time when the matter was before the Court a person liable to discharge the debt.

MADRAS ESTATES LAND ACT.

The Privy Council in *Pattabhi Rami Reddi* v. *Balarami Reddi*[6] had to consider the position of lessee from trustees appointed under a scheme who continued to be in management even after the Madras Hindu Religious Endowments Act came into force and which lease was acquiesced in by the subsequent trustees appointed under the Act. It was held that the *de jure* trustees by their conduct had clothed the original scheme trustees with sufficient authority to lease and as such the lessee did not lack a landholder to whom he was bound to pay rent with the result that by reason of the amendment of the Madras Estates Land Act in 1934, the lessee had acquired a permanent right of occupancy in the ryoti lands of the inam village. In *Ramaswami* v. *Jagannathaswami*[7], it was held that where the confirmation by the British Government was in respect not of the entire village comprising the Gudicat, but only a portion excluding the minor inams, it could not be said that the property which is included in the minor inams would be part of the confirmed inam village, simply because it is situated in that village and such property would not come under the definition of an "estate" in section 3 (2) (*d*) of the Act. The crucial test, as laid down in *Ramamoorthy* v. *Ammanna*[8], for finding out whether the subject-matter of a grant falls within the definition of "estate" in section 3 (2) (*d*) of the Act is whether at the time of the grant the subject-matter was of a whole village or only of a part of a village. It was pointed out in that decision that the Amending Act of 1945, makes no difference to this requirement that the village of which the grant has been made, confirmed or recognized by the Government must be an inam village and not part of a village

1. (1950) 2 M.L.J. 674.
2. (1941) 2 M.L.J. 751.
3. (1950) 2 M.L.J. 286.
4. (1950) 1 M.L.J. 224.
5. (1950) 1 M.L.J. 414.
6. (1950) 1 M.L.J. 458.
7. (1950) 1 M.L.J. 18.
8. (1950) 2 M.L.J. 442.

granted in inam and that the definition introduced by the Amending Act itself presupposes that a grant as an inam is expressed to be of a named village. *Chinna Basavayya* v. *Satyabhigna Theerthaswamulu Varu*[1], was another decision which considered the question as to when an inam is an "estate". After stating that it is a question of construction of the grant or the title deed issued at the time of the settlement in each case, it was laid down that if it is shown therefrom that the grant in terms was of a named village excluding minor inams and communal porambokes and not merely of an extent of lands situated in village falling short of the remaining area of the village, Explanation I to section 3 (2) (*d*) would be attracted. It was pointed out that Madras Act II of 1945 had not the effect of converting minor into major inams and that even after the Amending Act, if it is shown that an inam grant did not comprise the entire area of a village other than lands granted on service or other tenure and communal porambokes, the inam would not be an estate within section 3 (2) (*d*). Where lands are granted to the Swamigal of a Mutt for the *Nitya Naivedya Deeparadhana* of a particular deity and which are described as Devadayam lands and confirmed free of quit rent at the time of the inam settlement, it was held that it cannot be said that the lands are held on service tenure and therefore taken out of the category of "ryoti" land under section 3 (16) (*a*) of the Act. The point decided in *Sivasubramania Pillai* v. *Sri Thyagarajaswami Devasthanam*[2], was that land which originally formed an entire village by itself and was subsequently amalgamated in another village and ceased to be an estate long before 1908 when the Madras Estates Land Act came into force, cannot be regarded as ryoti land situated within an estate for the purposes of section 6 of the Act, in which the tenant can claim occupancy rights. Disapproving of the construction placed upon section 8 (5) and Explanation (2) to section 6 (1) of the Estates Land Act, in *Konda Atchamma* v. *Jayanthi Seetharamaswami*[3], it was held by a Bench in *Annam Naidu* v. *Appa Rao*[4], that it was wrong to assume that the effect of section 6 (1), Explanation (2) is to confer permanent occupancy rights on tenants as and from 30th June, 1934, or such other later date when the tenant was admitted to possession and that the Explanation only lays down who are the tenants who would be entitled to the benefits of Madras Act XVIII of 1936. It is pointed out that this does not mean that they are deemed to have obtained rights of occupancy from 30th June, 1934, and that they obtained such rights only from 31st October, 1936. Applying the law as laid down above, it was held that where an inamdar who got a decree for eviction on 7th April, 1933, and after obtaining possession leased the land to the defendants for one year ending 15th March, 1944, but the tenants continued in possession even after that date, the inamdar was entitled to the rights declared by section 8 (5) of the Act of 1936. The earlier decision in *Demudu* v. *Papayya Raju*[5], was approved. The point of time referred to by the words "now" and "after the passing of this Act" in section 12 (1) of the Act should be understood as referring to 1st July, 1908, and that there was nothing to indicate that "the passing of this Act" should be read as the passing of the subsequent Amending Act of 1936, or that the word "now" must be read as the commencement of such Act was the point decided in *Rama Rao* v. *Appayya*[6] and applying it it was held therein that a ryot in an estate is entitled to the trees which have been found to have grown on a holding after 1st July, 1908. It was held in *Aoudinayagam Pillai* v. *Pitchiah Chettiar*[7] that on the death of a registered pattadar there must be service of notice under section 112 of the Act on his heirs and legal representatives or on persons on whom the interest has devolved by operation of law and that when a sale is held after the death of the registered pattadar who had made a gift of the property, it will not be a proper notice when it is issued in the name of the dead person so as to give jurisdiction to the Collector to sell the holding. But in the same case it was pointed out that once the jurisdiction of the Collector is validly created by the service of a proper notice under section 112, any subsequent illegalities, like disregard of the provisions of section 116 or 117 of the Act, are only matters which

1. (1950) 2 M.L.J. 607.
2. (1950) 2 M.L.J. 470.
3. (1950) 1 M.L.J. 114.
4. (1950) 2 M.L.J. 396.
5. (1949) 2 M.L.J. 657.
6. (1950) 1 M.L.J. 342.
7. (1950) 1 M.L.J. 43.

do not make the sale null and void though they be unlawful in the sense that they may be required to be set aside, within the time fixed by Article 12 of the Limitation Act. *Muniswami Reddi* v. *Thirunavukkarasu Mudaliar*[1], is a case where it was held that unless it is shown that the registered pattadar was either personally served with notice of the sale for arrears of rent or that due diligence was shown in trying to effect a personal service on him and that failing in that attempt service was made by affixture, the sale will be a nullity and confers no title on the purchaser. In *Rajah of Venkatagiri* v. *Rami Reddi*[2], it was held that section 147 of the Act as amended in 1934 while it affords protection to the landholder who has not had notice of transfers *inter vivos* or *in invitum* or subdivisions of ryot's holdings, does not extend the protection to cases of devolution by operation of law, so that, when a ryot is adjudicated an insolvent it is the duty of the landholder to serve notice of sale under Chapter VI of the Act on the Official Receiver and a sale of the insolvent's holdings without giving notice of sale to him would not be binding on him.

Land Acquisition.

The only case on the subject decided this year was in *Veera Venkamma* v. *Collector of West Godavari*[3], which held that in cases of land acquisition and compensation which raise the question of the adequacy of the amount that has been awarded by a Court or Tribunal, which has got to assess the exact amount, the appellate Court ought to bear in mind that except on the basis of a fundamental or radical error of principle, it would have no ground of justification for interference.

Contracts.

An agreement amongst villagers not to bid against each other and that the actual bidder was to bid at the auction sale and obtain the right to catch the fish in a tank on behalf of all the villagers was held in *Ramalingaiah* v. *Subba Rami Reddi*[4], not to be invalid as being opposed to public policy and that such an agreement could be enforced. There is a full statement as to when there is an acceptance in the case of sale by auction in *Rajanagaram Village Co-operative Society* v. *Veeraswami Mudaly*[5]. It was held that in the case of a sale by auction, if there is no further condition of an approval or confirmation, ordinarily, if the bid is knocked down, the acceptance is communicated by the acceptance of the bid in the presence of the bidder and no further communication would be necessary, but that if, however, the acceptance was conditional that has to be communicated and there is no need or necessity for a further communication of the fulfilment of the condition. The communication of the acceptance twice is not needed. It was further pointed out that a conditional acceptance has the effect of binding the highest bidder to the contract, if finally there is the approval orconfirmation of the person indicated in the terms of the sale. It is not open to him to withdraw the offer as in the case of a provisional acceptance and if there is approval the contract becomes concluded and becomes enforceable. No question of damages can arise where it is impossible to say who committed a breach of the contract—*Sitaramamurthy* v. *Sobhanadhri*[6]. The meaning of the words " bound by law to pay " and " interested in the payment of money" in section 69 of the Contract Act fell to be explained by the Privy Council in *Govindram Gordhandas Seksaria* v. *State of Gondal*[7]. Their Lordships say that the words " bound by law to pay " do not exclude those obligations of law which arise *inter partes* whether by contract or tort and is not confined only to those public duties which are imposed by statute or general law. They extend to any obligation which is an effective bond in law. As regards the words " interested in the payment of money ", they say that it is not correct to say that a person could not be " interested in the payment of money " within the meaning of section 69 of the Contract Act unless he was at the same time entitled to some legal interest in the property in respect of which such payment might be made and that words themselves

1. (1950) 1 M.L.J. 206.
2. (1950) 1 M.L.J. 95.
3. (1950) 1 M.L.J. 725.
4. (1950) 2 M.L.J. 634.
5. (1950) 2 M.L.J. 486.
6. (1950) 2 M.L.J. 505.
7. (1950) 2 M.L.J. 1 (P.C.).

do not require that a person to be interested in a payment should at the same time have a legal proprietary interest in respect of which the payment is made. The actual decision was that payment of taxes due in respect of mills by a person who had contracted to buy them under an agreement to sell would entitle him to reimbursement and the payment by him cannot at all be said to be voluntary. That a mortgagee who has paid up a prior charge decree on a hypotheca in order to avert an imminent sale in execution of the decree can recover the amount so paid from the mortgagor or his alienees under section 69 of the contract was the point of the decision in *Vasudevayyar* v. *Bhagirathi Bai*[1]. This personal right of suit under section 69 would not be affected by the fact that the mortgagee had the right to add this money to the principal. The circumstances when neither section 69 nor section 70 would apply is well illustrated by the decision in *Ramaswami Naicken* v. *Viswanatha Chetty*[2]. It was held therein that where after a compromise decree entitling owners of moieties to reconveyance of property on payment of an amount within a fixed date there is a sale by the owners of one moiety of the whole property and payment by the vendee of the whole amount, he cannot claim from the buyers of the other share, contribution or reimbursement. Where even after the lands were sold the original pattadar's heirs are sued for arrears of cist and a decree is passed without any contest by them but the amount is paid by them in execution of the decree, they cannot recover it from the real owners of the lands the sums paid by them according to the decision in *Challa Appayya* v. *Desetti Chandra Ayyar*[3]. It was held that as the heirs of the original owners had not succeeded in showing to any extent that the real owners had had an opportunity either to accept or reject the benefit said to have been conferred upon them by reason of the payment of the cist made by the plaintiffs and further as the plaintiffs had not contested the suit against them they would not be entitled to the benefit under section 70 of the Contract Act. Further, the plaintiffs having ceased to have any interest in the lands by reason of the sale by their predecessors it could not be claimed that they could be entitled to contribution from defendants under section 69 of the Contract Act. Compare the Privy Council decision in *Govindram Gordhandas Seksaria* v. *State of Gondal*[4]. Where in the case of joint promisors one of them pays an amount in excess of his share, he cannot claim any contribution from a surety for the excess was the point decided in *Padmanabha Kakkothaya* v. *Keshava Derinjithaya*[5]. It was further decided in that case that if one of the persons liable to contribute does not or cannot pay his share, that amount has to be divided between other contributors only in the proportion of the benefit which each of them has received at the time of the original contract. It was pointed out that the Contract Act has not provided for such a contingency and that it seemed to be a *casus omissus*.

Company Law.

The circumstances justifying or otherwise the interference by the Court with the exercise of the power given to directors to decline to register the transfer of shares came to be laid in *Coimbatore Kamala Mills, Ltd.* v. *Sundaram*[6]. According to the decision the Court will not control the exercise of a discretion given by the articles of association of a company to its directors as to registering of transfers of shares unless it is proved that they are not exercising it *bona fide* and the presumption would be that they had acted *bona fide* and the onus would be on the person challenging their action to establish the lack of *bona fides* and the impropriety on their part. The effect of section 153-A of the Companies Act came to be laid down in a Reference under section 60 of the Stamp Act in *Sahayanidhi, Ltd.* v. *Subramanya Nadar*[7] by a Full Bench. It is pointed out that under the ordinary law of contracts while assets are assignable, liabilities under the contracts or duties arising thereunder are not assignable, the effect of section 153-A of the Companies Act is to some extent to override the ordinary law. There is not only a vesting of assets and property but also the imposition of a liability to discharge the

1. (1950) 1 M.L.J. 5.
2. (1950) 1 M.L.J. 7.
3. (1950) 1 M.L.J. 306.
4. (1950) 2 M.L.J. 1 (P.C.).
5. (1950) 2 M.L.J. 438.
6. (1950) 1 M.L.J. 808.
7. (1950) 2 M.L.J. 216 (F.B.).

debts of the transferor company as a result of the order of the Court passed under section 153-A. The title of the transferee company is derived from and by the force of the order of Court itself and such a document is a conveyance as defined in section 2 (10) and Article 23 of the Stamp Act and is to be stamped as such. In *Palghat Wariar Bank, Ltd.* v. *Padmanabhan*[1], it was held that when a company in winding up attaches certain property in execution of a decree in its favour as that of its judgment-debtor any claim petition by a third party cannot be regarded as "other legal proceeding" within the meaning of section 171 of the Companies Act and that hence such a claim petition can be proceeded with against the company without leave of the Court. As pointed out therein it would be most inequitable that a company in liquidation should institute execution proceedings and rely upon section 171 of the Act to debar other persons from defending their property in those execution proceedings. Where the manager, director or servant of a company has obtained a decree for an amount making it a charge on some moveables, the retention by him of such moveables for the amount due to him cannot, according to the decision in *Sundaresa Aiyar*, In re[2], be said to be wrongful under section 282-A of the Act.

SPECIFIC RELIEF.

The Federal Court in *Shanmugham Pillai* v. *Annalakshmi Ammal*[3] had to consider the question whether in agreement to resell property sold to the mortgagee and leased back to the mortgagor with a condition as to the agreement standing cancelled in case of default in the payment of rent under the lease on the due dates, can be relieved against and the agreement enforced, fell to be decided. It was held in the circumstances that the lessee mortgagor secured the privilege of repurchase only subject to the conditions set forth in the agreement. And that such conditions though relating to the payment of money, cannot be regarded as penalty and Courts will not afford any relief against a forfeiture for their breach. As the privilege was conferred upon payment of money at a stated period, it was lost as the money was not paid accordingly. A mere order of attachment under section 145, Criminal Procedure Code, would not be sufficient to deprive a person of his right of suit under section 9 of the Specific Relief Act when he relies upon his dispossession on a date prior to the proceedings under section 145 which upto the time of his filing the suit had left him out of possession was the point decided in *Balakrishna Ayyar* v. *Veerannan Servai*[4]. In *Somasundaram Chettiar* v. *Chidambaram Chettiar*[5], it was pointed out that compensation for breach of contract by way of damages should be made to the plaintiff in addition to the relief of specific performance only when the Court is satisfied that the decree for specific performance is not sufficient to satisfy the justice of the case and that the appellate Court is not bound to grant the alternate relief of refund of purchase money with interest and damages to a plaintiff where he was satisfied with pressing in the lower Court for the relief of specific performance only and he did obtain that relief. *Venkama Naidu* v. *Sayed Vilijan Chisty*[6] shows the circumstances when the discretionary power of Court to direct compensation to be paid will be exercised. It was pointed out that the language of section 41, Specific Relief Act, is very wide and gives a large discretion to the Court to make an order for compensation if the ends of justice require such compensation to be awarded where the Court adjudges that a deed is void. Where a minor as plaintiff sues to recover possession of property sold by his unauthorised guardian professing to act on his behalf, he seeks an adjudication that the sale is void and without such adjudication a decree for possession could not be passed as it is the basis for the decree. As decided in the case under notice, it is here that section 41 of the Specific Relief Act comes into play and invests the Court with discretionary power to direct payment of compensation. The principles governing the grant of declaratory relief in regard to proceedings in foreign Court came to be laid down in *Subramania Iyer* v. *Ramaswami Pillai*[7]. After stating that in regard

1. (1950) 2 M.L.J. 450.
2. (1950) 1 M.L.J. 314.
3. (1950) 1 M.L.J. 683 : 1950 S.C.J. 1 (F.C.).
4. (1950) 1 M.L.J. 13.
5. (1950) 2 M.L.J. 509.
6. (1950) 2 M.L.J. 587.
7. (1950) 1 M.L.J. 449.

to proceedings in foreign Courts a party is not entitled to a declaratory relief as of right, it was said that the Court would not and should not give a declaration as it has no jurisdiction in regard to the properties situated in foreign countries, as, if such declaration were to be given, it would infringe upon the undoubted rights of the foreign tribunal to decide cases pending before it. It was further pointed out that it would be improper and highly derogatory to the prestige of the foreign Court to be held that its decision is wrong, and that even if such declaration is given, it would be *brutum fulmen* as the foreign Court would certainly ignore it. In *Anglo French Textile Co., Ltd.* v. *Income-tax Appellate Tribunal, Madras*[1], it was held that section 45 of the Specific Relief Act cannot be invoked for the purpose of requiring the Income-tax Appellate Tribunal to refer to the High Court also further questions of law raised before it. The reason given is that section 66 of the Income-tax Act is self-contained with regard to the procedure to be adopted when either party is dissatisfied with the order of reference and it does provide for the contingency when the statement is incomplete as well as for that when no reference has been made at all.

STAMP ACT.

In *Shanmuga Mudaliar*, In re[2], it was pointed out that there is nothing in the Stamp Act or in the rules framed thereunder which enjoins on the Board of Revenue the duty to give an oral hearing to a person who invokes their revisional jurisdiction and that the failure of the Board to give such an oral hearing will not give a party to ask the Court to issue a writ of *certiorari* directing the Board to give such a hearing. A Full Bench in *Sahayanidhi* v. *Subramania Nadar*[3] has laid down that an order of Court approving a scheme directing transfer of assets and liabilities of a company in liquidation to another company under section 153-A of the Companies Act would be a conveyance as defined in section 2 (10) and Article 23 of the Stamp Act and has to be stamped as such and that the transfer cannot be treated as deeds of composition within the meaning of Article 22. A Full Bench in the *Board of Revenue, Madras* v. *Venkatarama Ayyar*[4] had occasion to state that the principle underlying the provisions of the Stamp Act with regard to valuation and estimation of the duty payable is that the value of the property should be taken from the face of the document, and that the revenue of the Government is protected by requiring the parties to make a true disclosure of all the facts and circumstances having any bearing on the duty payable, failing which they must suffer the consequences of their false or defective statements. It was also pointed out that although the Registrar cannot embark on an independent inquiry regarding the value of the property, yet he has the power under section 35 of the Stamp Act to refuse registration if the document is not duly stamped, from which it would seem to follow that he can require the person seeking registration to furnish the particulars required for the calculation of the duty payable. On the facts of the case it was held that where a statement is made in a settlement deed that " value for purposes of Stamp and Registration is Rs. 3,000 " while in fact the property was worth over a lakh of rupees, it contravened the provisions of section 27 of the Stamp Act which requires that the value should be truly set forth and that the relevant value is the value at the time the document is executed and not the value of the property at the time when the executant acquired it. Where, without any objection being raised as to its admissibility, an original instrument or secondary evidence of its contents has in fact been admitted, such admission cannot be called in question at any later stage in the same suit on the ground that the instrument was not properly stamped was decided in *Sheik Meera Sahib* v. *Venkatapathi Naidu*[5], where it was pointed out that section 36 of the Stamp Act is imperative in the matter. The Supreme Court in the *Chief Controlling Revenue Authority and Superintendent of Stamps* v. *Maharashtra Sugar Mills, Ltd.*[6],

1. (1950) 1 M.L.J. 406.
2. (1950) 2 M.L.J. 399.
3. (1950) 2 M.L.J. 216 (F.B.).
4. (1950) 2 M.L.J. 213 (F.B.).
5. (1950) 2 M.L.J. 544.
6. (1950) 2 M.L.J. 564 : 1950 S.C.J. 444.

had to consider the nature and scope of the power contained in section 57 of the Stamp Act to make a reference. It was held therein that the power contained in section 57 of the Act is in the nature of on obligation or is coupled with an obligation and can be demanded to be used also by the parties affected by the assessment of the stamp duty and that the power of making a reference under section 57 is not for the benefit of the Revenue Authority but that it is coupled with the duty cast on him, as a public officer to do the right thing. As pointed out, when an important and intricate question of law in respect of the construction of a document arises, as a public servant it is his duty to make the reference and that if he omits to do so it is within the power of Court to direct him to discharge that duty and make a reference. It is doubtful if the short statement in *Shanmuga Mudaliar*, In re[1], that a writ of mandamus to the Board of Revenue to refer a question of liability of a document to stamp duty cannot issue from the High Court as it cannot be said that the Board has failed to exercise any " statutory duty " can in view of Supreme Court judgment referred to above be considered quite accurate.

COURT-FEES.

In *Vaduganatha Pillai* v. *Srinivasa Raghava Ayyangar*[2], it was held that a quondam minor who impeaches a decree to which he was a party through his guardian and chooses the institution of a suit as the only mode of avoidance, is bound to include in the plaint a prayer for setting aside the decree and he can be directed to pay court-fee under section 7 (iv-A) of the Court-Fees Act. The phrase "documents securing money or other property having such value " in section 7 (iv-A) was held in *Padma Bivi Ammal* v. *Md. Moideen Rowther*[3] to include sales and also release deeds and hence a plaintiff in a suit for partition who has alleged that certain releases executed by her are void or in the alternative voidable, must seek to set them aside and pay adequate court-fee. In a suit brought for a declaration that a compromise decree passed in a prior suit was not binding on the plaintiff, the plaint should be valued on the value of the properties that formed the subject-matter of the decree sought to be set aside according to the decision in *Kothandarama Reddiar* v. *Chokkammal*[4]. In *Ramaswami* v. *Kunjammal*[5], it was held that in a suit by a quondam minor for recovery of possession of his property alienated by his mother and natural guardian under undue influence, it is sufficient for the plaintiff to value the suit under section 7 (v) of the Court-Fees Act and the plaintiff need not ask for cancellation of the sale deeds and pay court-fee under section 7 (iv-A) of the Act. In *Nagaratnam*, In re[6], it was pointed out that a Court's power to allow the refund of court-fee is not confined to sections 13, 14 and 15 of the Court-Fees Act and that it has got some more, though strictly limited powers. It was held that a Court can order refund of the court-fees under section 151 of the Civil Procedure Code where there is an excess payment made by mistake or where on account of the mistake of Court a party has been compelled to pay court-fee either wholly or in part and that outside these cases a Court has no power to refund under section 151, Civil Procedure Code. In *Sundaram Ayyangar and Sons* v. *Province of Madras*[7], it was pointed out that the test under section 17 of the Court-Fees Act is not whether the causes of action are distinct; nor is it a conclusive test to apply that different suits could have been brought separately against each of the defendants in respect of the relief claimed in the suit. It was held that suits against Government and an agent by the owner of a fleet of cars for recovery of amounts paid as licence fees twice over could not be said to have embraced two or more distinct subjects within the meaning of section 17 of the Act. In *Popuri Chinna Venkataswami*, In re[8], it was held that in computing the period of 89 days from the date of the decree within which the application for review of judgment may be presented on payment of half the fee payable, the time during which the Court is closed for vacation cannot be excluded and that where the 89th day happens

1. (1950) 2 M.L.J. 399.
2. (1950) 2 M.L.J. 378.
3. (1950) 2 M.L.J. 268.
4. (1950) 1 M.L.J. 436.
5. (1950) 1 M.L.J. 408.
6. (1950) 1 M.L.J. 222.
7. (1950) 2 M.L.J. 499.
8. (1950) 2 M.L.J. 474.

to be a Sunday, it cannot be contended that Article 5 applied, where the application for review was filed on the next day. In the circumstances of the case a refund of half the full court-fee paid was allowed.

LIMITATION.

In considering the effect of an amendment to the law of limitation it was pointed out in *Ramanathan Chettiar* v. *Kandappa Goundan*[1], that it is well-settled that the law of limitation being procedural law, its provisions operate retrospectively in the sense that they apply to causes of action which arose before their enactment. But it is equally well established that if a right to sue had become barred by the provisions of the Act then in force on the date of the coming into force of a later enactment, then such a barred right is not revived by the application of the new enactment. The scope of section 18 and the conditions to be satisfied before section 18 could be applied against a *bona fide* auction-purchaser have been stated fully in *Ghulam Kadir* v. *Municipal Council, Nagapattinam*[2]. Where an application is made long after a sale to set it aside on the ground of the fraud of the decree-holder, it was pointed that what section 18 of the Act requires is not merely proof of fraud which vitiates a sale but also proof of fraud which kept the judgment-debtor in ignorance of his right to make an application for setting aside the sale and that a decree-holder's fraud may have a continuing influence so as to keep the applicant in ignorance of his right to file a petition for setting aside a sale. But where the sale has been confirmed in favour of a *bona fide* auction-purchaser, the ignorance of the applicant of his right to file an application must also be established as due to the fraud of auction-purchaser. The decision finally concludes with the statement that except in cases where there was no jurisdiction to sell and the sale is a nullity, on that ground, *bona fide* Court auction-purchasers must not be deprived of the benefit of the provisions of the Limitation Act under Articles 166 and 12 and that it is not consistent with the policy of the Act to apply section 18 of the Act against them where they were not shown to be parties to the continuing influence of the fraud of the decree-holder. The decision in *Podila Venkanna* v. *Chinchinada Venkanna*[3], rendered soon after the above decision, has held that a judgment-debtor who is kept out of the knowledge of the execution sale by fraud can, in an application under Order 21, rule 90, Civil Procedure Code, to set aside the sale, invoke the aid of section 18 of the Act to extend the period of limitation where fraud is proved to have been committed by the decree-holder, or the auction-purchaser or both. The decision in *Payidamma* v. *Lakshminarasimma*[4], which was followed in *Ghulam Kadir* v. *Municipal Council, Nagapattinam*[2], was adversely commented upon in *Podila Venkanna* v. *Chinchinada Venkanna*[3]. In *Naranappa Naicker* v. *Ramalingam Pillai*[5], it was held after a discussion of the case-law on the subject that where the person sought to be bound by an acknowledgment is a person who had prior to such acknowledgment or payment acquired an interest in the property, (case of execution of mortgage decree) the acknowledgment would not be binding on him, although the person making the acknowledgment or payment was at the time possessed of some interest or other in the properties concerned. In *Mangapathi Naidu* v. *Krishnaswami Naidu*[6], it was held that the endorsement of payment by the use of the words "[illegible]" could not be construed as an acknowledgment of liability there being nothing in the endorsement suggesting that any further sum was due and that the Tamil expression used means "paid and endorsed" and not "towards" a debt. The effect of the Amending Act, XVI of 1942, also fell to be decided in the above case. It was held that the Amending Act might operate retrospectively upon payments and endorsements made before it came into force, though such payments and endorsements were of no avail at the date when they were made, but such a mode of interrupting the running of time would not serve to receive debts, which, according to the provisions of the old law had already became barred before the date of

1. (1950) 2 M.L.J. 624.
2. (1950) 1 M.L.J. 432.
3. (1950) 1 M.L.J. 471.
4. (1914) 28 M.L.J. 525 : I.L.R. 38 Mad. 1076.
5. (1950) 2 M.L.J. 13.
6. (1950) 1 M.L.J. 107.

the amendment. Another case deciding a similar point is *Ramanathan Chettiar* v. *Kandappa Goundan*[1], which held that an "open payment" made prior to the Amending Act would not save a claim from the bar of limitation if it was already barred prior to the coming into force of the amendment. The relative applicability of articles 29 and 49 was discussed and decided in *Muthuswami Goundan* v. *Dhanushkodi Nadar*[2]. It was held that where the property wrongfully seized from the plaintiff is alleged to be in the possession of the defendant, and the suit is for recovery of the said properties coupled with a prayer for the price of those articles, (as should be asked for under Order 20, rule 10, Civil Procedure Code) the plaintiff can take advantage of article 49 and could not be confronted with article 29. Where the goods have been sold to third parties, a suit against the defendant for loss caused by the wrongful seizure and sale, being the price of the goods would be governed by article 29 as also to cases where damages are claimed. That a suit by a consignee for the value of goods entrusted to a Railway Company for carriage and lost in transit would be governed by article 31 and not by article 30 was the point decided in *Governor-General in Council* v. *Messrs. Khadi Mandali*[3], where it was further held that the starting point would be the date when the Railway Company finally informs the consignee that the goods cannot be delivered. According to the decision in *Ethilavulu Ammal* v. *Pethakkal*[4], the guardian contemplated under article 44 is either a natural guardian or a testamentary guardian or a certificated guardian and that no others are contemplated by the article and that the article would have no application to a suit by a widow for setting aside a surrender executed by the father of the widow as her guardian both on the ground that the deed of surrender cannot be said to be a transfer of property and that the father cannot be said to be the guardian of the widow. Where at the time of the execution of a promissory note there is simultaneous agreement by debtor to pay the debt before the discharge of an existing mortgage or in default on the date of the redemption of the mortgage, it was held in *Manda Subbamma* v. *Karri Venkamma*[5], that the agreement had the effect of bringing the promissory notes under article 80 of the Limitation Act and a suit filed within 3 years of the discharge of the mortgage would be in time and that article 73 does not apply to the case. As regards the starting point of limitation under article 113 it was held in *Muniswami Goundar* v. *Shammanna Gouda*[6], that when the date is fixed under the first part of column 3 of article 113, limitation begins to run forthwith as the date is certain, and that where no time is fixed and where the party against whom the limitation runs is not in a position to know of the occurrence of the contingency contemplated by the contract, time begins to run only when he has notice of the refusal of the performance. It was pointed out that the words "date fixed" are comprehensive to include a date which can be ascertained with reference to an event certain to happen. A suit by a divided brother for his share of partible property recovered by his brother from third parties together with mesne profits, after the partition, and also for an account would according to the decision in *Nagamma Naidu* v. *Venkatarayulu Naidu*[7], be governed by article 120 and limitation would start to run from the date of the earliest denial by the defendant of the plaintiff's title. In *Venkataseshayya* v. *Subramanyam*[8], the question was whether article 62 or article 120 applied to a suit for recovery of a certain sum said to represent plaintiff's share of the sale proceeds of a site purchased in the name of the defendant by the defendant and the plaintiff's father. It was held that on account of the jural relationship between the parties a resulting trust can be postulated and any claim based on such relationship must be treated as excluded from article 62 and must be brought under article 120 of the Limitation Act. It was pointed out that it cannot be said that where an account is not called for, the suit must necessarily be treated as one falling under article 62 and therefore not being within article 120. For a suit to declare a private sale prior to an attachment before judgment which

1. (1950) 2 M.L.J. 624.
2. (1950) 1 M.L.J. 799.
3. (1950) 1 M.L.J. 210.
4. (1950) 1 M.L.J. 76.
5. (1950) 1 M.L.J. 161.
6. (1950) 2 M.L.J. 163.
7. (1950) 2 M.L.J. 450.
8. (1950) 2 M.L.J. 611.

is found to be fraudulent and to defeat the threatened attachment, time would begin to run not from the date of the first sale but from the time of the plaintiff's knowledge of it, was the point decided in *Synabhog Marthandu Rao* v. *Chenna Basappa Kuruba Gond*[1]. In *Ramachandra Rao* v. *Kasa Amniraju*[2], it was held that the mere fact of physical possession held by the true owner within the statutory period is not sufficient if it is traceable not to an *animus* on his part to exercise it in assertion of his own right but to the sufferance of the person in wrongful possession. Their Lordships of the Privy Council had to consider the applicability of articles 134-B and 144 in regard to the execution sale of debutter property and the question of the starting point of adverse possession against trust in *Mahanth Sudarsan Das* v. *Mahanth Ram Kirpal Das*[3]. It was held therein that the words used in article 134-B are incapable of applying to an execution sale of debutter property and that where land devoted to charitable purposes is so sold under an execution decree against the trustee of the charity, the ensuing possession of the purchaser is adverse from the date of sale. It was further held that adverse possession against the charity starts under article 144, from whatever date after the sale the purchaser obtained effective possession of the disputed property and not from the date of the death of the trustee. Their Lordships also point that article 144 extends the conception of adverse possession to include an interest in immoveable property as well as the property itself and there could be adverse possession of an undivided share, given the appropriate circumstances. That it is article 181 of the Limitation Act that would be applicable to set aside an illegal sale (sale in the absence of a proclamation) and not article 166 was decided in *Venkateswara Ettu Naicker* v. *Ayyammal*[4]. In the case of an execution sale which is a nullity an application to set it aside would be governed by article 181 and the right to apply will accrue when the applicant's possession is effectively interfered with—*Venkatasubba Rao* v. *Kanakaraju*[5]. A Full Bench in *Gopalaswami Mudaliar* v. *Thiagarajaswami Devasthanam*[6], has laid down that a decree passed by the Presidency Small Cause Court and transferred to a Court subject to the provisions of section 48, Civil Procedure Code would be governed only by article 182 of the Limitation Act and is not at all affected by section 48, Civil Procedure Code. While approving of the decision in *Sri Krishna Doss* v. *Alumbu Ammal*[7], the Full Bench pointed out that *Nagalingachetty* v. *Sreenivasa Ayyangar*[8], was not correctly decided in so far as it assumed that section 48, Civil Procedure Code was applicable to such a decree. In *Ramakrishna Naidu* v. *Srinivasalu Naidu*[9], a contention that an application under Order 9, rule 13, Civil Procedure Code, is virtually an applictation for review within the meaning of clause (3) of article 182 was refused to be accepted. The meaning and effect to be given to the use of the expression "struck off" came to be discussed in *Korapolu Shedthi* v. *Gangayya Shetty*[10], and it was held that an order "No bidders. Sale stopped. Petition struck off." passed on the last working day of the term prior to summer holidays, to be not a final order. According to the decision in *Venkatappayya* v. *Venkata Subba Rao*[11], where on a day subsequent to the passing of an order of attachment, the Court records the fact that the attachment has been effected and strikes off the petition, it is the latter date which is the date on which the final order on the petition is passed. Where an application for execution returned for complying with certain requirements was re-presented by a person not duly authorised, its rejection on that ground and for non-compliance with the requirements was held to be a final order so as to save limitation under article 182 (5) in *Sabapathy Mudaliar* v. *Mahalinga Padayachi*[12]. In *Lakshmi Narasayya* v. *Appalaswami*[13], it was held that article 182 (7) would apply to a case of an execution against a surety who had undertaken to pay the decree amount if the judgment-debtor did not file an insolvency petition within a month and did not prosecute it and that time would run from the dismissal of the petition for non-prosecution.

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1. (1950) 2 M.L.J. 653.
2. (1950) 2 M.L.J. 551.
3. (1950) 1 M.L.J. 243 (P.C.).
4. (1950) 1 M.L.J. 22.
5. (1950) 2 M.L.J. 290.
6. (1950) 1 M.L.J. 437 (F.B.).
7. (1911) 21 M.L.J. 777 : I.L.R. 36 Mad. 108.
8. (1941) 1 M.L.J. 365.
9. (1950) 1 M.L.J. 648.
10. (1950) 1 M.L.J. 204.
11. (1950) 2 M.L.J. 261.
12. (1950) 2 M.L.J. 539.
13. (1950) 1 M.L.J. 20.

Civil Procedure.

The definition of a "legal representative" in section 2 (11), Civil Procedure Code, was held in *Subba Naidu* v. *Kanniah Naidu*[1] to include a universal legatee to whom the whole estate of a deceased party has been bequeathed. The decision in *Natesa Sastrigal* v. *Alamelu Achi*[2] deals with the question as to who are persons or class of persons who are indicated by the expression "legal representative" and as to who would not be included in it, and there is quite long list given of either class. But the actual point decided was that the expression does not include legatees of a part of the estate and it also does not include those taking possession of the property of the deceased from the legatees of part of the estate. The conditions for the application of the doctrine of *res judicata* as between co-defendants were once again reiterated by the Privy Council in *Chandu Lal Agarwala* v. *Khalilur Rahman*[3]. According to their Lordships there must be: (1) conflict of interest between the co-defendants, (2) the necessity to decide the conflict in order to give the plaintiff the appropriate relief and (3) the decision of that question between the co-defendants. It was added that the doctrine may apply even though a party, against whom it is sought to enforce it did not in the previous suit think fit to enter an appearance and contest the question, but in such case it must be proved clearly that he had or must be deemed to have had notice that the relevant question was in issue and would have to be decided. In *Valliammai Ammal* v. *Sankara Ayyar*[4] dealing with the question when a decree in a suit by a presumptive reversioner would be binding on the actual reversioner, it was said that the true principle is the one embodied in Explanation 6 to section 11, Civil Procedure Code. According to *Madhavan Variar* v. *Chathu Nambiar*[5], where the title put forward by a plaintiff is totally different and wholly independent of the title put forward in an earlier suit, the bar of *res judicata* does not apply. It was further pointed out that the Explanation IV of section 11, Civil Procedure Code, requires that the matter not only "might" but "ought" to have been made a ground which implies that the plaintiff was bound to include the present claim in the earlier suit. But where the present claim of the plaintiff is his individual right which he was not bound to include in the earlier suit which was filed by the plaintiff in his representative capacity as karnavan of a tarwad wherein he was bound to include only all the available title of the tarwad, Explanation IV would have no application. Where in the case of a contract for the sale of goods C.I.F. or F.O.R. the consignment is found at the destination to be not according to sample, it was held in *Shivnath Malu* v. *Haji Ibrahim Kassam Uplitwala*[6], that as regards a suit for breach of the contract, the Court in the place where the goods were discovered not to be according to sample would have jurisdiction as part of the cause of action arose there. According to the decision in *Devaraja Ayyar* v. *Srinivasan*[7], the expression "voluntarily resides" in section 20 (*b*) of the Code does not mean permanent residence and that temporary residence will confer jurisdiction on the Court. In *Subramaniam Chettiar* v. *Srinivasa Ayyar*[8], it was held that as section 44 of the Code is not included in section 8 of the Code and as it had neither been made applicable to the Presidency Small Cause Court, that Court would have no jurisdiction to execute a decree passed by a Munsiff's Court in Travancore and transferred to the Presidency Small Cause Court for execution. Where though an order may appear to be passed under section 151 of the Code for something analogous to restitution and relates to the execution, discharge or satisfaction of the decree, it would according to the decision in *Irulayee Ammal* v. *Murugiah*[9] fall under section 47 of the Code and for that reason become appealable

1. (1950) 1 M.L.J. 276.
2. (1950) 1 M.L.J. 476.
3. (1950) 1 M.L.J. 241 (P.C.).
4. (1950) 1 M.L.J. 727.
5. (1950) 2 M.L.J. 501.
6. (1950) 1 M.L.J. 38.
7. (1950) 2 M.L.J. 484.
8. (1950) 2 M.L.J. 472.
9. (1950) 2 M.L.J. 17.

Where an order merely settles the terms of a sale proclamation and does not in any way determine or affect the rights of parties the order would not be open to appeal as an order under section 47 was the point decided in *Ramalingaswami Naicker* v. *Venkitaswami Naicker*[1]. But it was held in the same case that if in settling the terms the rights of the judgment-debtors *inter se* who are owners of the equity of redemption are affected by the order of the Court, that would be a matter relating to the execution, discharge or satisfaction of the decree and the decision of the Court would be open to appeal at the instance of the aggrieved party. In *Kunhikavu* v. *Thattan Kesavan*[2] when an application for stay of confirmation of sale under the provisions of Madras Act, XVII of 1946, was rejected it was held that as the order would amount to deprivation of possible rights under the Madras Act, it would be a decree as it is one in execution proceedings and from that point of view an appeal would lie under section 47 of the Code. In the Full Bench case of *Gopalaswamy Mudaliar* v. *Thiagaraja Devasthanam*[3], it was pointed out that section 48 of the Code would not apply to a decree passed by the Courts of Small Causes established in the towns of Calcutta, Madras and Bombay and that section 31 of the Presidency Small Cause Courts Act does not attract the operation of section 48 of the Code, because the latter only provides for a limit of time for execution and does not deal with the procedure for execution. *Lakshminarayanamurthi* v. *Sait Purnachand Chatrabhan*[4] is a case where on the facts it was held that an application twelve years after the decree to amend an execution application by adding the receiver could be allowed. According to the decision in *Suryanarayana* v. *Rajyalakshmi Devi Amma*[5], to make section 52 of the Code applicable it is sufficient to satisfy three conditions: the legal representative must have received some property of the deceased; he must be no longer in possession of it; the Court must be satisfied that he has failed to duly apply that property to discharge the debt of the deceased. In *M. & S. M. Railway* v. *Chengali Sydalli*[6], it was held that the provident fund of a railway employee is not liable to attachment and even if the employee agrees to the attachment, still it would be illegal and it would be open to the railway company as garnishee to raise the question of the illegality. In *Chekka Subramanyam* v. *Union of India*[7] and *Governor-General in Council* v. *Krishna Shenoy*[8], it was held on the facts that the description of the defendant, the railway administration in the notice under section 80 was sufficiently clear and so proper. Where the infringement of the rights of the residents of a village in respect of a public street does not constitute a public nuisance, such infringement can according to the decision in *Murugesa Mudaly* v. *Arunagiri Mudaly*[9], well be sued upon by any member of the public who suffers from the wrong complained of and that a suit under section 91 of the Code and a sanction of the Advocate-General is not necessary. In *Abdul Razak Sahib* v. *Abdul Hamid Sait*[10], it was held that where a plaintiff on behalf of all persons interested in a fund prays for a declaration that the defendants being the trustees of a trust should render true and proper accounts, etc., and for the appointment of a receiver, the case would fall under section 92, Civil Procedure Code and the previous sanction of the Advocate-General would be necessary for its institution and in its absence would not be maintainable. A Court can under section 94 (*e*), Order 21, rule 58 (2) and section 151, Civil Procedure Code, stay a sale in execution of a decree in a suit against a third party pending the disposal of a suit filed under Order 21, rule 63 by a claimant against the claim order—*Vodayar* v. *The Vijaya Bank*[11]. Where a finding of fact is supported by evidence, the High Court has no power in second appeal

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1. (1950) 1 M.L.J. 42.
2. (1950) 1 M.L.J. 347.
3. (1950) 1 M.L.J. 437 (F.B.).
4. (1950) 2 M.L.J. 661.
5. (1950) 1 M.L.J. 192.
6. (1950) 1 M.L.J. 186.
7. (1950) 2 M.L.J. 656.
8. (1950) 2 M.L.J. 506.
9. (1950) 2 M.L.J. 770.
10. (1950) 2 M.L.J. 282.
11. (1950) 2 M.L.J. 492.

question that finding—*Misri Lal Nayak* v. *Mst. Surji*[1]. In *M. & S. M. Railway Chengali Sydalli*[2], it was pointed out that where the trial Court on an erroneous iew of the law refuses to entertain an objection to an attachment, it is a failure exercise jurisdiction vested in it and as such a revision will lie against such an rder of refusal. The powers of the High Court in revision according to the decision *Rajam Bharathi* v. *Damodaram Naidu*[3] are very much less than when the matter brought up to it in appeal and that if the trial Judge had jurisdiction in the matter nd had not acted illegally or with material irregularity, the High Court has no ower to interfere even if it differs from the conclusions of the Subordinate Court pon questions of fact and law. Where a finding of fact is arrived at by the pplication of a wrong principle of law or is manifestly at variance with the evidence n record the High Court will interfere in revision—*Devaraja Aiyar* v. *Srinivasan*[4]. n *Srinivasa Mudaliar* v. *Abraham Pillai*[5], it was held that a revision lies against an rder refusing to bring a person on record as the legal representative of a deceased arty and in *Pullappa Naidu* v. *Venkatanarappa Reddi*[6], it was held that an order mending a decree so as to bring it in conformity with the judgment is not revisable nder section 115 because an alternative remedy in the form of an appeal against ne amended decree is available. There is a full disoussion on the question of the ope and applicability of section 132 (1) of the Civil Procedure Code in *Mohammad mail Maracair* v. *Wazir Bi Bi Saheba*[7] and after explaining the meaning of the ords " the customs and manners of the country " in the section, it was held that

Privy Council has pointed out that though the powers of amendment conferred by the Code are very wide, they must be exercised in accordance with legal principles and that it would not be open to a Court under section 153 and Order 6, rule 17, Civil Procedure Code, to allow an amendment which would involve the setting up of a new case. In *Foulkes* v. *Suppan Chettiar*[1], it was pointed out that when once the plaintiffs obtain an order under Order 1, rule 8, Civil Procedure Code, it is impossible for the other side to contend that the suit is not brought by them in a representative capacity. It was further held that when a suit is brought by several persons in a representative capacity, and if one of them dies, the suit does not abate because, the right to represent the others of a class is not a right which *ipso facto* survives to the legal representatives of the deceased party and that the source of that right is the order of the Court permitting the party to represent others. It was indicated that in such a contingency, it is for the Court to decide whether the suit can be allowed to be continued by the surviving person or persons or whether others should be joined. Where an infringement of the rights of the residents of a village in respect of a public street does not constitute a public nuisance, it is not necessary to compel a person that suffers from such a wrong to have recourse to Order 1, rule 8 of the Civil Procedure Code, which is after all only an enabling section—*Murugesa Mudaly* v. *Arunagiri Mudaly*[2]. In *Doraiswami Goundan* v. *Subramania Mudaliar*[3], it was held that the addition of a party should be ordered only if in the absence of that party, the Court cannot effectually and completely adjudicate and settle all questions in the suit and that in the case before the Court it was not necessary to add the Government as a party though the competency of the Legislature to enact section 44 (*b*) of the Madras Hindu Religious Endowments Act was raised. In holding that all simple creditors need not be brought on record as parties in a suit for partition by the minors against their father it was pointed out in *Rattamma* v. *Venkata Rao*[4], that Order 1, rule 10 uses the word "may" and not "shall". The Privy Council in *Kanda* v. *Waghu*[5] has indicated that it is not open to a Court under Order 6, rule 17 to allow an amendment which would involve the setting up of a new case. *Rajammal* v. *Kannammal*[6] was a case where owing to the peculiar circumstances, an amendment of the written statement at the appellate stage was considered necessary to meet the ends of justice and it was also remarked that a written statement or plaint could be amended at any stage if there are sufficient grounds shown for that purpose. When a Judge finds that a plaint has not been properly valued according to the decision in *Sriramulu Chettiar* v. *Raja Chettiar*[7], he should, in accordance with the provisions of Order 7, rule 11, direct the plaintiff to value it properly and only after his failure to do so reject the plaint and that a rejection of the plaint straightaway is not justified. In *Karamuri Surayya* v. *Thayaramma*[8], it was held that the intendment of Order 9, rule 13 of the Civil Procedure Code is to confer power upon a Court to impose conditions for setting aside an *ex parte* decree as to costs as to payment of the decretal amount whole or in part or as to such other conditions as the Court thinks fit and that under the provisions of law the Court has ample jurisdiction to impose any of the abovementioned three conditions. An application under Order 9, rule 13 cannot be treated as virtually an application for review within the meaning of clause 3 of Article 182 of the Limitation Act was the point decided in *Ramakrishna Naidu* v. *Srinivasalu Naidu*[9]. In *Kanda* v. *Waghu*[5], it was pointed out that the observations in *Gopika Raman Roy* v. *Atal Singh*[10] that where leave of Court is necessary for admission of documents, such leave should not ordinarily be refused when the documents are official records of undoubted authenticity cannot be read as implying that there is no discretion left in a trial

1. (1950) 2 M.L.J. 220.
2. (1950) 2 M.L.J. 770.
3. (1950) 1 M.L.J. 521.
4. (1950) 1 M.L.J. 649.
5. (1950) 1 M.L.J. 417 (P.C.).
6. (1950) 1 M.L.J. 805.
7. (1950) 1 M.L.J. 180.
8. (1950) 1 M.L.J. 190.
9. (1950) 1 M.L.J. 648.
10. (1929) 56 M.L.J. 562 : L.R. 56 I.A. 119 : I.L.R. 56 Cal. 1003 (P.C.).

sues arising in the case and the power to dispose of the issues in the way in which : considers to be most conducive to the rendering of justice and that the refusal f a trial judge to try an issue regarding the validity of the sanction of the Advocate-eneral under section 92, Civil Procedure Code, as a preliminary issue was not regular, when there was nothing bad with the sanction on the face of the record nd when the suit itself was ripe for trial. The necessity of a notice under Order 21, ule 22, Civil Procedure Code and on whom it is to be served when deciding a uestion as to the validity of sale was laid down in the following terms in *Venkata ubba Rao* v. *Kanakaraju*[2], namely : that a notice under Order 21, rule 22 is a ecessary condition for conferring jurisdiction upon the executing Court to sell the udgment-debtor's property and a sale without such notice is a nullity ; that if the otice was served on the parties, the sale would not be void even though at the ater stages notice was not served on all the parties if as a matter of fact the estate as represented sufficiently by one of the parties and that the sale would be valid the notice was served on a person held to be the representative of the deceased arty even though it subsequently turns out that he was not the real or only repre-ntative of the deceased party. After pointing out the object of rule 66 of Order 21, ivil Procedure Code, it was held in *Venkateswara Ettu Naicker* v. *Ayyamnal*[3], that if the ecific provision as to proclamation is violated, the sale would be regarded as hav-ig been properly conducted and would be void and that it cannot be said that the otal failure to make the proclamation under Order 21, rule 66 of the Code, is a ere irregularity in the publication or conduct of the sale. That when leave to id is asked for under Order 21, rule 72, Civil Procedure Code, the question to be onsidered is whether it will be to the advantage of every one concerned that the ave ought to be given and that the power to grant leave to bid must be cautiously xercised and that unless the Court is satisfied from the circumstances shown in the ffidavit that otherwise an advantageous sale could not be obtained, no such leave ould be granted were the points decided in *Varadarajulu Pillai* v. *Gendapodi Nanniar*[4]. fter considering the scope of the power to allow a withdrawal under rule 1 of rder 23, Civil Procedure Code, it was held in *Ahmad Koya Mollah* v. *Calicut unicipal Council*[5] that unless the conditions prescribed by the Code exist the High ourt has no jurisdiction to allow the withdrawal merely because unless that is done o review of the judgment and decree of the lower appellate Court can be sought y a party and that he will be put to considerable hardship. In the circumstances f the case in *Muhammad Ghouse Sahib* v. *Jamila Bi*[6], it was held that the allegations nd prayer in a counter-affidavit setting up a compromise may be treated as an appli-ation under rule 3 of Order 23 and an order thereon would be appealable nder Order 43, rule 1 (*m*). Provided a compromise is lawful, that is, not contrary o law, the Court is obliged to record a compromise and the mere fact that it may e voidable is no reason for a Court refusing to record it according to the decision n *Kuppuswami Reddi* v. *Pavanambal*[7]. The circumstances when an award of the rbitrators would operate as an adjustment or compromise within the meaning of rder 23, rule 3, Civil Procedure Code, was laid down in *Palaniyandi Chetty* v. *Kandappa*

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1. (1950) 1 M.L.J. 657.
2. (1950) 2 M.L.J. 290.
3. (1950) 1 M.L.J. 22.
4. (1950) 1 M.L.J. 111.
5. (1950) 2 M.L.J. 369.
6. (1950) 1 M.L.J. 151.
7. (1950) 1 M.L.J 524.

Goundan[1]. In *Arumugham Chettiar* v. *Sevugan Chettiar*[2], it was pointed out that security for costs can be asked only under exceptional circumstances and it should be the exception and not the rule, and it must be based upon some established principles, not on the mere circumstance that the Court in its first impression finds the suit as not a *bona fide* suit and that as rule 1 of Order 25 specifically deals with this, section 151 of the Code should not be invoked. The scope of the limitation to be placed upon the words " agreement with reference to suit " in rule 7 of Order 32, Civil Procedure Code and the test to be applied to decide the nature of agreements that would attract rule 7 of Order 32 of the Code was considered by a Full Bench in *Bapayya* v. *Bhushayya*[3], and it was held that an agreement that a guardian should withdraw an application under Order 21, rule 90, filed on behalf of a minor, fall outside rule 7 of Order 32, because the agreement was not one relating to the rights of the parties as claimed in the suit or to their rights and liabilities ascertained and decreed and that the order of the Court allowing the withdrawal is not voidable at the instance of the minor on the ground of want of sanction of the Court. That an applicant for leave to sue as a pauper is expected to disclose whatever properties he is possessed of in the sense of not only whatever property he is actually possessed but also whatever property he is entitled to, apart from the subject-matter of the suit was laid down in *Venkatasubba Reddi* v. *Kesava Reddi*[4], where it was held that where an applicant for leave to sue *in forma pauperis* is found to have a saleable interest in some immoveable property as the son of his father, he cannot be held to be a pauper without some evidence that he was not able to raise money on the security of such property and merely from the fact that his step-mother was in possession of it. In *Govindnathan* v. *Anjaneya Panditha*[5], it was pointed out that Order 33, Civil Procedure Code, does not specifically provide any procedure when the contemplated plaint discloses misjoinder of parties and causes of action and that in such a case the suit *in toto* cannot be said to be barred by any law and that the plaintiff has the right to elect which cause of action he can pursue in the suit which he seeks to file. According to decision in *Alamelu*, In re[6], if a plaintiff who has filed a suit *in forma pauperis* abandons a part of his claim, he should be called upon to pay the proportionate court-fee on the part abandoned and that this follows from the language of Order 33, rule 11, Civil Procedure Code, as amended in Madras. The Privy Council in *Sardar Autar Singh* v. *Sir Mohammad Ejaz Rasul Khan*[7] has laid down that Order 34, rule 2 (2) and (3), Civil Procedure Code, contain clear statutory directions precluding the reopening of a final decree for foreclosure on equitable grounds and that hence an executing Court has no power in the exercise of its equitable jurisdiction to grant relief against a penalty to reopen a final decree for foreclosure by extending time for redemption in a case where the decree is one passed by consent of parties. When an application is made under rule 19 of Order 41, Civil Procedure Code, to set aside dismissal of appeal for default, if there were valid excuses for the petitioner's absence on the date when the appeal was dismissed for default, the previous negligence or want of diligence on the part of the appellant to prosecute the appeal should not be made a ground disentitling him for restoration was the point decided in *Viswanatham* v. *Dakshinamurthi*[8]. The limits of the right of a respondent in an appeal to prefer objections to the decree without filing separate appeals were considered and laid down by a Full Bench of five Judges in *Venkateswaralu* v. *Ramamma*[9], which held that the provisions of Order 41, rule 22, Civil Procedure Code, do not enable one respondent to prefer objection against another respondent, at any rate, when the objection sought to be taken was one in which the appellant was in no way interested and overruled *Muniswami Mudali* v.

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1. (1950) 2 M.L.J. 372.
2. (1950) 2 M.L.J. 159.
3. (1950) 1 M.L.J. 196 (F.B.).
4. (1950) 1 M.L.J. 463.
5. (1950) 1 M.L.J. 40.
6. (1950) 1 M.L.J. 504.
7. (1950) 1 M.L.J. 419 (P.C.).
8. (1950) 1 M.L.J. 719.
9. (1950) 1 M.L.J. 54 (F.B.).

di[1], an earlier Full Bench case. It is pointed out that Order 41, rule 22, per construction confers only a restricted right on a respondent to prefer s to the decree without filing a separate appeal. Such an objection should ıral rule be primarily against the appellant and that in exceptional cases, ıcidentally be also directed against other respondents. *Ariangavu Pillai* v. *gai Ammal*[2] was a case where after considering the question when a remand rder 41, rule 23 is justified it was held on the facts that the remand was :. According to the decision when there is no material before the Court uding that the decree was wrong a remand to make the trial Court think matter once again and give fresh findings on the same issue was improper. *ayya* v. *Lakshmayya*[3], it was held that the wide language of Order 41, Civil Procedure Code, as amended in Madras gives ample rights to the l party to file an appeal against an order of remand even after the final in the suit has been given. The two rights of a litigant to appeal against of remand and to contest the proceedings taken in a trial Court pursuant er of remand were pointed out to be independent legal rights and that the of one such right was no bar to the exercise of the other. The words " case appeal " in Order 43, rule 1 (*d*), Civil Procedure Code, were held in *hnan Chettiar* v. *Muthalagu i Chettiar*[4], to mean not only a case in which an always provided, but also a case where an appeal is provided on certain ınd that therefore where a Court refuses to set aside an *ex parte* decree terms of an award an appeal would lie against such an order under ;, rule 1 (*d*), inasmuch as an appeal would lie on certain grounds under 7 of the Arbitration Act.

Criminal Procedure.

'alakrishna Ayyar v. *Veerannan Servai*[5], it was pointed out that a mere order ment under section 145, Criminal Procedure Code, was not sufficient to person of his right to relief in a suit under section 9 of the Specific Relief at trees which have been felled and severed from lands covered by a dispute a likelihood of breach of peace, but which are still lying on the spot and ed away will be covered by the phrase " crops or produce ", of land in 45 (2), Criminal Procedure Code, was the point decided in *Rev. A. Rampus Reddi*[6], and it was held that a Magistrate would therefore have juris- attach them. In *Satyanarayanamurthy* v. *Krishna Iyer*[7], it was held that to recite *sankalpams* to such persons as bathe in a holy tank and want *alpams* will not fall within the scope of section 147, Criminal Procedure en if there is a likelihood of a breach of the peace by reason of a rival such a right. It was pointed that in the absence of an exclusive right on to compel every person bathing in that tank to submit himself to his before using the water, the matter will not come under the scope of to water " under section 147. Where statements made under section 162 minal Procedure Code were not made available to the accused it was held *nna Lingappa*, In re[8], that in such a case an irresistible inference arises that has been caused to the accused and that hence he cannot be said to have r trial and his conviction and sentence have to be set aside. The principles ld guide a Court in the matter of acting upon extra-judicial confession ssed in *Venkatajalapati Kotiah*, In re[9], and it was pointed out that it is a of fact in each case, and it is for the jury or judge as the case may be, to whether such a confession is voluntary or induced by any of the considera-

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1) 27 M.L.J. 740 : I.L.R. 38 Mad.
2) 2 M.L.J. 370.
3) 2 M.L.J. 379.
4) 1 M.L.J. 483.
5. (1950) 1 M.L.J. 13.
6. (1950) 1 M.L.J. 213.
7. (1950) 1 M.L.J. 519.
8. (1950) 2 M.L.J. 766.
9. (1950) 2 M.L.J. 264.

tions which would render it unsafe to be acted upon and that it cannot be laid down as an inflexible rule of law that in no case an extra-judicial confession will afford the sole basis of conviction. It was added, that in cases of homicide and such other similar grave offences, it would not be safe to convict a person on the confession alone unless corroborated by other evidence and that it is a rule of prudence and not of law. Where in a case there are more than one accused, the omission of a Magistrate to warn some of the accused making a confession that it was not intended to take them as approvers was held in *Venkata Reddi*, In re[1], to be fatal to the admissibility of such a confession as it causes a grave doubt on the voluntary nature of such a confession in such cases and that there is reasonable ground for supposing that the confession might have been made on the assumption that the persons confessing would be taken as approvers and escape punishment. In *Manikka Nagendra Bagavathar*[2], it was pointed out that a confession cannot be rejected merely on the ground that the requirements of the rule as to recording of questions put and answers by accused in the direct form have not been strictly followed. It is pointed out that according to section 533 of the Criminal Procedure Code, the Court before whom such confession is tendered, shall take evidence that such person duly made the statement recorded and that notwithstanding anything contained in section 91 of the Evidence Act, the statement shall be admitted if the error had not injured the accused as to his defence on the merits. In *Karunthambi*, In re[3], it was held that though section 29 of the Evidence Act makes a confession made by an accused who had not been warned according to the provisions of section 164 of the Criminal Procedure Code, admissible in evidence, still it suffers from the infirmity that the necessary pre-requisites validating a confession and making it acceptable in Court are absent if the accused had not been warned that he was not bound to make a confession. It was pointed out that the Magistrate ought to satisfy himself on the day of his recording the confession that the confession was being made voluntarily and that the failure to do so is a defect not of form but of substance which vitiates the confession and that when no questions have been asked by the Magistrate to satisfy himself that a confession was voluntary, the defect cannot be cured by the provisions of section 533, Criminal Procedure Code. It was further held in the same case that the fact that the confession was recorded on a Sunday and out of Court hours would not amount to a defect of substance but only one of form which may not invalidate the confession. Another point decided in the same case was that though there is nothing illegal for a Magistrate who has recorded a confession to conduct a preliminary enquiry, it is but proper that a Magistrate who would be a witness in the case, should as far as possible, not be the committing Magistrate and that in such circumstances the proper procedure should be not to take part in the committal or the preliminary register proceedings. The word "ordinarily" in section 177, Criminal Procedure Code, was held in *Venkataraman* v. *Pushkalammal*[4], to mean "except in cases provided hereinafter to the contrary" with the result that the ordinary rule as to jurisdiction is that it is the area within which the offence is committed and not the place where the offender may be found that determines the Court that has jurisdiction to try the offence. In *Natesan Servai*, In re[5], it was held that section 192 (1) of the Criminal Procedure Code cannot be construed to give a superior Magistrate, who has heard the case in part, power to transfer the case to a Subordinate Magistrate to hear the rest of it. The Privy Council in *Sanmukhsing* v. *The King*[6], that section 195 (1) (*c*) of the Criminal Procedure Code can only refer to the document alleged to be forged and not to a copy of it as the Court before which the copy is produced is not really in a position to express an opinion upon the genuineness of the original.

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1. (1950) 2 M.L.J. 298.
2. (1950) 1 M.L.J. 337.
3. (1950) 1 M.L.J. 659.
4. (1950) 2 M.L.J. 171.
5. (1950) 2 M.L.J. 545.
6. (1950) 1 M.L.J. 286 (P.C.).

A Full Bench in *Narayana Aiyar* v. *Veerappa Pillai*[1], has laid that where an offence under both section 193 and section 500 of the Penal Code, has been committed, a complaint by the person defamed would be maintainable and that a complaint by the Court under section 195, Criminal Procedure Code, is not essential. That a sanction under section 197, Criminal Procedure Code; is not necessary for prosecution of a public servant for an offence under section 161, Penal Code, was once again made clear in *Lambhardar Zutshi* v. *The King*[2]. The powers of a committal Court were examined in *Guli Venkataswami*, In re[3], and it was pointed that the Committing Magistrate was not a mere post office and that he was not bound to commit all against whom any prosecution witness speaks regarding the offence but has a right and duty to weigh the evidence and satisfy himself that there are sufficient grounds for committing the accused to the Sessions. In judging of the evidence, he is not empowered to give the benefit of the doubt to an accused person in committal proceedings. In *The Public Prosecutor* v. *Sinnappa*[4], it was pointed out that where the trial of a large number of accused for prohibition offences is commenced against each accused as separate cases, it is not legal for the Magistrate to club all of them together at the defence stage. After pointing out that a Court or a jury is entitled when the charge is for the graver offence to find the accused guilty of the constituent part of the offence it was held in *Raman Ambalam*, In re[5], that in a trial for an offence under section 392 read with section 397, Penal Code, it is open to the jury to find the accused guilty of an offence under section 326 of the Penal Code. In *Venkatakrishnan*, In re[6], it was pointed out that a person cannot be convicted of a minor offence on account of a legal bar for the prosecution of the major offence. If the jury have reached a conclusion upon the evidence which a reasonable body of men might reach, it is not necessary for the ends of justice, according to the decision in *Sowrirajan*, In re[7], that the Sessions Judge should refer the case to the High Court merely because he himself would have reached a different conclusion upon the facts. He must be of the opinion that the verdict is one which no reasonable body of men could have reached upon the evidence (*i.e.*) in other words, it was perverse. In *Raghavan*, In re[8], it was held that the failure to examine the accused personally as required by section 352 of the Criminal Procedure Code, does not vitiate the trial when his personal attendance has been dispensed with under section 205 and whose counsel has filed a statement on his behalf. Where a Magistrate fails to question the accused after the examination of a Court witness whose evidence only supports the defence version, it cannot be said that it had occasioned a failure of justice and that the irregularity is curable by section 537 of the Code was the point decided in *Cariappa* In re[9]. The question of the power of a Magistrate to select the venue of trial was examined in *Ganesan*, In re[10], and it was held that section 352, Criminal Procedure Code, presupposes the power in the presiding Magistrate to decide on the venue of the trial and that when once he has decided on the place, that place where the Court is held must be deemed to be an open Court. Certain conditions as to accessibility were laid down and it was held, that it would be competent for a Magistrate to hold his trial within the jail compound. A joint Magistrate has no power to acquit under section 380 of the Criminal Procedure Code—*Eravadu*, In re[11]. In *Oomayan*, In re[12], it was held that it was not competent to the High Court to go into questions of fact in an appeal against a conviction as a result of a verdict by a jury in view of the provisions of section 418, Criminal Procedure Code and so it is not open to the High Court to examine the evidence and find out whether the conviction is justified.

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1. (1950) 2 M.L.J. 686 (F.B.).
2. (1950) 1 M.L.J. 302 (P.C.).
3. (1950) 1 M.L.J. 36.
4. (1950) 1 M.L.J. 32.
5. (1950) 2 M.L.J. 373.
6. (1950) 2 M.L.J. 763.
7. (1950) 1 M.L.J. 235.
8. (1950) 2 M.L.J. 195.
9. (1950) 1 M.L.J. 389.
10. (1950) 1 M.L.J. 745.
11. (1950) 2 M.L.J. 774.
12. (1950) M.L.J. 520.

In the case of a discharge of an accused under section 209, Criminal Procedure Code, only two courses are open to the Sessions Judge in revision under sections 436 and 437 of the Code according to the decision in *Karuppiah Ambalam* v. *Andiappan Servai*[1]. It was pointed out that he can either straightaway order the committal of the accused or direct the Magistrate to enquire into the matter afresh and that therefore, an order setting aside the order of discharge and directing that a charge be framed is not warranted by law. In *Eravadu*, In re[2], it was pointed that if a joint Magistrate acquits contrary to section 380, Criminal Procedure Code, the District Magistrate, if he thinks the order is wrong can only ask the Government to appeal and cannot report the case to the High Court under section 438. Nor could the High Court interfere in revision with such an acquittal. That deliberate attribution of immorality falsely to a wife will fall under the definition of legal cruelty and entitle a wife to live separately from such a husband and claim separate maintenance was decided in *Gangalamma* v. *Venkatarami Reddi*[3] and *Subbamma* v. *Venkata Reddi*[4]. In the latter case it was also held that a child entitled to maintenance under section 488, Criminal Procedure Code, must be a minor, that is normally below 18 years, though if he is a ward of Court, the age may perhaps be advanced to 21. In *Venkataraman*, In re[5], it was held that the High Court has no inherent power to award costs in proceedings under section 491, Criminal Procedure Code, which is of a criminal nature. In *Subramania Chetty* v. *Ganesan Pillai*[6], it was pointed out that sub-clause (3) of section 522, Criminal Procedure Code, can be invoked only when the main conviction is taken before the Court of appeal, reference or revision and not otherwise and that it is not open to the complainant to initiate new proceedings as it were by application to the appellate Court under sub-clause (3) of section 522 and ask for a relief which the trial Court could not have given after a month of the disposal of the criminal case.

1. (1950) 1 M.L.J. 340.
2. (1950) 2 M.L.J. 774.
3. (1950) 1 M.L.J. 75.
4. (1950) 1 M.L.J. 158.
5. (1950) 2 M.L.J. 186.
6. (1950) 1 M.L.J. 670.

e pursuit of the acquisition of the knowledge of law. That together with the
arly opportunities that came in his way of handling some of the biggest litigations
our State in all its stages enabled him easily to come up to the top rank at
ne Bar. He presented his cases in Court not only with remarkable clarity but
so whenever necessary with great vigour and force and in most ways has been
eminent advocate. It is refreshing to note that he carried his cheery optimism
nd his sturdy and robust independence with him on his elevation to the Bench.
s a Judge he has maintained a pleasant equanimity and has given universal satis-
ction to the members of the Bar irrespective of their standing or status. Gifted
ith great intelligence and quick perception and fully equipped as he was with a
und knowledge of law in all its aspects, it was quite easy for him to discharge his
ties as a Judge. Though he was a Judge only for a short time, the number of
dgments on difficult and important questions of law which he has rendered is
ally surprising. His judgments are always characterised by exhaustive
scussion of the law wherever necessary and by crisp and pithy statements on
sputed questions of law couched in precise and apt language. It is really a pity
at one so gifted and eminently qualified should have been made to lay down hi
fice at the arbitrary call of the age limit. He is quite fit and capable of rendering
any more years of useful service and it is only to be hoped that his great talent
ould be availed of by the authorities concerned in spheres where independence
d uprightness of character are very much in need. It can be said without fear
contradiction that he will adorn any judicial or quasi-judicial Tribunal with
eat distinction.

It is a matter of great gratification to us that one who was associated with
journal should have left such an outstanding mark as a great lawyer and an

REFERENCE IN COURT.

On the 30th of March, in making a reference in Court to the retirement of Mr. Justice Viswanatha Sastri, the Advocate-General Mr. V. K. Thiruvenkatachariar, said :

" We are met here to-day to bid farewell to you on the occasion of your retirement from the Bench of this Court. You have been one of us for so long that it would be inappropriate for me to review your career at the Bar and your work which is so well known to all of us. But I may mention some salient features which are of special importance.

You were apprentice to Sri B. Sitarama Rao whom we all miss to-day and who was one of the ideal practitioners of law in this Court. Subsequently you were for a very brief period junior to Sri G. S. Ramachandra Iyer and on his untimely death you started practice on your own at a very early stage. You published a book on Income-tax law and an early mastery of that subject has been a great asset to you in your Court work. You have been closely connected with the Madras Law Journal and Digest for a long time. During the last two decades your practice was mainly of first class work and your learned and masterly advocacy has left a mark in the reports of the various cases in which you appeared. I may mention the work you did in the *Tanjore Palace case* and in the *Vadapathimangalam case* in which you subsequently appeared before the Judicial Committee also. Another feature of your work was your constant practice in heavy and difficult cases in the trial Courts in various parts of the Presidency. I appeared in only one case against you which I had the good luck to win but eventually the Privy Council promptly adopted your arguments and reversed the High Court judgment.

In the last few years we have seen large changes in the Court and in the organisation of the Judiciary and the Bar owing to the constitutional developments and trends in legal procedure. There has been practically a complete change in the Bench not merely in this High Court but in the Courts all over India. In recent times much of the work which was previously done in Court has been transferred to administrative Tribunals. Very substantial legal rights are determined by Government Departments and quasi executive Tribunals. The interests involved are large and correspondingly the remuneration of Advocates appearing before these Tribunals is much larger than the normal remuneration they get in doing litigious work in the regular Courts. Since the inauguration of the new Constitution we are having litigation in the Courts based upon fundamental rights and at the same time these are done by summary procedure under Articles 32 and 226 of the Constitution. We are also having a large volume of work to review the decisions of administrative Tribunals, by way of *certiorari*, prohibition etc.

It is difficult for us to conclude whether it would have been advantageous for us that you should have continued as a member of the Bar or have become a Judge. Anyhow when you were invited you took up the office. Your work in the Court has been characterised by all the attributes which we associate with an ideal Judge. Foremost I would mention the pleasant atmosphere which has prevailed in your Court. We are nowadays accustomed to talk of courtesy from the Bench to the Bar or courtesy from the Bar to the Bench but any talk of courtesy itself contemplates possibility of the opposite. So far as your Court was concerned it never occurred to anybody even to think in those terms. Any member of the Bar who was really prepared with his case and argued it to the best of his ability has received a hearing with appreciation. On the other hand where the Advocate was not so fully equipped all the assistance that the parties were entitled to expect from this Bench and the Bar came from you. Perhaps to-day work at the Bar has

probably your inherited culture have been most valuable. Even on such a difficult question as private lands under the Estates Land Act, we find your judgment most convincing, without meaning any disrespect to your learned brothers. But the most valuable part of your work, however, has been a series of judgments which you have delivered as a member of the Bench dealing with income-tax cases. It is here that your long acquaintance with that branch of the law has been of great value. Again the feature which characterised your approach to the problem was perfect justice to the assessee and the basic conception that the Crown (now State) is entitled to its just rights and nothing more or less. We had a stage in which references under the Income-tax Act used to be dealt with by a narrow canalisation into exactly what was the question referred and answering it 'yes' or 'no.' You delivered your classic answer to this by beginning your judgment in one case with the proposition that answering 'yes' or 'no' would be unjust to the assessee.

We talk to-day so much of judicial enquiries and the judicial approach to problems but it is not sufficiently realised that the matters which are actually dealt with by Judicial adjudication in litigious contests is only an infinitesimal fraction of administration. What we really require is an impartial and fair approach to every problem by every one, whether it is a quasi-judicial tribunal adjudicating disputes or an executive officer who has to take a decision between the State and a citizen or between citizen and citizen affecting their rights. I wish every one in such responsible positions would take a lesson from your example.

When I was younger I thought that the entire administration should be left to younger men. Slowly I have changed my views and now I feel that the problems to-day are so complicated and important that the best talent in the country should be fully utilised. Therefore I refrain from wishing you a well-earned rest according to the usual formula and I sincerely hope you will be willing to undertake any work of importance to the State which you may be called upon to do and that your experience will be availed of by the State. So far as we at the Bar are concerned you are still going to be among us though you will not practise at the Bar. We look forward to a long continuance of the pleasant association we have had with you all these years.

Mr. Justice Viswanatha Sastri's Reply.

In replying to the farewell address Mr. Justice Viswanatha Sastri thanked the Advocate-General for the "far too kind" and generous things said about him and said. "I loved the freedoms that I enjoyed as an Advocate some of which have been considered to be so valuable as to deserve a constitutional guarantee. Freedom of speech and freedom of association which I enjoyed as a practising Advocate were seriously curtailed when I became a Judge, though I often chafed under such restraint. Occasionally, I expressed myself with a frankness and bluntness which might be considered unconventional. I felt that candid outspokenness was necessary to create and maintain truly cordial relations with the Bar and promote the speedy despatch of work. The assumption of a pose of stiffness and aloofness was quite distasteful to me and I have never had occasion to regret the free interchange of ideas and arguments between me and the members of the Bar. Though I have been a Puisne Judge and that for a short period of two years and four months, every day I took my seat on the Bench I felt the responsibility of the position I occupied and the great burden put upon me. At the Bar it often fell to my lot to appear for poor clients and I then vividly realised that the judgment

of a Court of final appeal affected the welfare, it might be the fortune and sometimes the character of the litigants who brought their dispute before the Court. I felt that the poorest litigant and the junior-most Advocate should feel that they have had a fair hearing and impartial consideration of the merits of their case and that they should not leave the Court with the sickening feeling that because they were small and inconspicuous, they could not get justice. I realised the great advantage derived from a quiet, patient and deliberate hearing of all that there was to hear. My first impression I have often changed after I had listened to counsel on both sides and I felt relieved to be able to arrive at a just result. I felt strongly that it was my duty not to make a fetish of the law but to do justice in the absolute sense, so far as the limitations of the law allowed me. I may have gone wrong in law and it is possible that in the office I held mistakes could have occurred; but I have the satisfaction that knowing the better, I never allowed myself to do the worse.

If I were asked where the most important part of the judicial work in this country is done, I would say it is in the High Courts. Having moved closely with people of different types and stations in life in several districts, I can state that this Court is looked upon as a wise, unerring and impartial arbitrator by the whole population of the State. On the wisdom, independence, integrity and impartiality of the Judges and the ability, industry and the honourable traditions of the Bar depend the success of judicial administration and the protection of the rights, privileges and liberties of our countrymen. The reputation of this Court and of Madras Bar has always stood high in our country. Long may it continue to be so. I am glad I have lived to see the day when this Court is manned by our own countrymen under the presidency of our illustrious Chief Justice, whom the Bench and the Bar alike hold in affectionate respect.

I am happy to find that legal work is more evenly distributed today than it was in the days of my struggle to gain a foothold in the profession. The range of modern law is so wide and the opportunities both at the Bar and in service of the State so many that no advocate with average ability and industry and with good character need be in want for any appreciable period after he started practice. Patient and hard work combined with integrity would secure for most of them a comfortable living and an honourable place in the profession. The lawyers should always remember that the usefulness of the legal profession and its title to the respect and the privileges it enjoyed depended on the maintenance in their ranks of a high standard of general knowledge and legal equipment and a strict sense of honour.

I am happy to acknowledge the regard and respect with which I have been treated by the Bar. If my career as a Judge has not been a failure, it was due in a great measure to the splendid assistance I have received from Advocates who appeared before me. I am truly grateful to my colleagues on the Bench who had all treated me with true fraternal regard. It was my peculiar good fortune to be associated with and guided by two eminent judges of this Court, the Chief Justice and Mr. Justice Satyanarayana Rao: While learning the art of judging from them I came into intimate contact with them and today, I have the honour of enjoying their friendship. My Lord, the Chief Justice, has treated me with more kindness and consideration than I would have expected from a life-long friend.

The most difficult part of my career as a lawyer and Judge is reserved to

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CLASS GIFTS AND THE PERPETUITIES RULE.

BY

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It was Blackstone that remarked : " The doctrine of estates in expectancy tains some of the nicest and most abstruse learning of the English law ". The relating to perpetuities is an important, albeit difficult, branch of the law ıting to future estates. Some aspects of it are incorporated in the Transfer of perty Act and the Succession Act with modifications. It is proposed to discuss his article certain phases of it as applied in India, and in particular, in relation class gifts. The last deserves special attention in view of a somewhat novel ırpretation placed on the first illustration to section 115 of the Succession , by the Judicial Committee in *Aniruddha Mitra* v. *The Administrator-General of gal*[1].

The rule against perpetuities seeks to prevent limitation of future interests ly to arise at too remote a period of time. The rule is set out in section 114 he Succession Act and section 14 of the Transfer of Property Act. Section 114 es : " No bequest is valid whereby the vesting of the thing bequeathed may be ıyed beyond the lifetime of one or more persons living at the testator's death the minority of some person who shall be in existence at the expiration of that iod, and to whom, if he attains full age, the think bequeathed is to belong ". tion 14 of the Transfer of Property Act is couched in similar terms. The period ınority in India is ordinarily and in the abstract 18 years. It would, however, ce considerable difference in regard to the effect of a disposition if the minority ıddition to the life or lives in existence is reckoned as 18 years in gross or as the iod of actual minority only of the beneficiary. English law allows a period 1 years in gross in addition to a life or lives in existence. A similar view as to Indian law may possibly be read in an observation of Gentle, J., in *Aniruddha ra* v. *Aravinda Mitra*[2]. The learned Judge said : " Section 114 enacts the against perpetuities prevailing in British India. By the ordinary law, a Hindu ins majority at the age of 18 years. Therefore, under the section, the limit ime during which a bequest in a will must vest is the period covered by (*a*) ime of a person or persons living at the date of the testator's death and (*b*) longer than 18 years after the termination of the lifetime ". Accurately stated, additional period is only the actual minority of the beneficiary who if he ined full age is to take.

To appreciate the nice shades of difference between the English and Indian rules in the matter, it would be helpful to notice the manner in which the ciple is formulated in the standard text-books. In Halsbury's Laws of England, stated : " An executory devise or other future limitation to be valid must vest, all, within a life or lives in being and twentyone years and a possible period estation thereafter ; it is not sufficient that it may vest within that period : ıust be good in its creation and unless it is created in such terms that it cannot after the expiration of a life or lives in being and twenty-one years and the

1. (1949) 2 M.L.J. 35 : L.R. 76 I.A. 104 (P.C.). 2. A.I.R. 1946 Cal. 396 : 50 C.W.N. 694.

period allowed for gestation it is not valid, and subsequent events cannot make it valid". Adverting to the period, it is stated: "This period is the life of a person or the survivor of any number of persons in being at the time of creation of such future estate or interest and ascertained for the purpose by the instrument creating the same and twenty-one years to be completed from the dropping of such life; if no such person or persons are ascertained by the instrument, the period is twenty-one years computed from the time of creation of the future estate or interest". Gray states the principle thus: "No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the time of creation of the interest". According to Jarman[1]: "No contingent or executory interest in property can be validly created, unless it must necessarily vest within the maximum period of one or more lives in being and 21 years afterwards". Theobald[2] observes: "A limitation by way of executory devise is void as too remote, if it is not to take effect until after the determination of one or more lives in being and upon the expiration of 21 years afterwards, as a term in gross and without reference to the infancy of any person who is to take under such limitation or of any other person, allowance for gestation being made only in those cases where it actually exists". In English law, the period of 21 years is thus treated as an independent period. The statutes in India however prescribe that the period to be allowed in addition to life or lives in being is the period of minority of some person who shall be in existence at the expiration of that period and to whom if he attains full age the thing bequeathed is to belong.

The rule against perpetuities in England was moulded by a series of decisions from the beginning of the 17th century and became crystallised by about the middle of the 19th century. Holdsworth[3] states that the rule was developed to define the limits within which executory interests in freehold could be created. According to him, the *Duke of Norfolk's case*[4] had settled that the interest was valid "if limited to vest after a life or lives in being", and that the first extension of the term was made "to cover the case where the person to whom it was limited was a posthumous child or a minor"[5] He points out that in *Taylor* v. *Biddall*[6] an executory devise to the heirs of a living person when they attained 21 was held valid and that in 1736, in *Stephens* v. *Stephens*[7], after an examination of the record in *Taylor* v. *Biddall*[6], Lord Hardwicke and the other Judges held that an executory devise limited to grand-children living at the testator's death when they attained 21 was valid. Holdsworth remarks that the "second extension covered an analogous, but a by no means identical case. Suppose a devise is to *A* for life, then to his eldest unborn son in fee, but if such son dies under 21 to *X*. Here vesting is suspended during a minority; but it differs from the first set of cases in that the minority is not that of the executory devisee. In 1685, in the case of *Massingherd* v. *Ash*[8], it was held that the devise to *X* was valid and in the case of *Staines* v. *Maddox*[9], in 1728, a similar limitation was held to be valid by the House of Lords". The second extension probably had something to do with the third extension, which allowed a gross period of 21 years irrespective of any minorities, after lives in being. The first step in this direction was taken in *Lloyd* v. *Carew*[10]. In that case there was a conveyance to *A* and his wife for lives, remainder to their children in tail, remainder to *A* in fee, provided that, if at the death of the survivor of *A* and his wife no issue of theirs was alive and if the heirs of the wife within 12 months of such death, without issue paid £4,000 to the heirs of *A*, the estate should go to the heirs of the wife in fee. The executory devise was upheld by the House of Lords. From this decision the conclusion was deduced that if an executory interest was so limited that it vested within a reasonable time after lives in being it will be valid. According to Holdsworth: "During the latter half of the 18th century, the opinion began to be expressed that this reasonable time should, by analogy to the utmost length

1. Jarman on Wills, 6th edn., p. 296.
2. Theobald on Wills, 10th edn., p. 409.
3. History of English Laws, Vol. 7, p. 225.
4. 3 Ch. Cas. 1.
5. History of English Laws, Vol. 7, p. 226.
6. (1678) 2 Mod. 289.
7. Cases temp. Talbot 228, 231-232.
8. (1685) 2 Ch. Rep. 275.
9. 3 Bro. C.C. 108.
10. (1697) Prec. Ch. 72.

which a minority can extend, be a period of 21 years, with addition when neces-
ry, of the period of gestation. Possibly the growth of this idea was encouraged
the fact that it had, ... been decided that the period of minority
owed need not be the minority of the person to whom the executory interest
as given". The case of *Cadell* v. *Palmer*[1] finally laid down that a gross term of
years might be taken without reference to any period of minority. Holdsworth
so points out[2] that in laying down these rules the Courts were influenced by the
nalogy of the rules applicable to contingent remainders. "A contingent remain-
er could be well limited to an unborn person after any number of vested remainders
lives in being and would take effect, if it was ready to vest when the last of the
ves dropped. It was possibly the same analogy that induced the Court to decide,
the case of *Taylor* v. *Biddall*[3] in 1678 that an executory devise to the heirs of a
ving person when they attained 21 was valid; for it is clear that if a contingent
mainder is limited to the heirs of a living person, an infant taker, he cannot
ken till he is 21; so that by such an executory devise the land is not tied up longer
an it might be tied up if limited by way of contingent remainder". The rule
hich allows a term of 21 years in gross, in English law, is thus due to historical
asons. The wording of the Indian statutes leave us in no doubt that the period
lowed here is only the period of the minority of the beneficiary. If 18 years in
oss had been intended the Legislature could have formulated the rule after the
shion of the English authors. Also the Legislature could have stopped with the

children and was surmounted in the civil law by the invention of the fiction that in all matters affecting its interests the unborn child *in utero* should be deemed already born. The classical statement is to be found in the words of Paulus[1] . . . . . thus rendered in Munro's translation : 'An unborn child is taken care of just as much as if it were in existence, in any case in which the child's advantage comes in question ; though no one else can derive any benefit through the child before its birth'. 'There is indeed' says Craig commenting on this passage " no reason in the case of a posthumous child to aggravate the calamity it suffers by the premature death of the father, nor to make that event a ground for diminishing its rights[2] ". In that case the House of Lords had to construe a provision in a will which said : " In the event of such child of mine leaving any issue him or her surviving, In Trust for *such child of mine* absolutely, but in the event of such child of mine not leaving any issue him or her surviving then such share and the income thereof shall go and accrue by way of addition to the share or shares in the appointed funds of any other child or children who shall survive me and being male shall attain the age of 21 years and being female shall attain that age or marry under it ". One of the sons of the testatrix died and a posthumous son was born to him. The House of Lords held that the son in question of the testatrix could not be considered as having left an issue him surviving, because the fiction could not be applied where it was not for the benefit of the child *en ventre sa mere*. The fiction was considered in relation to the rule against perpetuities by the Court of Appeal in *In re Wilmot's Trusts*[3] and it was held that a child *en ventre sa mere* at the time of the death of the testator would be treated as a life in existence. Romer, L.J. observed *apropos* of the matter : " For the purpose of deciding the questions of perpetuity arising upon gifts in a will of the kind we find in the present case, there is, in my opinion, an established rule that a child *en ventre sa mere* at the time of the testator's death, who is subsequently born, must be treated as having been alive at the death of the testator. And I do not think that rule should be departed from merely because for some reason, it is in the interests of the child to contend that the gift is void as infringing the rule against perpetuity ". This decision was not however considered by the House of Lords in *Elliot* v. *Joicey*[4] in asmuch as in the latter case the noble Lords were concerned only with the construction of the particular clause in the will before them " leaving any issue him or her surviving " and not with the question whether the fiction should be applied where a question relating to perpetuities happened to be in issue. The decision in *Elliot* v. *Joicey*[4] cannot therefore with justification be read as introducing a different principle into the law relating to perpetuities.

In *Thelluson* v. *Woodford*[5] while dealing with the rule against perpetuities Lord Eldon observed : " But if it is necessary I have no difficulty in stating as a lawyer that the rule has been properly laid down that the time of gestation may be taken both at the beginning and the end ". The reason behind this extension was that no inconvenience to society would arise if the property were to be tied up for a slightly longer period than the longest life in existence and 21 years *i.e.* by the period of gestation. In *Wallis* v. *Hodgson*[6] Lord Hardwicke in holding that a posthumous child was entitled under the Statute of Distributions gave the reason for his decision as follows : " The principal reason that I go upon is that the plaintiff was *en ventre sa mere* at the time of her brother's death and consequently a person *in rerum natura* ; so by the rules of common and civil law she was to all intents and purposes born in the father's lifetime". In *Thelluson* v. *Woodford*[5] Sir A. Macdonald, C.B. had stated : " But natural justice in several cases having considered children *en ventre sa mere* as living at the death of the father it should seem that no distinction can properly be made ; but that in singular event of both periods being required they should be allowed as there can be no tendency to perpetuity ". Jarman

1. Dig. Bk. 1, Tit. v. *De Statu Hominum* Sec. 7.
2. *Jus Feudal Lib* II., Dieg 13., Sec. 15. Lord Clyde's Translation II p. 643.
3. L.R. (1903) 2 Ch. 411.
4. L.R. (1935) A.C. 209.
5. 11 Ves. 112.
6. 2 Atk. 117.

tes the position thus : " A possible addition of the period of gestation to a life d 21 years occurs in the ordinary case of a devise or bequest to *A* (a person of ıle sex) for life and after his death to such of his children as attain the age of 21 ars or indeed in the case of a devise or bequest simply to the children of *A* male) who shall attain majority though not preceded by a life interest ; in either se *A* may die leaving a wife *en ceinte* and as such child would not acquire a vested erest until majority the vesting would be postponed until the period of 21 years yond a life in being with the addition it might be of nine or ten months ; d if to either of these suppositions we add the circumstance that *A* the parent s (as of course he might be) an infant *en ventre sa mere* at the testator's decease ere would be gained a double period of gestation (namely) one at the commence- nt and another at an intermediate part of the period of postponement ". Under : Indian Law also the period may be extended by two periods of gestation. there be a bequest by a testator to any son that may be born to him for life and the first child of such son on attaining majority absolutely and it so happens ıt at the time of the death of the testator his wife is pregnant and subsequently es birth to a son the son should be entitled to the bequest for he must be deemed be in existence at the death of the testator. Even if the fiction is to be applied)ject to the limitation in *Elliot* v. *Joicey*[1] the result would not be different, for it uld be to the advantage of the child *en ventre sa mere* for the fiction to apply and n-application of the fiction will entail the failure of the bequest under section 113. it so happens that such son of the testator dies leaving his wife *en ceinte* and a son)orn subsequently, such son would be entitled to take, for, on his birth, he should deemed to have come legally into existence within the lifetime of his father,)erson legally in existence at the death of the testator. The grandson of the tator will thus acquire a vested interest within the period of a life in existence l his minority, the period allowed by the law. A different opinion has sometimes n expressed that only one period of gestation may be added under the Indian t[2]. It may, with respect, be stated that the position is not warranted by authority consistent with principle.

The application of the perpetuity rule to class gifts may now be examined. tion 115 of the Succession Act and section 15 of the Transfer of Property Act ıl with the matter. Section 115 states : " If a bequest is made to a class of sons with regard to some of whom it is inoperative by reason of the provisions ection 113 or section 114, such bequest shall be void in regard to those persons y and not in regard to the whole class ". It may, in passing, be mentioned t this is the present form of section 115. The provisions in the Transfer of perty Act are similar. Two illustrations are attached to section 115. The t of them states : A fund is bequeathed to *A* for life and after his death to all his ldren who shall attain the age of 25. *A* survives the testator and has some ldren living at the testator's death. Each child of *A* living at the testator's th must attain the age of 25 (if at all) within the limits allowed for a bequest. *A* may have children after the testator's decease some of whom may not attain age of 25 until more than 18 years have elapsed after the decease of *A*. The uest to *A's* children, therefore, is inoperative as to any child born after the ator's death and *in regard to those who do not attain the age of* 25 *within* 18 *years after death, but is operative in regard to the other children of A*. Prior to the amendment 1929 the bequest failed in regard to the entire class. The amendment rejected at is known as the rule in *Leake* v. *Robinson*[3] and preserved the bequest in regard certain persons of the class. As to the persons now entitled to take under the uest mentioned in the illustration three views have been suggested : (i) Only se sons of *A* in the illustration living at the testator's death who attain 25 within years of *A's* death can take. A literal reading of the illustration affords support his view. (ii) The bequest is inoperative in regard to the children of *A* born r the testator's death who do not attain the age of 25 within 18 years after *A's*

1. L.R. (1935) A.C. 209.
2. Vide Law of Property by Mr. G.C.V. Subbarao, 2nd edn., p. 344.
3. 2 Mer. 363.

death, but is operative in regard to such children of *A* who do attain the age of 25 within 18 years of *A's* death though born after the testator's death. This view receives support from the observations of the Judicial Committee in *Aniruddha Mitra* v. *The Administrator-General of Bengal*[1] approving the interpretation placed on the illustration by the appellate Bench of the Calcutta High Court in *Aniruddha Mitra* v. *Aravinda Mitra*[2]. (iii) All the children of *A* living at the death of the testator will take if they attain 25 whether within 18 years of the death of *A* or afterwards and among those that are born subsequent to the death of the testator those who attain 25 within 18 years after *A's* death will take. These views may now be examined.

It will be helpful to remember that section 114 deals with cases where the bequest is in favour of individuals whereas section 115 deals with bequests made in favour of a class of persons. The perpetuities rule is intended to prevent the limiting of an interest where the vesting may be suspended for too long a period. For an interest to vest, three requirements should be satisfied : (i) the identity of the beneficiary must be established, (ii) his right to the interest as distinguished from his right to possession must not depend upon the occurrence of some future uncertain event, and (iii) the size of his interest must be ascertained[3]. A long line of cases has established the last requirement as one of the essentials of vesting for the purposes of the perpetuity rule, *Pearks* v. *Moseley*[4]. Thus a gift before 1926 to trustees for such of the children of *X* as attained 25 (*X* being alive at the date of the gift and having no child aged 25 or more) was totally void even as regards those of *X's* children who were alive at the time of the gift and so incapable of reaching 25 except during lives in being *i.e.*, their own lives. The reason was that until it was known exactly how many children would ultimately reach the given age the size of the share to be taken by each beneficiary was uncertain and if *X* had other children after the date of the gift they might attain 25 more than 21 years after the death of all persons alive at the date of the gift. And if a single member of the class might possibly take outside the period the whole gift fails even as regards those members of the class who have already satisfied the required contingency. The meaning of " gift to a class " is explained by Mukherjea, J. in *Jiban Krishna Das* v. *Jitendra Nath Das*[5] as follows : " A ' gift to a class ' as distinguished from a gift to individuals has a well recognised meaning in law. The expression undoubtedly has its origin in English Courts, but it has been adopted in the Indian Succession Act, and the provisions relating to it are applicable to Hindus also. As was said by Lord Cottenham, ' a gift to a class implies an intention to benefit those who constitute the class and to exclude all others ; but a gift to individuals described by their several names and description, though they may together constitute a class implies an intention to benefit the individuals named ' (Vide *Barber* v. *Barber*[6]). Important legal consequences flow from this distinction. Thus the addition or diminution of members does not affect a class, the share of each being dependent upon the ultimate number of persons. Again in case of death of a member of the class, the legacy does not lapse but passes by survivorship to the other members ". In the case of class gifts, the share of each member is not ascertained at the time of the creation of the gift or the death of the testator as in the case of a gift or bequest to *designatio personarum* but depends upon the number of members that may ultimately answer the description. So until the class *is closed*, the share of each member remains unascertained. Jarman[7] states the principle thus : " A number of persons are popularly said to form a class when they can be designated by some general name as ' children ', ' grandchildren ', ' nephews ' but in legal language the question whether the gift is one to a class depends not upon these considerations, but upon the mode of gift itself, namely, that it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the

1. (1949) 2 M.L.J. 35, 43 (P.C.).
2. A.I.R. 1946 Cal. 396 : 50 C.W.N. 634.
3. Cheshire, Modern Law of Real Property, 5th edn., p. 432.
4. (1880) 5 A.C. 714.
5. (1949) 1 M.L.J. 628, 634 (F.C.).
6. (1838) 3 My & Cr. 688.
7. Jarman on Wills, 6th edn., p. 336.

the age of 25 (if at all) within the limits allowed for a bequest. But *A* may have children after the testator's decease some of whom may not attain the age of 25 until more than 18 years have elapsed after the decease of *A*. The bequest to *A's* children, therefore, is inoperative as to any child born after the testator's death ; and as it is given to all his children as a class it is not good as to any division of that class but is wholly void. Illustration (ii) stated : *A* fund is bequesthed to *A* for his life and after his death to *B*, *C*, *D* and all other children of *A* who shall attain the age of 25. *B*, *C*, *D* are children of *A* living at the testator's decease. In all other respects the case is the same as that supposed in illustration (i). The mention of B, C, and D by name does not prevent the bequest from being regarded as a bequest to a class, and the bequest is wholly void. According to section 114 a bequest created in favour of an individual may fail if the vesting of the bequest may be delayed beyond the lifetime of one or more persons living at the testator's death and the minority of the person to whom the bequest has been given to take effect on his attaining majority. For this purpose it is well settled that possibilities alone are to be taken into account, *Ward* v. *Van Der Loeff*[4]. The principle applies in India also, *Sundararajan* v. *Natarajan*[5]. In regard to every child of *A* in illustration (i) cited *supra* born after the death of the testator there is the possibility that he

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1. (1791) 3 Bro. C.C. 401.
2. L.R. (1920) 1 Ch. 99.
3. 2 Mer 363.
4. L.R. (1924) A.C. 653.
5. (1925) L.R. 52 I.A. 310 : I.L.R. 48 Mad. 906 (P.C.).

may not attain 25 within the period allowed by the law and in regard to every one of them taken individually the bequest fails by virtue of section 114. Hence illustration (i) to section 115 of the Succession Act of 1925 says "The bequest to *A's* children therefore is inoperative as to any child born after the testator's death". This statement formed part of illustration (i) to section 102 of the Act of 1865 and even after the amendment of section 115 remains untouched. The amended section 115 purports to save the bequest only in regard to those members of the class in regard to whom the bequest does not fail by reason of section 114. In regard to every child of *A in esse* at the death of the testator taken individually the bequest does not fail by reason of section 114, because each of such child if taken individually, will be a life in existence and he must attain 25 if at all in his lifetime. It has, however, to be borne in mind that the children of *A* alive at the testator's death have to take as members of a class and not as *designatio personarum*. It means that the vesting is postponed till all the members of the class who can take fall to be ascertained. Theobald states[1]: "Where there is a gift to a class, any member of which may have to be ascertained beyond the limits of perpetuity—for instance to the children of a living person who shall attain 25—the whole gift is void". But "if by the application of the rules for ascertaining the class, the class must be finally ascertained within the limits of perpetuity the gift is good". As to who are "life or lives in being" regarding the application of the perpetuity rule, according to Dr. Cheshire[2]: "The lives must be designated either expressly or by implication. An instrument often states, as it did in *Cadell* v. *Palmer*, that during the lives of certain named persons the beneficiaries are to have certain limited interests in the land. Again persons who acquire vested interests constitute lives in being for purposes of the rule, so that if there is a gift to *A*, a bachelor for life, remainder to any wife he may marry for life, remainder in fee simple to his first born grandson, *A* constitutes a life in being as much as if he has been expressly named as such. Lives may also be specified by implication. This will be true of *B*, for instance, in a gift to *A* for life, remainder to the children of *B* alive at *B's* death". The rule has been developed as already stated in regard to the defining of limits within which executory limitations might be created and the lives in existence to be taken should naturally be lives expressly mentioned by the settlor in the deed or will or deducible by necessary implication. In regard to a class gift as the one found in illustration (i) to section 115, the life in existence to be taken is only the life of *A* and not that of any members of the class that are to receive the gift. None of the sons of *A* surviving the testator can be taken as a life in existence because it is only *A* that has a vested interest for life; none of the members of the class has any vested interest nor has been mentioned by the testator as a life in existence. Even in illustration (ii) to section 115, the specific mention of *B*, *C*, and *D* by names would not alter the situation, for they are merged up in the class as has been specifically pointed out in that illustration itself. In *Bentinck* v. *Duke of Portland*[3], Lady Mary Bentinck left a legacy of 240 shares in a railway company to trustees upon trust to such of the four children of Lord Charles Bentinck and Lady Charles Bentinck as the Duke of Portland might appoint and as regards that portion as to which the Duke might not make any appointment, in trust for all and every of the said four children of Lady Charles Bentinck who shall be living at the expiration of 12 calendar months next after the decease of Lady Charles Bentinck or the testatrix herself, whoever might survive, to take as tenants-in-common and the issue then living and who shall attain the age of 21 years or marry of any of the said four children who shall have died before the expiration of such twelve calendar months, such issue through all degrees to take *per stirpes*. The testatrix bequeathed 4/7th of her estate, the residue, also on similar trusts. She died in 1843. Lady Charles Bentinck and her four children survived her. The Duke of Portland made no appointment. The question arose whether the bequest of 240 shares and the 4/7th was not void due to the

1. Theobald on Wills, 10th edn., p. 418.
2. Modern Law of Real Property, 5th edn., p. 475.
3. (1877) 7 Ch. D. 693.

rule against perpetuities. The class which was to take was assumed by Fry, J., to consist of " such of the four children of Lady Charles Bentinck as should happen to be alive at the expiration of 12 calendar months from her death (or from the death of the testatrix) and such of the issue then living who should attain the age of 21 or marry of the said four children who were then dead." The learned Judge observed : " The inquiry then remains if it can be called an inquiry, whether some of that class are not to be ascertained at a period beyond that which is prescribed by the rule against perpetuities. It is clear that they are, because a grandchild of Lady Charles Bentinck, being a member of the class may attain the age of 21 at a period beyond the lifetime (of the testatrix or) of Lady Charles Bentinck or 21 years afterwards." The bequest was held to be void. It is to be noted that the life of Lady Charles only was taken as the life in existence and not of any of the four children alive at the death of the testatrix. If the children of Lady Charles had been taken as lives in existence for the purpose of ascertaining the period all the shares would have become ascertained within 21 years after their lives and the bequest would have been valid. But as Lady Charles only was taken as the life in being, there arose the possibility that a child of hers might die just at the end of the 12 calendar months and his issue might attain 21 twenty-two years after the death of Lady Charles. This case therefore clearly points out that the members of the class, should not be taken as lives in existence where that class as a unit should take. This decision was referred to with approval by Lord Penzance in *Pearks* v. *Moseley*[1]. The same principle seems to have been adopted by the framers of the Succession Act in giving the illustration to section 115, as is apparent from the recital that the bequest to *A's* sons born after the death of the testator is inoperative because they might not attain 25 years within 18 years after the decease of *A*. There has been no mention of *A's* sons who are alive at the time of the testator's death as lives in existence. That was the position in the illustration before the 1929 amendment and the same position has been continued after the amendment. If the life to be considered is the life of *A* only, the perpetuity period in the case will be *A's* life and the period of minority of the beneficiary. If the bequest had been to *A* for life and his sons at 18, it would have been valid for the vesting of the bequest must necessarily be over within *A's* life and minority of the last of the sons of *A*. The utmost limit of the period would be *A's* life and 18 years. The bequest in the illustration is however bad because the vesting of the same may possibly be after the permissible period. The amendment to section 115 by Act XXI of 1929 attempts only to preserve the class bequest from totally perishing. The bequest has not been made operative as regards those not born by the date of the testator's death, for with regard to every one of them the bequest would be void by virtue of section 114 and if the testator could not give individually to one not born at the time of his death on his attaining 25 he would be equally incapable of giving it to him by including him in a class. The illustrations to the section indicate the combined effect of the provision in sction 115 and the rules relating to class gifts. Those that attain the qualification within *A's* lifetime and 18 years thereafter take under the bequest in vested interest and the rest do not take anything.

It may be contended that under illustration (ii) to section114 where the bequest is to *A* for life, then to *B* for life, and after the death of *B* to such of *B's* sons as first attains 25 and *B* dies leaving one or more sons in the lifetime of the testator, the bequest to any of *B's* sons that may first attain 25 is stated to be valid because they were considered to be lives in existence and therefore the same consideration should apply in regard to the children of *A* alive at the testator's death in the illustration (ii) to section 115. But it should be remembered that illustration (ii) to section 114 deals with a bequest to an individual. The quantum of the interest to be taken by the beneficiary is ascertained. The beneficiary would be the eldest son of *B* if he satisfied the condition of attaining 25 which must happen in his lifetime; if he died, the second son satisfying the condition would take and so on and the vesting must take place necessarily within the life of the last of the sons. All the

1. (1880) 5 A.C. 714.

sons are ascertained persons. If none attained 25 the bequest will pass by intestacy. But in illustration (ii) to section 115, the bequest was not given to *B*, *C* and *D* as individuals so as to vest in favour of each on attaining 25 years or failing which his 1/3rd share should pass by intestacy, but was given to them as members of a class and the shares are not ascertained till all the beneficiaries are ascertained. The eldest may attain 25 but will not get a vested interest. The case in illustration (ii) to section 115 thus entails a different treatment and approach.

Again it may be suggested that *B*, *C* and *D* in illustration (ii) to section 115 may be regarded as lives in existence after dropping those born subsequent to the death of the testator and the perpetuity period may be reckoned on that footing, in which event, the bequest must be valid because it must necessarily vest within the lifetime of *B*, *C* and *D*. Here also it is to be remembered that *B*, *C* and *D* are not independent individuals who are the objects of the bequest but members of a class. The perpetuity period in regard to those born after the testator's death would be *A's* lifetime and 18 years thereafter. The period cannot be one in reference to one division of the class and a different one in regard to another. It follows that the same period must be taken with reference to all the members of the class, which is *A's* life and 18 years thereafter.

The other side of the shield may be looked at. In *Aniruddha Mitra* v. *The Administrator-General of Bengal*[1], the Judicial Committee referred to the question and expressed a different view. The facts of the case may be stated. A Hindu made a will. By clause 5 he gave a right of residence in the family dwelling house and the right to use the furniture to his wife, son Aniruddha Mitra, and his wife, for the duration of their respective lives. By clause 7 he directed his executor or trustee to pay each of the above three Rs. 700 per month for maintenance, the survivors or survivor having the benefit of the amounts payable to those that might die, by way of addition. By clause 8 he left an annuity of Rs. 4,000 per month to be paid from income to the Calcutta University. By clause 9 he left the residue to the " legitimate son or sons of my son Aniruddha Mitra whether natural born or validly adopted " ; the fund " shall be made over" to him or them, when he or the youngest of them attains 21 years and until that period provision for their maintenance made. By clause 10 he gave direction to accumulate the income until the residue was so made over. He directed by clause 11 that if no son was born to or adopted by Aniruddha Mitra during the lifetime of the testator, till such time as a son might be born to or adopted by his son or his wife (not named) the income from the property was to be paid to the Calcutta University. Finally he directed by clause 12 that if no son was born to or adopted by his wife then the whole of his property was to be given to the Calcutta University. Disputes arose as to the validity of the bequest limited in favour of the " legitimate son or sons of my son Aniruddha Mitra whether natural born or validly adopted." The testator died in 1933 and at that time Aniruddha Mitra had no son but in 1934 he took in adoption a boy Arabinda Mitra. The trial Judge, Das, J., held, firstly, that the expression " validly adopted " was wide enough to include a son adopted by a wife of Aniruddha whom he might marry after the testator's death, and such a son might acquire a vested interest beyond the perpetuities period but such son must be deemed to be in existence legally by virtue of the Hindu law doctrine that the adopted son is to be regarded as begotten by the adoptive father and hence was unaffected by section 114 of the Succession Act. Secondly, he held that the interests of the sons of Aniruddha were not affected by section 113 inasmuch as they acquired vested interests on their birth in the legacy (though possession had been postponed) and comprised the entire remaining interest of the testator. Thirdly, (dealing with an argument that the bequest is preserved at least in regard to natural born sons and son to be adopted by Aniruddha Mitra by the operation of sections 87 and 115) he held that in view of the illustrations to section 115, " the members of the class, the bequest in whose favour is saved by section 115 must be persons in existence at the date of the testator's

1. (1949) 2 M.L.J. 35 : L.R. 76 I.A. 104 (P.C.).

erests on their birth or adoption. Sons belonging to categories 1 to 5 acquire ted interests within the lifetime of Aniruddha (the posthumous son being treated cording to Ormond, J., for the purpose of the rule against perpetuities as one rn in the lifetime of Aniruddha) and the share of each would be defined within iruddha's lifetime if the bequest was confined only to them. As regards catego- s 6 and 7, Ormond, J., thinks the bequest fails by virtue of section 114—category ossibly because the testator referred to ' wife ' of Aniruddha in general in clause 11, l not to Nivanani in particular, and as such she should not be taken as a life determining the period ; category 7 does not need any explanation—unless s preserved by the doctrine of Hindu law. So the bequest is void only in regard categories 6 and 7 and not in regard to categories 1 to 5. In the case of the latter bequest is valid, for whether they are born before or after the testa- 's death, they would all come into existence within Aniruddha's life and acquire ted interests with their shares being ascertained if the gift is confined to them y. Both the Judges in the result did not approve Das J.'s view. Some other ervations of Gentle, J., in the case may be noticed. After citing the text of stration (*i*) to section 115, the learned Judge stated : " The words within the ckets (*i.e.*, ' and in regard to those who do not attain the age of 25 within 18 rs after *A*'s death, but is operative in regard to the other children of *A*') were stituted, by the Act 21 of 1929 for the words ' as it is given to all his children a class, it is not good as to any division of that class but is wholly void '. This

1. (1944) 2 M.L.J. 20 : L.R. 71 I.A. 93 (P.C.).

amendment was made at the same time as the section was amended and in order to make the illustration conform with the section. I am unable to construe the meaning of the illustration in the same way as Das, J. I do not take the view that the bequest is inoperative with respect to all of *A's* children born after the testator's death. I think the meaning of the last sentence is *to make the bequest inoperative only as to children, born after the testator's death, who do not attain the age of* 25 *within* 18 *years after the death of A but the bequest is operatie with respect to such children who do attain such age within those* 18 *years*" (italics ours). The conclusion is open to criticism. The illustration contemplates 3 distinct groups of children of *A*: (*i*) children born after the death of the testator, (*ii*) children born before but who do not attain 25 within 18 years of the death of *A*, (*iii*) the rest, that is, those that are alive at the testator's death and attain 25 within 18 years after *A's* death. It would seem that according to Gentle, J., only 2 groups of sons of *A* are contemplated : (*i*) those that are born after the death of the testator and do not attain 25 years within 18 years of the death of *A* and (*ii*) the rest. In his view, the bequest fails in regard to the former only but is operative in regard to the second. If such was the intention of the Legislature the words " and in regard to those ", etc., would be otiose. Also such a construction would go against the rules of grammar regarding the number. The words " The bequest to *A's* children, therefore, is inoperative as to any child born after the testator's death and in regard to those who do not attain the age of 25 within 18 years after *A's* death " can never form the description of a single class of persons. Gentle, J., made certain other remarks which also may be noticed. He said : " In my opinion the illustration manifests the generality and effect of the provisions in section 115 and the section applies to all members of a class in whose favour a bequest is made. Before leaving section 115 and illustration (*i*) to it, one further matter arises. The bequest in the illustration, to *A's* children is contingent upon their attaining the age of 25 and it is inoperative in respect of any child or children who do not attain that age within 18 years after *A's* death. Those children who attain 25 within 18 years after *A's* death can take the bequest in spite of other children dying before completing that age within the period and therefore failing to take anything. At the testator's death, *A* then being alive when the rules in sections 113 and 114 have to be applied, there is a possibility that no child of *A* will attain the age of 25 within 18 years after *A's* death. If the rules in sections 113 and 114 have to be applied inflexibly at the testator's death, then, with that possibility present, the bequest would fail in its entirety if Dr. Gupta's contention were correct. But the illustration provides, the gift does not fail with respect to those members of the class who attain 25 within 18 years after *A's* death. Therefore there must be a period of waiting after the testator's death before ascertaining which of *A's* children can take the bequest by attaining 25 within 18 years. The position is the same in regard to all of *A's* children, whether born before or after the testator's death, *e.g.*, at the testator's death (*a*) *A* has a child who is one year old and who will be able to take provided he reaches the age of 25, if *A* survives the testator by at least 6 years, *i.e.*, when the child is 7 years old and who will be 25 in 18 years thereafter. (*b*) *A* has a child born one year after the testator's death who will be able to take provided he reaches the age of 25 if *A* survives the testator by 8 years, *i.e.*, when the child is 7 years old and who will be 25 in 18 years thereafter. In light of illustration (i) it is clear that finality as to the validity of a bequest has not to be ascertained at the testator's death but there can be a period of waiting thereafter for the happening of some actual events to ascertain which child or children take the bequest. At the testator's death, however, it can be ascertained so far as section 114 is concerned that a bequest will be valid in regard to those members whose interest in it will vest within the statutory period but invalid as to the remaining members." One may pause to observe that where a bequest is made to an unascertained individual or class of unascertained individuals, such as the first son of *A* to attain 18 or sons of *A* that attain 18, which is confined within the limit set by the perpetuity rule the bequest will be considered to be valid, but there may be a period of waiting before which the beneficiaries might be ascertained and their shares determined and they might thus attain vested interests. If the bequest is made to an individual which is

ima facie affected by section 114 subsequent events will not validate it. The lidity or otherwise of the bequest must be judged with reference to circumstances isting at the death of the testator. Gentle, J., affirms that the rule in section 114 ust be applied as at the testator's death, but that when it comes to a class gift at principle is to be abandoned and actual events after the testator's death served to find out which of *A's* sons attains 25 years within 18 years after *A's* ath.[1] A careful reading of section 115 would show the incorrectness of such position. The section renders void the bequest to those of the members of the ass in regard to whom it would be inoperative by reason of section 114. nd whether a bequest is valid or not under section 114 is to be decided with ference to the circumstances at the testator's death only and not by subsequent ents. The bequest will be void with regard to all the children of *A* born ter the testator's death, because, in regard to every one of them there is a ssibility of his attaining 25 years beyond *A's* life and the period of the neficiary's minority. But as regards a son of *A* in existence at the testator's ath, taken individually section 114 does not hurt as he is a living person d will attain 25 years within his lifetime and as regards such sons the bequest not void by virtue of the rule against perpetuities. That will not however ean that the bequest should not fail on account of other reasons. If there is a quest to *A* for life and all his sons that attain 18 years, the bequest may fail if the sons of *A* die before attaining 18. So also in the case postulated in the ustration, a son of *A* alive at the testator's death, may fail to take on account of s failure to attain 25 years within 18 years after *A's* death, the utmost period ed by law for the ascertainment of the beneficiaries. Again the policy of the actment is to prevent the postponement of vesting in favour of an unborn benefiary beyond the period of a lifetime and his minority. If there is a bequest to *A* life and his first son at 25, the bequest in favour of the son of *A* is void. If it given to *A* for life and to such sons of *A* as attain 25, according to the interpretan suggested by Gentle, J., the sons of *A* that attain 25 within 18 years after *A's* ath will take. If *A* has some sons at the testator's death but all die before attaing 25 and some sons are born after the testator's death and attain 25 within 18 years er *A's* death they all can take. Possibly the same result would follow when *A* s no son at all at the testator's death. It would mean that what in law is prohibited the case of a bequest to an individual may yet be permissible provided the beneiary is included in a class of persons who suffer from a similar incapacity. It difficult to hold that the statute intended such a result. Gentle J.'s opinion the illustration (*i*) to section 115 is only by way of obiter. The nature of the quest on whose validity he had to adjudicate was different from the bequest vered by the illustration. In the Calcutta case, the bequest was such that the n would acquire vested interests merely on their birth and before the dropping a life in existence and the son that was adopted was adopted by Aniruddha during lifetime. When the matter was taken up before the Judicial Committee, the ard declined to express any opinion about the applicability of the doctrine of ndu law relating back the existence of the adopted son to the date of the death of adoptive father in the context of the rule against perpetuities. The Board pressed themselves in favour of the view that the sons of Aniruddha acquired ted interests on birth only or on adoption. As regards the interpretation of stration (*i*) to section 115, the Board approved the views expressed by Gentle Ormond, JJ. Sir Madhavan Nair observed : " From the reasoning of the learned lge (Das, J.) it is clear that the application of the section is limited to members a class who are in existence at the date of the testator's death and that the bequest noperative in this case with respect to all the children born after the testator's th. It may be mentioned that what was actually observed by Lord Maugham, o delivered the judgment of the Judicial Committee in *Sopher's case*[2], was t : ' the section must of course be read and construed in connection with the strations to be found in the Act '. The section referred to is section 113 of the

1. *Aniruddha Mitra* v. *Arabinda Mitra*, A.I.R. 3 Cal. 396, 401.

2. (1944) 2 M.L.J. 20 : L.R. 71 I.A. 93 (P.C.).

Act. Gentle, J., with whom Ormond, J., agreed did not accept the interpretation put upon the section by the learned Judge for the reason that the words of section 115 of the Act are general, that though the illustrations may be looked into in order to understand the meaning of the section, they do not exhaust its meaning and that illustration (i) referred to by the learned Judge, when correctly understood, does not support his view. Their Lordships agree with the above view. It is perfectly clear that the words of section 115 of the Act are sufficiently wide and do not in any manner limit its application to the members of a class who are in existence at the date of the testator's death. The learned Judge, Das, J., would have certainly accepted this view of the section but for what he considered the light thrown upon its meaning by the illustrations. . . . . The illustration relied on by the learned Judge [apparently illustration (ii)] does not restrict the meaning of the section 115. It is the last sentence in the illustration that has given trouble to Das, J. As already pointed out the clause in italics in the last sentence was substituted for the words : ' as it is given to all his children as a class it is not good as to any division of that class but is wholly void ', by Act XXI of 1929. This amendment was made at the same time as the section was amended in order to make it harmonise with the section. In their Lordships' view, the last sentence in the illustration means that the bequest is inoperative in regard to children of *A* born after the testator's death, who do not attain the ge of 25, within 18 years after *A's* death, but it is operative in regard to such children who do attain the age of 25 within 18 years, though born after the testator's death. The learned Judges of the High Court who heard the appeal have interpreted the sentence in the above sense and their Lordships think they have correctly interpreted it. The illustration thus understood does not in any manner restrict the operation of the section. It just illustrates its meaning and does nothing more ". It may with respect be submitted that Sir Madhavan Nair has only reiterated what Gentle, J., had said. He has not said that the illustration is wrong. He has however put a meaning upon it which as already explained it cannot bear. The observations of the Board are as much obiter as those of Gentle, J. It may be that the Supreme Court will re-examine the position when the occasion arises. It is difficult to accept that the Legislature while prohibiting a testator from creating a bequest in favour of an unborn individual contingent upon his attaining an age greater than 18 has allowed him to create a bequest in favour of a class of persons consisting of unborn persons contingent upon attaining an age greater than 18 years leaving it to fortuitous chance to fulfil what he has not been able to do with respect to each individual of that group.

The last of the views in regard to the effect of illustration (i) to section 115, namely, that all children alive at the testator's death must acquire the interest whenever they attain the prescribed age whatever the point of time, and that the restriction of attaining 25 years within *A's* life and 18 years thereafter in the illustration applies only to those children of *A* born after the testator's death may now be examined. It may be stated that for reasons already given, those that are born after the testator's death cannot take at all. As regards those born before the testator's death the suggestion would be acceptable if the bequest had been to the sons of *A* alive at the date of the testator's death *designatio personarum* but the illustration postulates a case of class gift.

The conclusions may now be summed up as follows : (1) Under the Indian law the perpetuity period is life or lives in being and the period of actual minority of the beneficiary to whom if he attains full age the interest is to belong. (2) This period can receive in certain circumstances extension by as much as two periods of gestation, one in regard to the life in existence and another in regard to the beneficiary. (3) In applying the rule to a class gift, those members of the class who cannot individually take under the bequest by reason of section 114 cannot take under section 115 either, and among the rest those who attain the prescribed age within the perpetuity period will be entitled to take.

:NT OF THE HON'BLE MR. JUSTICE S. PANCHAPAG SASTRI.

ther eminent Judge has retired within the short space of a mc as well known that Mr. Justice S. Panchapagesa Sastri would ha· et when the actual day of retirement arrived, it was a matter of ş :ryone that it had come. All of us who have such an affectio m would have felt happier if some arrangement had been evolve ıld have been made to continue as a Judge for some more years. ·ly in his career at the Bar, he was marked out for his sound knowl ıough he might not have been spectacular his learned and persu: ily earned for him a top place at the Bar. His long association .aw Journal equipped him with a precise knowledge of the :d in him a remarkable faculty for critical examination of jud His scholarly edition of Mitra's "Limitation and Prescripti leserved encomiums from the Bench and Bar alike throughout Ir ears prior to his elevation to the Bench, he enjoyed a most lucr: it was really a big sacrifice that he made when he allowed hir ded to accept the offer of judgeship which could last only f

ge he has been scrupulously correct and most efficient in the disch , and if at all, he was only weighed down by a too rigid sen: . It was even felt sometimes that the office of judgeship sat ıpon the erstwhile genial and pleasant advocate.

it is a matter of great gratification to us that one who has l nnected with our journal for a long time should have earned la· te and as a Judge yet we cannot but feel that he should 1

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said that such statutes have to be worked with a full understanding that they are new measures and you must construe them so as to give proper effect to that object. "The words of the Act", he said, "were meant to be wide and elastic, because they are to be applied to the needs and circumstances of poor people living in confined quarters. The Court has to condescend to realise what these are." I can say that in your case you realised the effect of decisions on the parties involved according to their circumstances and gave your full consideration to them but with this improvement that you were understanding without condescension.

Proceedings in your Court were marked by absolute cordiality and I must mention the one thing in which you failed. You failed in your effort to refuse adjournment of cases even though you published a notice relating to it in the cause list. You were firm in print but when Counsel appeared before you in flesh and blood you could not fail to accede to their request.

On behalf of the Bar I bid you farewell on your retirement and wish you a continued period of usefulness to society.

Mr. Justice Panchapagesa Sastri's Reply.

Mr. Justice Panchapagesa Sastri after thanking the Advocate-General and the members of the Bar for the kind sentiments expressed on the occasion said: "The Advocate-General had referred to the fact that though after retirement, he might be 'with them', he might not be 'of them'. The Advocate-General could, in his position, speak about the policy underlying the Constitution Act. But it would not be proper for me to express any opinion on that subject. Perhaps, there is much to be said in favour as also against it. That, however, is not a matter on which I should permit myself any remarks."

After expressing his gratitude for the sympathy and co-operation shown to him by the members of the Bar which was responsible for making a Judge a good one or otherwise, His Lordship said "I am aware that the Madras Bar and the Madras Bench have got great traditions. Indeed, they are second to none in the Indian Union. It is the Madras Bar that is held as the first and most important Bar by the Judges of the Supreme Court. The Madras lawyer really dominates the Supreme Court. At any rate, none is allowed to excel the members of the Madras Bar there; that certainly we can confidently claim. I trust the Madras High Court still enjoys a similar reputation there. It was my anxiety that I should not, during my tenure of office, do anything to lower its standard, and I have tried to keep it as high as possible. I am free to confess that I was not actuated by a desire to leave behind me great judgments to be quoted or preserved in Law Reports. I was more anxious to do justice to the cases before me, and, if I carried out that desire, I felt satisfied."

"I would, on some other occasion perhaps, come forward with some of my views

and my colleagues are deeply alive to the importance of the question from the point of view referred to by the Advocate-General and I am sure, to the interest not merely of the richer class which is going away but of the poorer class whose welfare is now the anxious thought of our statesmen and the Legislatures. I am sure their interest will safely be protected by fearless and, at the same time, sympathetic administration of justice by this Court."

In conclusion after expressing his thanks to the Chief Justice and his colleagues who had always been uniformly kind to him and to the staff of the High Court for their co-operation, His Lordship said : "It may not be out of place if I say that from my experience of the judgments of the Subordinate Judiciary, we have got a fine and loyal service of judicial officers, men of great ability and character—people who do a lot of work from morning till evening but who are, unfortunately, due to financial stringency, not paid so amply as they should be. This is my personal feeling. Nevertheless, the work of the Subordinate Judiciary requires to be appreciatively referred to publicly, and I am glad to take this opportunity to do so."

SECTION 195 (1) (*b*), CRIMINAL PROCEDURE CODE

By

MAHALINGA PADMANABHAN, ADVOCATE, TUTICORIN.

Opinion is not unanimous on the point, whether section 195 (1) (*b*), Criminal Procedure Code, will apply to a case where a Magistrate accepts a referred charge sheet under section 173 of the Code on a complaint made to him through the Village Munsiff.

The Madras and Nagpur High Courts hold that the section will not apply to the contemplated case while the Bombay and Lahore High Courts hold otherwise.

The relevant sections of the Code read as follow :

Section 195 (1) (*b*) : "No Court shall take cognizance of any offence punishable under any of the following sections of the same code, namely, ... 211 . . . when such offence is alleged to have been committed *in or in relation to any proceeding in any Court*, except on the complaint in writing of such Court or some other Court to which such Court is subordinate ;"

I have italicised the words, in or in relation to, etc., as the answer to the question must depend ultimately on the interpretation to be given to those words.

For the purposes of the discussion we have to note section 173, too, which runs thus :—

"(*a*) Every investigation under this chapter shall be completed without unnecessary delay, and, as soon as it is completed, the officer in charge of the police station shall—(*a*) forward to a Magistrate empowered to take cognizance of the offence on a police report, in the form prescribed by the State Government setting forth the names of the parties, the nature of information and the names of persons who appear to be acquainted with the circumstances of the case, and stating whether the accused (if arrested) has been forwarded in custody, or has been released on bond, and if so, whether with or without sureties, and

(*b*) communicate, in such manner as the . . . . . ."

The problem comes down to this : We must see whether the proceedings under section 173 of the Magistrate accepting the police report will amount to a proceeding in a Court. Is the action of the Magistrate a judicial action or merely an administrative one ?

The following cases are against the question at issue.

they answered the contention by saying that if the intention of the Legisla- so it would have specifically mentioned it.

next case is *Rangaswamy*, In re[2]. There the facts are not the same lated here, the difference being the complaint under section 211, Indian ode, was made by the Police themselves. The Magistrate dealing with nal complaint accepted the police 'final report' and stopped further tion. The Chief Justice, Sir Owen Beasley held in answer to the conten- the Magistrate had taken cognizance of the case and that it was 'a proceed- s Court', that it was not a case 'which the Magistrate had taken judicial nor were they judicial proceedings at all'. It is to be noted that no case either cited or followed in this ruling.

eror v. *Birdichand Chunnilal*[3] is another case where the question has been l and decided. Though many of the decisions on the point by the various urts have been mentioned one would wish there was a fuller discussion.

ctly opposed to the view found in the above rulings are certain decisions ahore and Bombay High Courts.

Ghulam Rasul v. *Emperor*[4], the learned Judge concludes, "I am clear that ls in this sub-section 'in relation to proceedings in any Court' apply to of a false report or false statement made in any investigation by the police *ntention that there shall in consequence be a trial in the criminal Court.* (Italics His Lordship finds support for his view in *Chuhermal* v. *Emperor*[5].

t is the case in *Boywalla* v. *Engineer*[6]. There the accused in the original it was arrested and then after investigation the Magistrate was requested lid accordingly discharge him. The question was whether all these acts icial acts or rather, was the matter one in relation to a proceeding in a It was held that the order of the Magistrate discharging the accused can an administrative order and characterised the argument advanced before it was an administrative one as a piece of novelty. The absurdity of that t if pursued would have resulted in holding the very discharge as no dis- l law, was pointed out by the learned Chief Justice. Lower down in that e learned Judges trace the courses open to the Magistrate when he receives under section 173 and finally conclude: "The learned Magistrate in ng the accused is making an order similar in character to the order he e under section 203, Criminal Procedure Code".

most instructive case on the subject is *Kote* v. *Emperor*[7], which follows v. *Engineer*[6], referred to above. In an elaborate judgment His Lordship ice Lokur examines the various decisions on the point. After a full and e discussion with particular reference to the powers of the Magistrate

section. *Having regard to the object of amending section* 195, *Criminal Procedure Code, requiring a complaint from a Court, instead of its mere sanction for the prosecution of any offence committed in relation to that Court, we think that the Magistrate passing an order on a final report of the police sent after the investigation under section* 173, *Criminal Procedure Code, should be deemed to be a Court passing a judicial order disposing of the information given to the police.*" (Italics mine.)

The crux of the problem is the interpretation of the term 'Court' in section 195 (1) (*b*). Does the Magistrate acting under section 173 act judicially and are the proceedings judicial proceedings?

What is a "Court"? A most instructive case in regard to the meaning of that term is one reported in *Mahabaleswarappa* v. *Gopalaswami Mudaliar*[1], a judgment of Curgenven, J. A number of cases have arisen under sections 476 and 195, of the Code, where the character of many quasi-judicial authorities had to be determined with a view to know if they could be called Courts under those sections. The one under reference was for determining whether the Election Commissioner constituted a 'Court'.

Mr. Justice Curgenven observes, "Definitions are of a limited scope, being only for the purpose of the Act in which they occur, unless specially extended. Such are the definitions of 'Court' in section 3 of Evidence Act, and of 'Court of Justice' in section 20, Indian Penal Code. By section 4, Criminal Procedure Code, the latter phrase is to be understood in the same sense in the code. The definition in the Evidence Act, requires that the person constituting the 'Court' shall be legally authorised to take evidence. The Penal Code defines a 'Court of Justice' as a Judge acting judicially and a Judge as every person: 'who is empowered by law to give, in any legal proceeding civil or criminal, a definitive judgment, or a judgment which if not appealed against would be definitive or a judgment which, if confirmed by some authority, would be definitive'."

After examining the nature of the Election Commissioner with reference to this definition His Lordship goes in for a wider definition and adopts the ruling in *Raghoobuns Sahoy* v. *Kokil Singh*[2]. That decision says:

"The word 'Court' used in section 195, Criminal Procedure Code, without the previous sanction of which offences therein referred to committed before it, cannot be taken cognizance of, has a wider meaning than the words 'Court of Justice' as defined in section 20, Penal Code. It includes a tribunal empowered to deal with a particular matter and authorised to receive evidence bearing on that matter in order to enable it to arrive at a determination."

Further reference is made to how the question what is a Court has been answered

:n; what is judicial power ? That again is found defined in *Mahabaleswa-Gopalaswami Mudaliar*[2], by means of an extract from *Shell Co. of Australia* v. *Commissioner of Taxation*[3] which runs as follows :

What is 'Judicial Power' ? Their Lordships are of opinion that one of the initions is that given by Griffith, C.J., in *Huddart, Parker & Co.* v. *Moore*- here he says : 'I am of opinion that the words 'Judicial Power' as used n 71 of the Constitution means the power which every sovereign authority necessity have to decide controversies between its subjects, whether the rights *life, liberty or property.* The exercise of this power does not begin until bunal which has power to give binding and authoritative decision (whether o appeal or not) is called upon to take action." (Italics mine.)

.in as to the character of the proceeding before the Magistrate, when ts the final report made under section 173 *Raghunath Puri* v. *Emperor*[5], holds a proceedings are legal proceedings.

re can be no doubt that the Magistrate while acting even in merely accept-

Thus we see that the Magistrate accepting the final report under section 173 cannot do so without applying his mind and following the reasoning in *Raghunath* v. *Emperor*[1], and chiefly *Emperor* v. *Sourindra Mohan Chuckerbutty*[2] it could be argued that the proceedings before him are judicial proceedings and he acts judicially. Further, if we are to adopt the reasoning in the decisions in *Rangaswamy*, In re[3] and *Khan* v. *Emperor*[4], it will be possible to agree that the Magistrate under such circumstances acts as a Court. And from these it is a near step to look at the case of a report under section 173 as one that will attract the provisions of section 195 (1) (*b*) and so if a person against whom a complaint is made which ends in final report under section 173, takes it into his head to challenge the complaint under section 211, Indian Penal Code, he cannot do so without the Magistrate concerned making the complaint.

"Here as elsewhere the learned Judges were impressed", says his Lordship in *Mahabaleswarappa* v. *Gopalaswami Mudaliar*[5], while referring to a decision in *Nanda Lal Ganguli* v. *Khetra Mohan Ghose*[6], "by the mischief which would ensue if 'any private person who alleged that false evidence has been given before the tribunal might institute a prosecution without any control on his action by the tribunal before whom the evidence was given'." There is much force in this, as to allow private individuals to move the law for a proceeding ending in merely a report under section 173 will only be to give room for unnecessary waste of time and mischief. There will be some substance if a party as a result of such complaint is put to the hardship of undergoing a trial before a Court. It must be left to the judicial discretion of the Magistrate who accepts the report to decide whether he should make the complainant stand a trial. Mostly these are cases where for some reason or other a party moves the police, who finding that the whole matter is a paltry one and not deserving a prosecution make the final report to the Magistrate. It must be open to the Magistrate to examine the report and agree with the police or take further action. Otherwise there is no reason why the Code should have entrusted the work of confirming the action of the police in dropping proceedings to the Magistrate. If it was purely an administrative one they could have very well nominated a police official of a fairly high rank to do the job. It is clear that the Legislature must have, as a check on the executive, intended to entrust the task to a Magistrate acting in judicial capacity.

Thus if the importance of the scope and possible mischief that might ensue if section 195 is not properly pressed into service is recognised, then, it is submitted with great respect that the decisions on the point require a revision so as to conform to the view expressed and followed in *Kote* v. *Emperor*[7].

THE

MADRAS LAW JOURNAL.

I] MAY. [1951

POWERS OF PROVISIONAL PARLIAMENT.

By

MR. T. R. VENKATARAMA SASTRI.

The question has been raised as to whether the provisional Parliament under Article 379 has the power to amend the Constitution under Article 368. The question is not without difficulty but the conclusion that I arrive at, not without some hesitation, is that the provisional Parliament has the power to amend. The considerations *pro* and *con* may be stated thus :

Contra.—The powers of Parliament are those under Article 245 *et seq.* which relate to administration of subjects that fall under the seventh schedule.

The power under Article 368 is outside the power of Parliament under that schedule. This is power to amend the Constitution. Those are matters of ordinary legislation.

Article 368 does not in terms state that the power to amend is conferred on Parliament and then prescribe the procedure but confers the power on the two houses severally requiring the concurrence of Legislatures in some cases.

Article 379 does not specifically include the power to amend as among the powers conferred on Parliament.

The conditions of Article 368 show that the State Legislatures are part of the machinery for amending the Constitution. Power to make amendment being one and indivisible, the requirement of assent by other Legislatures places the power in the hands of others also.

That they are strong considerations is not denied and the conclusion is very plausible. On the other side are these considerations.

Article 368 refers primarily to the amendments by the two Houses and President which Parliament is defined to be in Article 79. The consent of the Legislatures like special votes are only conditions of validity. Legislatures are not makers of amendments.

The procedure broadly speaking is the same as in ordinary legislation under Articles 107 and 111.

Article 379 should be read as saying in effect that what two houses do after they are constituted, the provisional Parliament is to do before they are duly constituted.

> The opposite construction creates a gap in time during which action under Article 368 cannot be taken.
>
> The reply is that the requirement of two Houses, the requirement of majority in *each* House, of two-thirds majority vote in *each* House and the consent of Legislatures, though only in some cases, prevent the power under Article 368 being the action of Parliament alone. To apply Article 379 *to* 368 is to whittle away the safeguards of Article 368.

I concede the weight of that argument. I have great hesitation, and I expect the Supreme Court will have grave hesitation, in upholding the argument against its power. To hold that provisional Parliament has the power will not be held to do violence to the language of Article 368, but it will be considered a fair, if a liberal, construction of its provisions.

INDIA—SOVEREIGN.

By

MR. T. R. VENKATARAMA SASTRI.

It has been suggested that, when the Constituent Assembly enacted a Constitution for India in November, 1949, India was politically independent but not sovereign. That view seems to us incorrect. Sovereignty in India must be either in Britain or in India and cannot hang in mid air vesting in neither the one nor the other. After the Independence Act, 1947, was put into effect, sovereignty was not in Britain but only in India.

It was our boast that India won her freedom from foreign control without physical violence and bloodshed. If freedom is to be peacefully achieved, without an interval of anarchy, existing machinery under the old law must be used, replacing the old structure, as it were, brick by brick. The temporary expedient of using old law and its machinery produces the illusory impression that in exercising our *unrestricted* power we are still under the guiding hand of the old sovereignty. If the Independence Act had merely withdrawn the British sovereignty and left us to work our own fate, there could not have been any doubt of the sovereignty of the Constituent Assembly. But as the Independence Act proceeds to indicate the steps by which India is to work it out, India seems to be acting still under their directions. Article 372 shows that the assistance of the old machinery is needed even now but it is used by the specific direction of the Constitution.

Take the Statute of Westminster. The White Dominions, while retaining the Crown as the symbol of their association, wanted in no way to be subordinate to Britain. They were given the option of *freedom* under section 10 of the Act. Section 2 gave absolute legislative freedom—freedom from the shackles of past and *future* legislation by the Parliament at Westminster. Section 3 gave power of extra-territorial legislation. Section 4 provided that future legislation of Parliament should only be binding if made at the request and with the authority of the Dominion. Section 5 said that the Dominions were not to be *possessions* within two sections of the Merchant Shipping Act. Section 6 repealed the reservation of Bill for Royal Assent under Admiralty Act. It was expected that, complete freedom being available at any time, the old association will not snap unnecessarily. The Constitutional status of those Dominions were safeguarded by sections 7, 8 and 9 but in our Independence Act the Constituent Assembly was to frame a constitution under section 8. A comparison of the two Statutes may be set in parallel columns to exhibit their common points and differences. *W* will stand for the Statute of Westminster and *I* for the Independence Act.

W.		*I*
S. 2 ..	No past or future British Statute binding ..	S. 6 (2, 4, 5)
S. 3 ..	Extra-territorial operation ..	S. 6 (1)
S. 4 ..	Consent Legislation ..	—
S. 5 ..	Merchant Shipping Act ..	—
Ss. 7, 8, 9.	Constitution preserved ; to be made for India.	S. 8
— ..	King ceases to be Emperor ..	S. 7 (2)
— ..	His Majesty's Government withdraws ..	S. 7 (1)
— ..	Suzerainty ceases ..	S. 7 (1)
— ..	Governor-General to implement provisions ..	S. 9
— ..	Future Parliament's powers may be restricted.	S 6 (6)

One can see the difference. It is not option given because every one knew that the option will be taken. Recognition of the king was not agreed to here. Even as to the result of the Statute of Westminster, A. B. Keith says :

"But any limitation of authority which now remains is voluntarily accepted and so far as the Imperial Parliament is concerned the *full sovereignty* of the Dominions is now recognised . . . . . But the issue of sovereignty is now clear."

The position now is that King in Parliament as to Britain and as to each Dominion is different. At the time of the war it was said that the King in England was at war but the King as head of the Dominions was not at war until the Dominions declared war.

What the Constituent Assembly proceeded to enact was not to be void as contravening any past Parliamentary statute nor can it now be avoided by future statute. What it enacted was unquestionable law. What it did was to declare India a Republic. President of the Republic displaces the King and the Governor-General. He is in charge of the Defence (Articles 53, 54). He appoints Governors, Rajpramukhs, Lieutenant-Governors and Commissioners. He appoints the Judges of the Supreme Court and the High Courts. He assents to Bills in the Union and deals with Bills reserved for his assent by a Governor or other authority.

Emergency legislation is his and his are Emergency Proclamations. Thus all the powers of the King and Governor-General are at an end. The Independence Act itself withdrew the authority of His Majesty's Government and the Union authorities have taken their place. From the Secretary of State all property, contracts, services have come into the hands of Indian authorities. Even in suits the Dominion is replaced by Union, see Article 300 (2) (*a*).

Supreme Court has displaced the Judicial Committee of the Privy Council. Article 395 repeals the Act of 1935. What is left of the old power in Britain? The Constituent Assembly has used its power to cut off all connection with Britain. The full sovereignty has passed into the hands of India unquestionably in fact and in law.

I hear some one asking what would be the result of repealing the Independence Act which repeal is within the power of Parliament. The English Parliament is too wise to attempt to retake India by any such repeal. The question will not arise for consideration. But I am prepared to say that it cannot be done, (6 (4) and (5)). Manumission cannot be undone. India having passed out of their hands cannot be taken back by any legislative tricks; but only by reconquest which again is an unwise step that England is too prudent to take in world conditions (U. N.). This is the age of releases and not of conquests.

What the Constitution prohibits cannot be done. What it permits to be done under conditions can only be done under those conditions. What is permitted to Parliament it may do ; what is permitted to others it cannot take away. In short what is in the Constitution cannot be gone against without an amendment. "The Parliament shall not make a law" cannot mean shall not make until it makes or so long as it does not make, Article 13 (2).

THE

Madras Law Journal Reports.

I] JANUARY [1951

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

Navakoti Daniel .. *Appellant**

v.

Ingilala Mariamma .. *Respondent.*

Seduction—Suit for damages for—If maintainable on behalf of minor girl seduced—Maintainability of action as one for damages for breach of contract to marry.

An action brought by the mother of a minor girl on behalf of that girl for damages on the ground of her seduction by the defendant cannot be maintained because the person seduced cannot found on seduction, as seduction implies consent.

(English and Indian authorities discussed).

Although a minor's contract may be void in Indian law, a contract entered into on behalf of the minor by the guardian for the minor's benefit would be binding and enforceable. Anyhow, there is no doubt that the case of an agreement for marriage made for a daughter under age by her guardian, such being the custom of the parties' community, has been treated in India as an exception to the general rule that an infant's contract under Indian law is altogether void. Accordingly the suit on behalf of the minor girl can be decreed as on the basis of damages for breach of contract to marry, although the suit may not be maintainable on the basis of seduction.

Appeal against the decree of the District Court, Nellore, in A. S. No. 709 of 1945, preferred against the decree of the District Munsiff Court, Nellore, in O.S. No. 785 of 1944.

K. Krishnamurthi for Appellant.

Y. G. Krishnamurthi (*amicus curiae*) for Respondent.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit for recovery of damages for breach of promise to marry or in the alternative for seduction of the plaintiff. The plaintiff, a Christian, is the girl seduced, who complains also of the breach of promise, and she sues through her next friend and mother. The trial Court (the District Munsiff's Court, Nellore) found that there was the tort of seduction as well as a breach of promise and awarded damages in a sum of Rs. 500 as against the Rs. 1,000 claimed in the plaint. On appeal taken by the defendant to the District Judge of Nellore that decree has been confirmed, not however on the ground of seduction but on the ground of a breach of promise to marry. In second appeal the case has been presented alike with reference to breach of promise and with reference to seduction. It may be stated that the plaintiff has since the presentation of the second appeal become a major and has been declared as such. In view of the importance of the questions raised I requested Mr. Y. G. Krishnámurthi

*S.A. No. 1308 of 1946. 7th September, 1950.

to act as *amicus curiae* for the plaintiff-respondent who does not appear here by pleader. I am indebted to him for the assistance rendered by him.

The argument in regard to the seduction aspect of the case is that seduction is a tort on the basis of which an action can be brought only by the plaintiff's father or mother on the ground of loss of personal service. As to this what the lower appellate Court has said is this :

"It is true that only the parent or master of the injured woman can maintain an action for damages for seduction under the English rule. The English rule as to loss of service has no counterpart in the German and French Codes. The English rule is however generally followed in the United States, though abrogated in some States like California. It seems to me that Indian Courts are not bound to follow this historic relic and may adopt a rule which protects the family tie and honour as such *and not illogically through a different cause of action.*"

Although it is somewhat difficult to know what the words *italicised* in the passage cited mean, the learned District Judge apparently was inclined to hold the suit maintainable as for seduction though at the instance of the plaintiff only and not of her father or mother on the ground of loss of services. The learned Judge however did not decide the point as he could confirm the decree and judgment of the trial Court not because the plaintiff was entitled to damages for seduction but because she was entitled to damages for breach of promise to marry.

The English rule as to the maintainability of a suit for damages for seduction is stated in Halsbury's Laws of England, Vol. XXII at pages 247 and 248, in paragraphs 428, 429 and 430 as follows :

"The right of the master to recover damages where he has been deprived of the services of his servant by the wrongful act of a third person applies to the case where he has been deprived of the services of a female servant by reason of her seduction and consequent confinement. By reason of the circumstances that a daughter may be the servant of her parent, seduction has developed into what may be regarded to all intents and purposes as a separate tort, for which, subject to certain limitations, an action lies as the woman who has been seduced cannot herself, as being a consenting party, maintain any action against her seducer. The action must be brought by some one who can be assumed to be her master. This will, as a rule, be her father, or, if the father is not alive, her mother, though action may also be brought by her father by adoption, and by an uncle, aunt or brother. No action can, however, be brought by any person who encourages or connives at the seduction.

Since the right of action is based upon the loss of service some evidence, however slight, must be adduced by the father, or other person in *loco parentis* to establish the existence of the relation of master and servant between himself and the woman seduced at the date of the seduction . . . . . and if he fails to do so, the action must fail. It is not, however, necessary for him to prove that there was an express contract for service. The existence of the relation is to be presumed from the fact that she resides with her father and performs the duties of a servant, and in this case it is immaterial that the daughter is of age or married. Nor is it necessary for her to reside in the same house as her father, so long as she is in the position of his servant. Where, however, she resides in the same house, it is sufficient to show that she rendered occasional assistance in the work of the household, or even that, in the circumstances, as, for example, when she is under age, the father had a right to her service."

In an early case in Allahabad *Ramlal* v. *Tularam*[1], a suit was brought not as in the present case by the woman who was seduced but by the father of the girl as for compensation for the loss of his daughter's services in consequence of her abduction by the defendant. The case came up before Sir Robert Stuart, C.J., and Oldfield, J. The learned Chief Justice after referring to *Harpe* v. *Luffkin*[2], where Lord Tenderden on a motion for a new trial held that the father was a sufficient plaintiff in the action and a verdict in his favour was upheld, went on to point out however that such a ruling proceeded on the fiction that the daughter, though a married woman, might still under the circumstances be considered as her father's servant. The learned Chief Justice of Allahabad then quotes the observations of Lord Tenderden C.J., in the case cited to this effect :

"Unless he (the husband) interferes, it by no means follows that such a relation (that of master and servant) may not exist, *especially as against third persons who are wrongdoers.*"

On this observation of the learned Chief Justice of England the learned Chief Justice of Allahabad proceeds further to make this comment :

1. (1881) I.L.R. 4 All. 97. 2. (1827) 7 Barn and Cress, 387.

"The last words appear to recognise a principle of parental or family authority which might be usefully applied to the present case; but the English theory on which the remedy for such a wrong as that of seduction of a young woman is based is a theory I do not find to have any place in the law of this country, and I am certainly not inclined in any way to encourage its introduction into the legal system of India; and in other European countries, that is, in European countries other than England, the remedy is afforded on the much more intelligible ground of being a wrong to the woman herself as for example, in the law of Scotland at the present day, in which country the woman needs no help from her father or other relation, but may sue directly for the wrong done to her, that is of course, where she is of the proper age for maintaining a suit of the kind. But the present case is that of a minor deserted by her husband, and taking refuge in her father's house, where she continued to reside; and it seems to me reasonable and just that the father should under the circumstances be allowed to complain of the seduction of his daughter to a Court of Justice, especially in such a case as the present, seeing that the parental control and authority of a father in India over his children do not appear to be so entirely destroyed as it is in England in the case of a married daughter, but which control and authority are in this country retained by the father to a considerable extent, and recognised whenever circumstances may bring him and his daughter together domestically."

The other learned Judge (Oldfield, J.) who was a party to the Allahabad case took a much stricter view of the unreasonableness of the importation into the law of India of the rule of English law as to an action for seduction. Says the learned Judge:

"The claim, however, in respect of the loss of the daughter's services stands on quite a different footing. It has evidently been brought with reference to the law of England as to an action for seduction, where the basis of the action is founded, not upon the wrongful act of the defendant in the seduction, but upon the loss of service of the daughter, in which service the parent is supposed by a fiction to have a legal right or interest . . . . . It would be very undesirable to introduce a fiction of this kind into the law of this country. The plaintiff cannot be allowed to maintain a suit on a contract for service which is not seriously asserted, nor indeed found to exist in fact, and which is is not consonant with Hindu customs. Hindu women are no doubt dependent to a great extent on their male relatives, and they have certain household duties which they are expected to perform, but their position is not one of servitude, from which any contract of service can be implied."

It will be seen from the foregoing passages from the judgments of the learned Judges who decided *Ramlal* v. *Tularam*[1], that except in special cases, according to the learned Chief Justice, an action by the parent of the seduced girl in his own right cannot be brought for damages for seduction while according to the other Judge, Oldfield, J., no action by the guardian on the basis of the fiction obtaining in English law can at all be brought in India, the more appropriate form of action being by by the seduced woman herself. The difficulty in the way of accepting the view indicated in these judgments that the seduced woman herself has the right of action lies, in my opinion, in this consideration which the Judges in the Allahabad High Court have ignored, namely, that, as well-settled in England and as on general principle may well be accepted in India, a woman who has been seduced cannot herself as being a consenting party maintain an action against her seducer, so that any action can only be brought by some one who can be assumed to be her master. This consideration is adverted to in a judgment of the Nagpur High Court reported in *Baboo* v. *Subanshi*[2], wherein a critical review of the judgment of the Allahabad High Court is to be found, with which I respectfully agree. As stated at page 657 of the Report of the Nagpur case:

". . . . . we ought to accept the English rule rather than reject it. If we accept it, then we can apply it as a rule of justice, equity and good conscience. But if we reject it, then there is nothing that we can do because we would be inventing a new tort and that is a matter which though within the province of the legislature is not within the competence of Judges."

Then again as pointed out at page 658 of the Report, the person seduced might, though not entitled to found on seduction because seduction implies consent, have however, a right of action under some other head of law such as assault, false imprisonment or deceit in tort or breach of promise to marry, where such was the case. On the whole I am of opinion that in the present case the action as one brought by the seduced person herself on the ground of seduction cannot be maintained for the reason that I have already indicated, namely, that the person seduced cannot found on seduction, because seduction implies consent.

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1. (1881) I.L.R. 4 All. 97.
2. I.L.R. (1949) Nag. 650.

Turning now to the question of the maintainability of the suit as one for damages for breach of contract to marry, learned counsel for the appellant relies upon section 11 of the Indian Contract Act and argues that, unlike under the English law where a minor's contract is only voidable at his option, in India such a contract is altogether void and can give rise to no cause of action. In the present case the facts are that after the plaintiff attained puberty her parents proposed that the defendant should marry her, and the defendant also agreed to it. Thereafter sexual relations went on between the plaintiff and the defendant with the result that the plaintiff became eventually pregnant and even bore a son to the defendant. As pointed out in Pollock and Mulla's Commentaries to the Indian Contract and Specific Relief Acts, 7th Edition, page 64, the case of an agreement for marriage made for a daughter under age by her guardian, such being the custom of the parties' community, has been treated as an exception to the general rule that a minor's agreement under the Indian law is altogether void. It is true that the learned Commentators after referring to the case in *Rose Fernandez* v. *Joseph Gonsalves*[1], as illustrating the exception proceed to observe thus :

"This case was approved and followed in a case where the parties were Hindus. In a Bombay case the *de facto* guardian of a minor had entered into a contract on the minor's behalf for the purpose of insuring property belonging to the minor. It was held that the guardian had authority to effect the insurance and, that being so, that the minor for whose benefit it was made could sue on it in his own name in order to recover on the policy (*Great American Insurance Co.* v. *Madanlal Sandal*[2]). The principle on which this decision is based is not altogether easy to understand. If the guardian contracts as the minor's agent, it is the minor's contract and therefore a nullity. If it is the guardian's contract, he should alone be entitled to sue, though he may be under an obligation to hold any benefit under the contract for the minor's benefit. The Court expressly disclaimed any intention of following such cases as *Modhab Koeri* v. *Bajkuntha Karanker*[3] and *Rose Fernandez* v. *Joseph Gonsalves*[1], but it is not very easy to distinguish them ; and all three cases seem to have been really decided on the ground that the contract was for the infant's benefit and that it would be unjust in the circumstances to deprive the latter of that benefit. But there is nothing in the Indian Contract Act corresponding to the rule of English law (saved by the Infants Relief Act, 1874) which makes a contract for the infant's benefit enforceable ; all contracts in India made by an infant are void."

It must be noticed however that in the footnote (*u*) where reference is made to the case in *Rose Fernandez* v. *Joseph Gonsalves*[1], the learned commentators once again point out that contracts to marry made by a guardian on behalf of an infant may be on a special footing. I am not satisfied that read as a whole the passage at page 64 of the commentaries on which reliance has been placed by learned counsel for the appellant is really fatal to the present suit. On the other hand, it is fairly clear that the learned Commentators do make a distinction between contracts to marry on the one hand and other contracts on the other made by a guardian on behalf of an infant.

My attention has been drawn in this connection by Mr. Y. G. Krishnamurthi appearing as *amicus curiae* to the Privy Council decision in *Subramaniam* v. *Subba Rao*[4], where it is pointed out that although a minor's contract may be void in Indian law, a contract entered into on behalf of the minor by his guardian for his benefit would be binding upon him and enforceable against him. The question there arose with reference to the applicability of section 53-A of the Transfer of Property Act in favour of the transferee under a contract for sale of land on behalf of a minor entered into by his guardian. It is not in my opinion correct to say after this Privy Council ruling, that there can be no contract entered into on behalf of a minor by his guardian which can be enforced at all against him, notwithstanding that in a given case the contract as entered into may well have been for the benefit of the minor. Anyhow, whatever the position may be in regard to other contracts entered into on behalf of a minor by the guardian there is no doubt that the case of an agreement for marriage made for a daughter under age by her guardian, such being the custom of the parties' community has been treated in India as an exception to the general rule laid down by the Privy Council in *Mohori Bibee* v. *Dharmadas Ghose*[5],

1. (1924) I.L.R. 48 Bom. 673.
2. (1935) I.L.R. 59 Bom. 656.
3. A.I.R. 1919 Pat. 561.
4. (1948) 2 M.L.J. 22 : L.R. 75 I.A. 115 : I.L.R. (1949) Mad. 141 (P.C.).
5. (1903) L.R. 30 I.A. 114 : I.L.R. 30 Cal. 539 (P.C.).

that an infant's contract under Indian law is altogether void. In my opinion, the suit was rightly decreed by the Courts below as on the basis of damages for breach of contract to marry, although the additional footing on which the trial Court has proceeded, namely, that of seduction, has in the view already indicated by me in this judgment, to be regarded as invalid.

In the result the second appeal fails and is dismised but without costs, as the respondent has not appeared by advocate. No leave.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

Rao Bahadur M. R. S. Rathnavelusami Chettiar .. *Appellant**

v.

M. R. S. Manickavelu Chettiar and others .. *Respondents.*

Company Law—Requisition for a meeting—Not complied with—Convening of meeting by shareholders—Premises locked up—Meeting held at a nearby place—Resolution removing managing director—Suit for a declaration that meeting invalid—Maintainability.

The shareholders of a company called upon the managing director (plaintiff) to convene a meeting for the election of a new managing director. He having failed to do so within 21 days they issued notices of meeting on a particular date to be held at the registered office of the company. The premises of the company having been found locked up on that date, the assembled shareholders adjourned to a nearby premises, convened the meeting and passed the resolution removing the plaintiff from the managing directorship. A suit was filed by him questioning the validity of the meeting.

Held that (i) as the plaintiff was suing in respect of an individual wrong and not a wrong in which all the shareholders generally and as a body are interested the suit is maintainable.

(ii) Assuming there was a violation of law by reason of the people assembled at the registered office of the company moving on to a place nearby and holding their meeting there in view of the difficulty created by the locking up of the registered office, the violation is only an irregularity and not an illegality which vitiates the meeting ;

(iii) The plaintiff is precluded from complaining of any invalidity by reason of his conduct in making the premises of the registered office of the company unavailable for the meeting.

Case-law discussed.

Appeal against the decree of the Court of the Subordinate Judge, Devakottai, in A. S. No. 78 of 1949, preferred against the decree of the Court of the District Munsiff, Devakottai, in O. S. No. 95 of 1949.

K. Bhashyam and *S. V. Venugopalachari* for Appellant.

R. Gopalaswami Aiyangar for Respondents.

The Court delivered the following,

JUDGMENT :—There are in the main two interesting questions of company law involved in this case : (1) whether the suit out of which this second appeal arises is maintainable ; and (2) whether a resolution of the shareholders of a company known as Vel Brothers, Ltd., (hereinafter to be referred to as the company), of 3rd November, 1948, removing the plaintiff from its managing Directorship, and appointing the first defendant as Managing Director instead, is invalid or illegal. The facts which require to be stated for appreciating the points arising for decision are these. The first and the second defendants called upon the Managing Director, the plaintiff, by letter dated 28th September, 1948, to convene a meeting for electing a new Managing Director in place of the plaintiff. The reply of 27th October, 1948, that was given to it by the plaintiff was that since the general meeting was anyhow going to be held on 30th December, 1948, the matter might be considered at that juncture. Finding that the plaintiff did not take action on their letter within 21 days the requisitionists sent notices to all the members of a meeting proposed to be held on 3rd November, 1948, at the registered office of the company at 5 P.M. The subject, it was said, was the election of a Managing

*S.A. No. 599 of 1950. 10th August, 1950.

Director in place of the plaintiff. It may also be stated that in a letter written by the plaintiff Ex. B-11 of 27th October, 1948, he himself had expressed an intention to move a resolution at the meeting to be held on 3rd November, 1948, that the company be wound up voluntarily. On 3rd November, 1948, it appears however that the meeting could not be held at the premises of the registered office at the time fixed because the premises were locked. As the lower appellate Court has found the shareholders who were assembled at the registered office for the purpose of the meeting accordingly moved on to the premises at No. 286, Kallukatti East Street which is only a few yards off the registered office and there held a meeting at which a resolution removing the plaintiff from Managing Directorship was passed. The validity of the meeting so held and of the resolution so passed is the subject-matter of the present action. The plaintiff complains that the meeting and the resolution are altogether invalid and illegal. The answer of the defendants is firstly that a suit of this character is not maintainable and secondly that the meeting and the resolution are perfectly legal and valid.

The suit was disposed of by the learned District Munsiff of Devakottai on the basis of a certain admission made by the pleader for the plaintiff on the plaint which is to the following effect :

"I admit for the purpose of this suit that the registered office of the Vel Brothers, Ltd., Karaikudi, was not available for the meeting to be held at 5 P.M., on 3rd November, 1948, and that a meeting was held at 5-15 P.M., on 3rd November, 1948, in the premises of Door No. 286, Kallukatti East Street, and the resolutions complained of by the plaintiff were passed at that meeting."

No evidence was taken by the learned District Munsiff who proceeded on the basis of this admission to deal with the merits of the case after finding the suit to be maintainable as not being a matter of mere internal management or a mere domestic matter on which the Court should not interfere. On appeal taken to the Court of the Subordinate Judge of Devakottai the judgment of the learned District Munsiff has been reversed on both the points. The plaintiff accordingly files this second appeal against the decision of the lower appellate Court.

As regards the maintainability of the suit the learned Subordinate Judge has applied what he calls the well known rule in *Foss* v. *Harbottle*[1] which he defines as being that a Court will not interfere with the ordinary management of a company acting within its powers and has no jurisdiction to do so at the instance of the shareholders. He has quoted James L.J., from *MacDougall* v. *Gardiner*[2], to this effect :

"I think it is of the utmost importance in all these companies that the rule which is well known in this Court as the rule in *Mozley* v. *Alston*[3] and *Lord* v. *Cooper Mines' Co.*[4] and *Foss* v. *Harbottle*[1] should be always adhered to ; that is to say, that nothing connected with internal disputes between the shareholders is to be made the subject of a bill by some one shareholder on behalf of himself and others, unless there be something illegal, oppressive or fraudulent, unless there is something *ultra vires* on the part of the company *qua* company or on the part of the majority of the company, so that they are not fit persons to determine it ; but that every litigation must be in the name of the company, if the company really desire it.

In my opinion if the thing complained of is a thing which in substance the majority of the company are entitled to do or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called and then ultimately the majority gets its wishes."

The respondents before me have reiterated their reliance upon this statement of the law before me. Mr. Gopalaswami Aiyangar has also drawn my attention to the fact that the resolution passed on 3rd November, 1948, was later on confirmed by a resolution of a general body meeting held on 30th December, 1948.

The rule is *Foss* v. *Harbottle*[1], has been considered by this Court in *Nagappa Chettiar* v. *Madras Race Club*[5], and has been, with its limitations and exceptions, set forth in detail in Palmer's Company Law, 19th edition, by A. F. Topham, K. C.

1. (1843) 2 Hare 461 : 67 E.R. 189.
2. (1875) L.R. 1 Ch. D. 13 at pp. 21 and 25.
3. (1847) 1 Ph. 790 : 41 E.R. 833.
4. (1848) 2 Ph. 740 : 41 E.R. 1129.
5. (1949) 1 M.L.J. 662 : I.L.R. 1949 Mad. 808.

at pages 228 to 230. I have considered the matter carefully and have come to the conclusion that what we are concerned with here is not really either the rule or any exception thereto. The question which arises here is indeed a different matter and is governed not by the rule in *Foss* v. *Harbottle*[1], but by what has been said by Sir George Jessel, M. R., in *Pulbrook* v. *Richmond Consolidated Mining Co.*[2]. The ruling of Sir George Jeseel, M. R., has been considered in very close detail by Beasley, J., as he then was in *Watrap S. Subramania Aiyar* v. *The United India Life Insurance Co., Ltd.*[3] The case before the learned Judge related to the United India Life Insurance Co., Ltd., Madras. There the articles of Association provided for the election or appointment of two directors by the policy holders of the company, the directors so elected or appointed to be known as "policy holders' directors". Two persons alleging themselves to have been validly elected "policy holders' directors", sued the company and its directors for a declaration of the validity of their election as such directors and of their right to act as such and also an injunction restraining the other directors from interfering with their right to act as such directors. On objection taken by the defendants that individually the plaintiffs had no cause of action and that the suit should have been instituted by the policy holders as a body, the objection was overruled by the learned Judge who held that the plaintiffs alone could maintain the suit and that no other policy holders on their behalf could have maintained it, and that the directors of the company had properly been impleaded as defendants. Referring to the decision of Sir George Jessel, M. R., in *Pulbrook* v. *Richmond Consolidated Mining Co.*[2], the learned Judge observes at page 398 that that decision

> "seems to be authority both for the statement that a director who has been excluded from acting as a director by the directors of a company can sustain an action in his own name on the ground of individual injury to himself and for the statement that such an action can be sustained against the other directors."

The learned Judge quotes the following from Sir George Jessel, M. R.'s decision :

> "In this case a man is necessarily a shareholder in order to be a director, and as a director he is entitled to fees and remuneration for his services, and it might be a question whether he would be entitled to the fees if he did not attend meetings of the board. He has been excluded. Now, it appears to me that this is an individual wrong, or a wrong that has been done to an individual. It is a deprivation of his legal rights for which the directors are personally and individually liable. He has a right by the constitution of the company to take a part in its management, to be present, and to vote at the meetings of the board of directors. He has a perfect right to know what is going on at these meetings."

Reference may be made in this connection also to a Bench ruling of this Cour (of Curgenven and Cornish, J.), in *Srinivasan* v. *Watrap Subramania Aiyar*[4], where after pointing out the distinction between the class of cases illustrated by *Pulbrook* v. *Richmond Consolidated Mining, Co.*[2], on the one hand and the class of cases illustrated by *Foss* v. *Harbottle*[1], on the other the learned Judges ruled that :

> "The Court has jurisdiction to entertain a suit by shareholders against the Company in respect of an infringement of their individual rights as shareholders when the interests of justice so require and a suit in substance to establish and enforce the right of a shareholder to exercise his vote is therefore maintainable at the instance of a single shareholder."

It is perfectly clear to my mind that in the case before me that plaintiff is suing in respect of an individual wrong and not a wrong in which all the shareholders generally and as a body, only are interested. He is asking it to be declared—and that is principally a matter of concern for him—that he has not ceased to be the Managing Director and that the first defendant has not become that in his place. The question of the maintainability of the suit must therefore be answered in favour of the appellant before me.

Turning to the other question arising for determination I must state that the lower appellate Court's finding as to what happened on 3rd November, 1948, is contained in paragraph 16 of its judgment which I may as well quote :

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1. (1843) 2 Hare 461 : 67 E.R. 189.
2. (1878) 9 Ch. D. 610.
3. (1928) 55 M.L.J. 385, 398.
4. (1931) 61 M.L.J. 724.

"There is no evidence as to what actually happened, as to whether the requisitionists and other members assembled for the meeting at the registered office and finding it locked adjourned to 286, Kallukatti East Street and there held the meeting. But it was admitted that the meeting was actually held there at 5-15 P.M. It is not disputed that 286, Kallukatti East Street is a residential place of the parties, who are close relations, within a few yards from the registered office of the company. Only appellants 1, 2, and 4 attended the meeting and the 1st respondent did not attend it. It is not suggested that any other member turned up at the registered office and went away or was prevented from attending the meeting held at 286, Kallukatti East Street, for want of notice. In view of the first respondent's *volte face* at the trial and in view of his admission, the appellants did not adduce any oral evidence. In the circumstances, in view of the pleadings and the admissions made by the first respondent at the trial, it is quite likely that appellants 1, 2 and 4 assembled at the registered office for the meeting but the 1st respondent locked up the premises and made the registered office not available for the meeting to be held there at 5 P.M. and did not give them any facilities for holding the meeting and that consequently they adjourned to 286, Kallukatti East Street, a few yards away and held the meeting there at 5-15 P.M. and passed the resolutions complained of there at that meeting to the knowledge of the 1st respondent. This could reasonably be presumed under section 114, Evidence Act, having regard to the common course of natural events, human conduct, and public and private business, in their relation to the facts of this particular case."

This, it is said, by Mr. Bhashyam, the learned advocate for the appellant, is not a finding of fact which I should accept ; it is a mere surmise and speculation which should never be regarded as an effective substitute for proof. I am not prepared to accept the argument. It seems to me rather that what the learned Judge has recorded in paragraph 16 is an inference of fact from the admitted circumstances of the case gleanable from the endorsement on the plaint, the contents of the minute book and the probabilities of the case.

Accepting this view of the lower appellate Court for the purpose of his argument Mr. Bhashyam urges (1) that the meeting actually held at No. 286, Kallukatti East Street, was not the outcome of an adjournment of a meeting fixed for one place to another place so that the proceedings at the latter place may be regarded as a continuation of the meeting initiated earlier at the former place, and (2) that if on account of the plaintiff's conduct it became impracticable for the requisitionists to conduct the meeting of the company at its registered office the proper remedy to be pursued was either to take steps for a fresh meeting under the Indian Companies Act or to move the Court under section 79 (3) of the Act to order the meeting to be held and conducted in such manner as the Court may think fit. Against the latter contention Mr. Gopalaswami Aiyangar has urged that section 79 (3) of the Act applies only to cases where for any reason it is impracticable to call for a meeting of a company or to conduct it and not to cases in which it is impracticable to hold it. Learned counsel seeks to make a distinction between the holding of a meeting which according to him applies to the stage preliminary to the choice of the chairman and the conducting of a meeting which applies to the stage thereafter. I am not satisfied that this distinction which is undoubtedly subtle is at all sound. In my opinion the expression "to conduct" in the provision of the statute includes the stage prior to the choice of the chairman, and the impracticability in the conducting of the meeting did nonetheless exist in the present case because in the matter of the assembling of the shareholders at the premises of the registered office there was difficulty. The fact that the words "held" and "conducted" are both to be found used in the provision of the statute in relation to the order to be made by the Court if the impracticability contemplated by it arises, affords no gound in support of the contention of counsel, It became impracticable in the circumstances of this case to conduct the meeting of the company in the registered office. Whatever the reason for it might be, sub-section (3) of section 79 says that it would be open for the Court either on its own motion or on the application of any director of the company or of any member of the company entitled to vote at the meeting to order a meeting of the company to be called, held and conducted in such manner as the Court thinks fit. The restricted interpretation sought to be put upon the statutory provision by learned counsel for the respondents must accordingly be repelled.

The contention of the learned Counsel for the appellant that there was no adjournment from the registered office to No. 286, Kallukatti East Street, arises on the presupposition that the adjournment must be after a regular meeting is

first held with a chairman. Regulation 55 of Table A of the Indian Companies Act is referred to in this connection. That provides :

"The Chairman may with the consent of any meeting at which a quorum is present (and shall if so directed by the meeting), adjourn the meeting from time to time and from place to place."

It is said that the place of meeting is very important and only the chairman of the meeting has the privilege of adjourning it. As against this submission for the appellant Mr. Gopalaswami Aiyangar urges that the right to adjourn which is expressed through the chairman where one exists is always a thing inherent in an assembly which can be exercised by it where none exists. In support of their respective contentions learned counsel on both sides have relied upon the case in *Watrap S. Subramania Aiyar* v. *The United India Life Insurance Co., Ltd.*[1], one relying upon what is to be found at page 400 where a reference is made to "the power of the meeting to adjourn itself", the other relying upon what is to be found said at page 402 with reference to Lord Harwicke C.J.'s pronouncement in the case of *Stoughton* v. *Reynolds*[2]. In this last case it was held that the adjournment of a vestry meeting was a common right vested in the parishioners at large and not in the vicar, unless by law or by custom it was shown that the vicar himself had power to adjourn the meeting. I am on the whole of opinion that the reference to "the power of the meeting to adjourn itself" at page 400 of the Report does not involve and imply that there must in every case be a meeting held under a chairman at one place before an adjournment can be said to take place by the actual holding and conducting of a meeting at another place.

In any case I am not satisfied that if there was a violation of law in the present case by reason of the people assembled at the registered office of the company moving on to a place hard by and holding their meeting there in view of the difficulty of the locking up of the registered office with which they were confronted when they were assembled there, the violation is to be regarded as anything more than an irregularity. It does not seem to my mind that the validity of the meeting actually held at No. 286, Kallukatti East Street must necessarily and *ipso facto* be pronounced against in the absence of any proof that a different result would have necessarily followed on a fresh meeting.

One other point which has been debated before me is whether by reason of his conduct in making the premises of the registered office of the company unavailable for the meeting to be held the plaintiff is precluded from complaining of the invalidity of the meeting actually held at 286, Kallukatti East Street. As to this, it is observed by the learned Subordinate Judge in paragraph 20 of his judgment as follows :

"It is urged for the 1st respondent that there is no evidence to show that he was aware of the meeting held at 286, Kallukatti East Street, or of the resolution passed at that meeting and if notice were issued for a fresh meeting to all the members it could not be said that the same result could have followed, *i.e.*, the same resolutions could have been passed at such a fresh meeting. But it is quite probable on the pleadings and the admissions of the 1st respondent that he was aware of the meeting held at 286, Kallukatti East Street, and no fresh notice was necessary therefor and he could not be allowed to make the registered office unavailable for such a meeting to be held there and then contend that the consequent change of venue of the meeting invalidated the meeting and the resolutions passed at the meeting for want of notice. He came to Court with the case that he was waiting for the meeting to be held at the registered office at 5 P.M. anxious to preside at it and take part in it, but nobody came and nothing happened and no meeting was held that day at all either at 286, Kallukatti East Street or anywhere else. But he gave it up as untrue and admitted that a meeting was actually held at 286, Kallukatti East Street and the resolutions complained of were actually passed. It could little avail him to contend that the resolution was invalid for want of fresh notice of meeting."

In support of the view of the learned Judge thus expressed Mr. Gopalaswami Aiyangar relies upon a passage in Broom's Legal Maxims, 8th edition, page 233 and a passage in the judgment in *Watrap S. Subramania Aiyar* v. *The United India Life Insurance Co., Ltd.*[1]. In the case in *Watrap S. Subramania Aiyar* v. *The United India Life Insurance Co., Ltd.*[1], the venue of the meeting of the company had to be changed from its registered office to the Mahajana Sabha Hall on account of

1. (1928) 55 M.L.J. 385. 2. (1736) 95 E. R. 176.

the failure of the company to give those facilities which had been promised by the 7th defendant on behalf of the company. What happened was that after the 7th defendant had said that the company would give all facilities for the meeting, as a matter of fact the company proceeded to appoint its own directors in haste. Having done so, as the learned Judge observes :

" . . . . . it is clear that it refused to give the facilities for the meeting being held in its office and the other facilities which the policy holders desired ; in fact, it clearly and definitely declined to allow the office to be used for the purpose of the adjourned meeting. The policy holders therefore selected the Mahajana Sabha Hall. It was the deliberate act of the defendants that caused this change of venue and Mr. Alladi Krishnaswami Aiyar has argued with great force that it does not lie in the mouth of any one who has by his own act prevented someting taking place afterwards to take exception to that state of affairs and to use that state of affairs for his own benefit. I think that that argument is a perfectly sound one. It seems to me that it would be a travesty of the law if a person who has deliberately brought about a state of affairs should be allowed to take exception to that state of affairs and use that changed state for his own advantage."

The learned Judge then proceeds to discuss the two English cases, *New Zealand Shipping Co.* v. *Societe des Ateliers et Chantiers de France*[1] and *Quesnel Forks Gold Mining Co., Ltd.* v. *Ward and others*[2] and winds up thus :

" I think that the defendants cannot be heard to say that the change of venue was an irregularity such as to make the meeting of the 5th May invalid."

The passage in Broom's Legal Maxims relied upon before me is part of the discussion of the maxim "*Nullus commodum capere potest de injuria sua propria*"—No man can take advantage of his own wrong—to be found at pages 191 to 200 of the tenth and latest edition of the work. There the rule and its limitations are pointed out in a very exhaustive treatment. The maxim which is based on elementary principles, as is said in that work, is fully recognised in Courts of law and equity and, indeed, admits of illustration from every branch of legal procedure. It is therefore a sound principle, as observed at page 193 that " he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned". Then as observed at page 195, the maxim applies also with peculiar force to that extensive class of cases in which fraud has been committed by one party to a transaction, and is relied upon as a defence by the other. It is pointed out at page 197 citing the Latin maxim "*Allegans contraria non est audiendus*" that " a person who has expressly made a verbal representation, on the faith of which another has acted, shall not afterwards be allowed to contradict his former statement, in order to profit by that conduct which it has induced." Finally, it is said at page 199 :

" In *Hooper* v. *Lane*[3], which strikingly illustrates the rule that 'no man shall take advantage of his own wrong', various instances were put by Bramwell, B., showing that the rule only applies to the extent of undoing the advantage gained, where that can be done, and not to the extent of taking away a right previously possessed."

It is argued by Mr. Bhashyam that the case in *Watrap S. Subramania Aiyar* v. *The United India Life Insurance Co., Ltd.*[4], was one in which there was a separate meeting held in the changed venue after the earlier meeting had become frustrated, and that therefore it cannot be applied as being of sufficient parity on facts, to the case on hand. It is urged therefore that except that his client cannot dispute the necessity for the meeting which came to be actually held at 5-15 P.M. on 3rd November, 1948, in other premises he is not estopped from relying upon the invalidity of that meeting in order to invalidate the resolution passed at it. Mr. Bhashyam also urges that at best his client's conduct might be a matter for consideration on a question of costs and would not preclude an argument of the kind which has been advanced by learned counsel against the validity of the meeting held at Door No. 286, Kallukatti East Street and of the resolution passed at it, removing his client from the office of Managing Director and appointing the first defendant in his place. I have carefully considered the matter and have come to the conclusion that the way in which Mr. Bhashyam seeks to get over the point of estoppel is not sound. The facts with reference to which he distinguishes the

1. (1919) A.C. 1 (H.L.).
2. (1920) A.C. 222 (P.C.).
3. (1857) 6 H.L.C. 443 : 10 E.R. 444.
4. (1928) 55 M.L.J. 385.

case in *Watrap S. Subramania Aiyar* v. *The United India Life Insurance Co., Ltd.*[1], do not in the least affect the principle which really falls to be applied to this class of case. There is no reason why that principle which is so fully discussed in *Watrap S. Subramania Aiyar* v. *The United India Life Insurance Co., Ltd.*[1], with reference to the English cases and which is of very extensive application in a variety of cases as pointed out in Broom should not be actually held applicable to the case on hand, as it was held applicable to the case in *Watrap S. Subramania Aiyar* v. *The United India Life Insurance Co., Ltd.*[1]. The differentiation attempted by learned counsel between that case and this is on an accident of fact and not on an essential of legal principle.

In the result the second appeal fails and is dismissed with costs. No leave.

V.P.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE BASHEER AHMED SAYEED.

T. Venkateswara Rao and others .. *Petitioners.**

Criminal Procedure Code (V of 1898), section 491—Rehearing habeas corpus *application disposed of on merits though party was absent—Permissibility.*

There is no provision of law which enables the Court to rehear an application for a writ of *habeas corpus* which had been disposed of on the merits by the Court after examining the materials placed before it, even though the party or counsel was not present at the time the petition was heard. An application for a writ of *habeas corpus* is of a criminal nature and no review is allowed in such matters.

Petition praying that in the circumstances stated in the respective affidavits filed therewith the High Court will be pleased to restore to file Crl.M.P. Nos. 1393, etc., of 1950 respectively to the file of the High Court and rehear them or to grant leave to the respective petitioners to appeal to the Supreme Court against the orders of the High Court, dated 27th July, 1950, in the said Crl. M. P. Nos. 1393 of 1950, etc.

Counsel not appearing on behalf of the Petitioners.

The Order of the Court was made by

Govinda Menon, J.—These are applications by the various petitioners therein for restoring applications which had been disposed of on the merits by this Court. The reasons alleged are that at the time the applications were heard the petitioners were not present in Court.

There is no provision of law which enables the Court to rehear an application for a writ of *habeas corpus* which had been disposed of on the merits by the Court after examining the materials placed before it, even though the party or counsel was not present at the time the petition was heard. Once the application had been looked into and disposed of on the merits there is no provision either in the Criminal Procedure Code or any other law for the time being in force which empowers the High Court to rehear such an application. An application for a writ of *habeas corpus* is of a criminal nature and no review is allowed in such matters. We are, therefore, of the opinion that these applications are not maintainable and are therefore dismissed.

In the alternative, in each of these petitions there is a prayer for granting the petitioner leave to appeal to the Supreme Court against the judgment of this Court. It seems to us that in view of the recent pronouncement of the Supreme Court in *Machiralla Shivaji* v. *The King*[2], where Patanjali Sastri, J., in delivering

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1. (1928) 55 M.L.J. 385.

* Crl.M.P. Nos. 2031 to 2037 of 1950. 3rd October, 1950.

2. A.I.R. 1950 F.C. 129.

the judgment of the Court expressed the opinion that if the applicant was a member of a communist party which itself was indulging in unlawful and subversive activities, that by itself would be sufficient for the Government of the State to come to the conclusion that his being at large would be prejudicial to the maintenance of public order in the State. Following the observations of the Supreme Court we feel that there is no substantial question of law involved in these cases which would warrant us in granting leave to appeal to the Supreme Court.

All these petitions are therefore dismissed.

V.S. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRA REDDI.

N. N. Meyyammai Achi .. *Petitioner**

v.

Venkatachalam Chettiar .. *Respondent.*

Criminal Procedure Code (V of 1898), section 96—Search warrant—No reasons given for issuing—Legality.

Where a Magistrate has not given any reasons for issuing a search warrant and it does not appear from the records that he had exercised his judicial mind in the case and the action of the Magistrate in the circumstances is very high handed, the order has to be quashed.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Additional Sub-Magistrate, Karaikudi, dated 4th March, 1950, in C.C. No. 292 of 1950.

C. K. Venkatanarasimham and *V. V. Radhakrishnan* for Petitioner.

G. N. Chari, P. Basi Reddi and *T. S. Santhanam* for Respondent.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

The Court made the following

ORDER.—This is a petition in revision to quash the search warrant issued under section 96, Criminal Procedure Code, on 4th March, 1950, by the Additional Sub-Magistrate of Karaikudi under the following circumstances.

The first accused, who is the father of the second accused, the petitioner herein, adopted the complainant in June 1920. Sometime thereafter, that is, in or about the year 1929, misunderstandings arose between accused 1 and the complainant for reasons which it is unnecessary to state here and the complainant was living away from the first accused and his family. The partition of the family properties having been effected sometime in the year 1939, the complainant executed a release deed in consideration of his having received a sum of about a lakh of rupees. Thereafter, an attempt was made by the sons of the complainant to have the release deed set aside on grounds of undue influence and inadequate consideration, which proved unsuccessful. On 4th June, 1949, the first accused's wife died leaving behind her some stridhana property. Within a few months of the death of the first accused's wife, *i.e.*, the adoptive mother of the complainant, the complainant filed a complaint before the Additional Sub-Magistrate of Karaikudi alleging that the stridhana properties belonging to his adoptive mother, which devolved on him under some custom or usage to be set up by him, and also certain documents which would prove his case, were in the possession of the first and second accused who have not delivered the same to him in spite of his oral request in the presence of some mediators. On the same day he also filed an application for the issue of a search warrant without any independent affidavit in support of that application.

The learned Magistrate issued immediately a search warrant, without satisfying himself about the necessity therefor, authorising and requiring the Sub-Inspector of Police to search all the articles mentioned in the schedule to the

* Crl. R.C. No. 322 of 1950. 20th April, 1950.
(Crl. R.P. No. 305 of 1950.)

order and to produce the same forthwith before that Court. The search warrant authorised the Sub-Inspector not only to take hold of the documents standing in the name of the adoptive mother, *i.e.*, the wife of the first accused, but also such of the documents as were in favour of Meyyammai Achi (the petitioner) *alias* Visalakshi Achi and all other items of properties as may be pointed out by the complainant wherever they may be found.

The first and the second accused coming to know of the issue of the search warrant, when the Sub-Inspector, followed by a number of constables, went to their house, filed an application before the Magistrate for withdrawing the search warrant. But the learned Magistrate, without recalling the warrant, dismissed it making the following observation :

"It is not desirable to recall the warrant. The Sub-Inspector will be asked to make out a list of the stridhanam properties of the deceased Alamelu Achi found in the house of A. 2 and send it to Court instead of sending the properties to Court for remand. The properties, if found, will be returned to her own custody on getting a bond from her for their production in Court when required."

It will be seen that no reasons are given even in this order why the search warrant was originally issued or why the Magistrate considered it undesirable to recall the warrant.

It is to quash this search warrant issued by the Magistrate that the present criminal revision petition is filed.

It is not desirable that I should express any opinion on the merits of the complaint itself. I will therefore content myself with dealing with the question of the legality and the propriety of the search warrant. As I have already stated, the Magistrate has not given any reasons for issuing the search warrant. Nor does it appear from the records, that the Magistrate has exercised his judicial mind in this case. It is not necessary to refer to the various cases cited by Mr. K. S. Jayarama Aiyar, the learned counsel for the petitioner, which lay down that in issuing a search warrant under section 96, Criminal Procedure Code, the Magistrate should be satisfied that it is absolutely necessary to issue such a warrant, that the Magistrate should exercise his judicial mind before issuing the search warrant under section 96, Criminal Procedure Code, and that he must give his reasons for the issue of such a warrant. Nor is it necessary for me to deal with the cases which have been cited by the learned counsel on the other side which are not quite relevant for the decision of the case before me. All that the cases cited by the learned counsel for the respondent lay down is that it is quite competent for a Magistrate to issue a search warrant under section 96, Criminal Procedure Code and that he need not wait for this purpose till a *prima facie* case has been established. I am satisfied that this action of the learned Magistrate is very highhanded, to say the least. I therefore allow the petition and quash the search warrant issued by the trial Magistrate under section 96, Criminal Procedure Code. Anything done in pursuance of the search warrant will be withdrawn.

V.S. ——— *Order quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Attappa Goundan and others .. *Petitioners.**

Penal Code (XLV of 1860), sections 341 and 95—Use of mere words without physical obstruction—Offence under section 341, if committed.

It is doubtful whether, without physical obstruction, by mere words a person can be said to commit an offence under section 341, Indian Penal Code. Even if it is considered an offence, still section 95, Indian Penal Code, will apply.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Sub-Divisional 1st

* Cr. R.C. No. 542 of 1949. (Cr.R.P. No. 492 of 1949). 10th October, 1950.

Class Magistrate's Court, Sankari, in C. A. No. 53 of 1948 confirming the judgment of the Stationary Sub-Magistrate, Tiruchengode, in C.C. No. 1626 of 1949.

V. Rajagopalachari and *E. Subramaniam* for Petitioners.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

The Court made the following

ORDER.—There is no evidence that the petitioner offered physical obstruction. It is doubtful whether, without physical obstruction, by mere words, a person can be said to commit an offence under section 341, Indian Penal Code. Even if it is considered an offence still section 95, Indian Penal Code, will apply. The conviction and sentence are set aside. The petitioners are acquitted. The fines, if paid, will be refunded.

V.S.

Conviction set aside.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

The Public Prosecutor .. *Petitioner.**

The Madras Borstal Schools Act (V of 1926)—Order of detention in a Borstal School to run consecutively with such previous order of detention—Legality.

There is no provision to direct an order of detention in a Borstal School to run consecutively with such a previous order of detention as in the case of a sentence of imprisonment and such an order if made, would be invalid.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of detention, dated 6th May, 1950, in C.C. No. 5 of 1950, Sub-Divisional Magistrate's Court, Narasaraopet.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) for Petitioner.

The Court made the following

ORDER.—The learned Public Prosecutor is right when he says that there is no provision to direct an order of detention in a Borstal School to run consecutively with such a previous order of detention, as in the case of a sentence of imprisonment. Besides, detention in a Borstal School is a reformatory measure, like admonition, and there is a little point in piling detention on detention any more than in giving admonition after admonition. So, the learned Magistrate's order directing this detention to be *consecutive* to the previous one is set aside, and the detention directed here is allowed to be merged in the previous detention (ordered in C.C. No. 6 of 1950, Sub-Divisional Magistrate, Narasaraopet) and to run concurrently with it till that term is over.

V.S.

Petition allowed.

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*Crl.R.C. No. 695 of 1950.
(Crl.R.P. No. 639 of 1950).

27th June, 1950.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VISWANATHA SASTRI.

P. V. Eswara Iyer ... *Petitioner**

v.

Sankunni Nair ... *Respondent.*

Malabar Tenancy Act (XIV of 1930), sections 13 and 50—Original petition for fixing fair rent and directions that tenant should pay one year's rent in advance or furnish security—Interlocutory order appointing receiver—Appealability where final order in the original proceeding is itself not open to appeal.

The landlord applied by an original petition under section 13 (2) and (3) of Malabar Tenancy Act for fixing fair rent in respect of the holding of the tenant and for a direction that he should pay one year's fair rent in advance or furnish security. On the default of the tenant to furnish security as directed by the Court an interlocutory application for appointment of a receiver was allowed. The tenant filed an appeal against the order appointing receiver and the appellate Court reversed the order. On a contention in revision that the appeal to the lower appellate Court was incompetent,

Held : The Legislature has in section 50 (1) of the Malabar Tenancy Act expressly made Order 40 of the Civil Procedure Code applicable to proceedings under the Act. Order 43, rule 1 (*s*), Civil Procedure Code, grants a right of appeal against an order appointing or refusing to appoint a receiver under Order 40, rule 1. When Order 40, rule 1, Civil Procedure Code, was incorporated in the Malabar Tenancy Act as part of the procedure applicable to proceedings under the Act, it carried with it the right of appeal given by Order 43, rule 1 (*s*), Civil Procedure Code. There is nothing in the Malabar Tenancy Act restricting or displacing the right of appeal which is attracted by the incorporation of Order 40, rule 1, Civil Procedure Code, in section 50, clause (1) of the Act.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Palghat in C.M.A. No. 13 of 1949, preferred against the order of the Court of the District Munsif of Palghat, dated 20th day of April, 1949, and made in I.A. No. 2619 of 1948 in O. P. No. 140 of 1948, etc.

C. S. Swaminathan for Petitioner.

C. K. Viswanatha Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—These Civil Revision Petitions raise a question of law of some importance and that is, whether an appeal is maintainable against an interlocutory order appointing a receiver in an original proceeding other than a suit, when the final order in the original proceeding is itself not open to appeal. The landlord, here petitioner, applied in O.P. Nos. 139 to 141 of 1948 on the file of the Court of the District Munsif of Palghat, under section 13 (2) and (3) of the Malabar Tenancy Act, for fixing the fair rent in respect of the holding of the tenant, here respondent, and for a direction that he should pay one year's fair rent in advance or furnish security for the rent. There were interlocutory applications filed for the appointment of a receiver in case the tenant defaulted to pay the rent or furnish security. By his order, dated 9th April, 1949, the District Munsif directed the tenant to furnish security for Kanni rent on or before 20th April, 1949, but the tenant failed to comply with this order. On the landlord's applications I.A. Nos. 2618 to 2620 of 1948 in O.P. Nos. 139 to 141 of 1948 praying for the appointment of a receiver for the holdings of the tenant the District Munsif appointed a receiver. The tenant filed C.M.A. Nos. 11 to 13 of 1949 in the Court of the Subordinate Judge of South Malabar at Palghat, against the orders of the District Munsif appointing a receiver. The appellate Court reversed the orders of the Munsif on the ground that there were no sufficient grounds for dispossessing the tenant by the appointment of a receiver. The landlord has preferred these Civil Revision Petitions against the orders of the appellate Court.

Mr. C. S. Swaminathan, the learned advocate for the petitioner, contends that the appeals preferred by the tenant to the Court of the Subordinate Judge were incompetent and that the orders passed by the appellate Court were without

* C.R.P. Nos. 1273 to 1275 of 1949. 22nd September, 1950.

jurisdiction. Both sides relied on section 50 of the Malabar Tenancy Act (XIV of 1930) which runs as follows :—

"50. (1) The Procedure provided as regards suits in the Code of Civil Procedure, 1908, including Orders XXXVIII, XXXIX and XL of the first schedule, shall be followed as far as it can be made applicable in all proceedings relating to applications under this Act.

(2) Appeals shall lie from orders made under sections 12, 23, 25, 30, 31, 34, 35 and 36 as if they were decrees in suits."

The argument of the petitioner is that an order under section 13 is not made appealable by section 50 (2) and where the final order on the main proceeding itself is not open to appeal, an interlocutory order by way of appointment of a receiver, made during the pendency of that proceeding, is not appealable. For the respondent it is contended that under section 50 (1) of the Act the provisions of Order 40, rule 1, Civil Procedure Code, are expressly made applicable to proceedings under section 13 of the Act, and the landlords have invoked the provisions of Order 40, rule 1, Civil Procedure Code, by applying for the appointment of a receiver. The order made on his application was one made under Order 40, rule 1, Civil Procedure Code and was therefore open to appeal under Order 43, rule 1, sub-clause (*s*), Civil Procedure Code. No decision exactly in point was cited by the learned counsel, but some decisions were relied upon by way of analogy.

The petitioner relied upon *Ramanayya* v. *Kotayya*[1], where this Court held that no appeal lay under clause 15 of the Letters Patent against an order of a single Judge refusing to grant leave to appeal from his judgment in a second appeal. He also referred to In re *Veerasami Padayachi*[2], where it was held that an order of a single Judge refusing to review his judgment in a second appeal was not appealable under clause 15 of the Letters Patent. I might also refer to the recent decision in *Kumarappa Chettiar* v. *The Official Receiver, West Tanjore*[3], where the decisions in *Ramanayya* v. *Kotayya*[1] and in In re *Mangalam Govinda Row*[4], were followed and an order refusing leave to appeal in a second appeal was held not to be appealable under clause 15 of the Letters Patent. The *ratio decidendi* of these cases was that an order granting or refusing leave was part of the decision on the merits of the second appeal itself and not an independent order apart from the decision. Since the decision on the second appeal was open to a further appeal only with leave, an order refusing leave which was part of the decision itself could not be treated as an independent order appealable without leave. I consider that these decisions have no application because the order appointing a receiver was a judicial order having a separate and independent existence of its own, apart from the order of the original petitions filed under section 13 of the Malabar Tenancy Act. In my opinion, the merits of the order appointing a receiver could be canvassed on appeal independently of the merits of any final decision or order that might be rendered on the main petition. The petitioner also relied on the decisions in *Thomas Souza* v. *Gulam Moideen Beari*[5] and *Kanai Lal Ghose* v. *Jatindra Nath Chandra*[6], to the effect that an order in execution of a decree passed under section 9 of the Specific Relief Act was not appealable. But this conclusion was based on the express language of section 9 that "no appeal shall lie from any order or decree passed in any suit". The word "suit" was construed as being wide enough to include execution proceedings also.

These decisions do not lead to the conclusion that merely because a final order in an original proceeding is not open to appeal interlocutory orders made during the pendency of the proceeding become unappealable. It is, of course, a trite proposition that an appeal lies only if it is granted by statute. The Legislature can provide for a right of appeal against an interlocutory order in a proceeding even though the final order on that proceeding is not made appealable, or it might provide that an interlocutory order shall be open to appeal only in cases where an

1. (1929) 57 M.L.J. 398 : I.L.R. 52 Mad. 952.
2. (1938) 1 M.L.J. 402 : I.L.R. (1938) Mad. 633.
3. (1949) 2 M.L.J. 641.
4. (1935) I.L.R. 59 Mad. 293.
5. (1902) I.L.R. 26 Mad. 438.
6. (1917) I.L.R. 45 Cal. 519.

appeal would have lain from the final order in the main proceeding. An example of the former class of cases would be found in section 96 read with Order 23, rule 3, and Order 43, rule 1, clause (*m*), Civil Procedure Code, under which an order recording a compromise is appealable, but not a decree passed on the compromise. See *Govindaswami* v. *Kaliaperumal*[1]. An example of the latter class of cases is found in Order 43, rule 1, clause (*u*) read with Order 41, rule 23, Civil Procedure Code. An intermediate position is envisaged in section 102, Civil Procedure Code, which allows one appeal but not a second appeal from an order in execution of a small cause decree when the decree is under execution on the original side of the Court, if the value of the subject-matter of the suit does not exceed Rs. 500. The small cause decree itself is not open to appeal, but an order in execution of the decree made on the original side is open to appeal. I am therefore unable to accept the broad proposition for which the petitioner contends. In my opinion, it all depends on what provision has been made by the Legislature by way of a grant of a right of appeal in each particular case.

In the present case, section 50 (2) of the Malabar Tenancy Act does not include an order under section 13 in the category of appealable orders. The orders specified in section 50 (2) are made appealable as if they were decrees, that is to say, they would be open to an appeal and a second appeal conformably to the provisions of sections 96 and 100, Civil Procedure Code. The Legislature has in section 50 (1) of the Act expressly made Order 40 of the Civil Procedure Code applicable to proceedings under the Act. Order 43, rule (1), clause (*s*), Civil Procedure Code, grants a right of appeal against an order appointing or refusing to appoint a receiver under Order 40, rule 1. When Order 40, rule 1, Civil Procedure Code, was incorporated in the Malabar Tenancy Act as part of the procedure applicable to proceedings under the Act, it carried with it the right of appeal given by Order 43, rule 1, clause (*s*), Civil Procedure Code. There is nothing in the Malabar Tenancy Act restricting or displacing the right of appeal which is attracted by the incorporation of Order 40, rule 1, Civil Procedure Code, in section 50, clause (1) of the Act. It must be remembered that the application for the appointment of a receiver was made to an ordinary civil Court subject to the appellate jurisdiction of the District Court and the High Court and not to a special tribunal or judicial officer functioning as *persona designata*. The Court was here appealed to as one of the ordinary courts of the country. The effect of section 13 of the Malabar Tenancy Act was merely to invest the Court with jurisdiction over the new subject-matter dealt with by that section. The proceeding was a judicial proceeding and the order appointing a receiver was a judicial determination under Order 40, rule 1 of the Civil Procedure Code. If the Court of the District Munsif had all the powers and jurisdiction conferred by Order 40, rule 1, of the Code in the matter of appointing a receiver and dispossessing the respondent—and this is the true position according to both sides—it is not possible to hold that the decision of the District Munsif was not open to appeal, which was attracted to every order made under Order 40, rule 1, by virtue of Order 43, rule 1, clause (*s*), Civil Procedure Code. The general principle applicable to cases of this kind was thus stated by Viscount Haldane, Lord Chancellor in *National Telephone Co.* v. *Post-master General*[2]:

> "When a question is stated to be referred to an established Court without more, it imports that the ordinary incidents of the procedure of that Court are to attach, and also that any general right of appeal from its decisions likewise attaches".

It may be that a particular case is taken out of this general principle by special enactment. There is none such in the present case. On the other hand, the procedure prescribed by the Civil Procedure Code is expressly made applicable by section 50 (1) of the Malabar Tenancy Act to proceedings under the Act, and there is no prohibition of an appeal. In *Adikappa Chettiar* v. *Chandrasekhara Thevar*[3] Lord Simonds, delivering the judgment of the Judicial Committee, held that:

1. A.I.R. 1921 Mad. 696.
2. (1913) A.C. 546.
3. (1948) 1 M.L.J. 41 : L.R. 74 I.A. 264 : I.L.R. (1948) Mad. 505 (P.C.).

"Where a legal right is in dispute and the ordinary Courts of the country are seized of such dispute, the Courts are governed by the ordinary rules of procedure applicable thereto and an appeal lies, if authorised by such rules, notwithstanding that the legal right claimed arises under a special statute which does not in terms confer a right of appeal".

To the same effect were the decisions of the Board in *Secretary of State* v. *Chelikani Rama Row*[1] and *Hem Singh* v. *Basant Das*[2]. In view of what I consider to be the clear pronouncement of the Judicial Committee I do not propose to discuss the decisions in *Chandrawati* v. *Jagannatha Singh*[3] and *Shri Devi Amma* v. *Valia Narayana*[4] relied upon by the respondent.

On the merits it is unnecessary to interfere with the order of the lower appellate Court. The receiver who has been in possession has presumably deposited the rents in Court and the petitioner has been paid the rents in arrear or at any rate the bulk of such arrears. I do not agree with all the reasons given by the lower appellate Court for reversing the order of the trial Court. Having regard to the subsequent course of events it is unnecessary to disturb the orders of the lower appellate Court. If the respondent after he is put in possession of the property by the receiver who has been continued by an interim order of this Court commits default in payment of the rent or in furnishing security therefor within such time as the Court thinks fit to allow, it will be open to the petitioner to apply for the appointment of a receiver and such an application should be dealt with on its own merits by the trial Court. The Civil Revision Petitions are dismissed but, in the circumstances, without costs.

K.S. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAGESA SASTRY.

The Saraswathi Vilasam Shanmughanandha Nidhi, Ltd., Vellore, by its Secretary T. S. Nagarathna Pillai and others .. *Appellants* *

v.

V. S. Daivasigamani Mudaliar and another .. *Respondents.*

Company Law—Power of general body of shareholders to fix different or additional qualifications for directors apart from the holding of shares—Special resolution providing for deposit as additional qualification for directors —If ultra vires.

A special resolution passed at the extraordinary meeting of a Bank providing for a holding of a fixed deposit of Rs. 1,000 as an additional qualification for a director is entirely *intra vires* and legal. There is nothing in the policy of the Indian Companies Act or in its language which prohibits additional or different qualifications for directorship apart from the holding of shares.

Appeal against the decree of the Court of the Subordinate Judge, Vellore, dated 25th November, 1946, in A.S. No. 75 of 1945, preferred against the decree of the Court of the District Munsif, Vellore, dated 16th September, 1944, in O.S. No. 317 of 1944.

V. V. Raghavan for Appellants.

G. R. Jagadisa Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—Defendants are the appellants. This appeal arises out of an action instituted by the two respondents who were shareholders and directors of the first appellant company known as "The Saraswati Vilasam Shanmughanandha Nidhi, Ltd.", Vellore. Appellants 2 and 3 who were defendants 2 and 3 in the lower Court were respectively the Secretary and Vice-President of the said Nidhi.

1. (1916) 31 M.L.J. 324 : L.R. 43 I.A. 192 : I.L.R. 39 Mad. 617 (P.C.).
2. (1936) L.R. 63 I.A. 180 : I.L.R. 17 Lah. 146 (P.C.).
3. A.I.R. 1925 Lah. 489.
4. A.I.R. 1929 Mad. 20.

S.A. No. 654 of 1947.

23rd March, 1950.

The suit was for a declaration that a certain resolution passed by the general body on 30th April, 1944, was invalid. The suit is a representative suit.

Article 5 of the Memorandum of Association of the Company is as follows :

"The share capital of the company is Rs. 20,000 divided into 2,000 shares of Rs. 10 each".

The object of the company was to carry on the business of banking. The articles of association of the company provided for the management of the company. Article 21 was as follows :—

"The members of the Managing Committee shall each take not less than 25 shares in the company".

Article 20 ran as follows :

"The Managing Committee shall consist of not less than five persons and not more than ten persons inclusive of the President, Vice-President, Treasurer, Secretary and Auditor."

On the 30th March, 1944, the company issued a notice of general body meeting in pursuance of a requisition under section 78 of the Indian Companies Act. The meeting was to be held on Sunday, the 30th April, at the registered office. The subject noted was as follows :—

"To add to paragraph 21 of the Rules of the Nidhi that 'the directors shall each keep a sum of Rs. 1,000 (one thousand) in fixed deposit."

The meeting was duly held on the 30th April and the following special resolution was passed—

"That the following shall be added to paragraph 21 of the Rules of the Nidhi, namely, 'the directors shall each keep a sum of Rs. 1,000 (one thousand) in fixed deposit'.

It was unanimously resolved by all the members of the general body that this rule shall be binding on the directors functioning at present and the directors who may succeed them hereafter.

It was unanimously resolved by all the members of the general body that in accordance with the provisions of the Indian Companies Act, if the directors commit default in making the fixed deposit aforesaid within 60 days from today they shall be removed without any notice."

The two plaintiffs who were two of the directors then functioning filed this suit on 29th June, 1944 and prayed for a declaration that the resolution of the general body is illegal and void and also that the Court may grant an injunction against the defendants restraining them from removing either the plaintiffs or such other directors who do not comply with the above resolution. There was a prayer for costs and for such other relief as the Court may think fit. The contention in the plaint was that this resolution imposing an additional qualification for directors was opposed to the Indian Companies Act and also to the provisions of the memorandum of association. There was a subordinate contention that the resolution making it applicable to past directors was not properly included in the subject-matter of the agenda as set out in the notice convening the meeting. The trial Court held that there was nothing in the Indian Companies Act which prohibited a company from laying down in its articles a qualification requiring that a director should have a certain amount of fixed deposit in the company. It rejected the argument on behalf of the plaintiffs that the only qualification which could be imposed by the articles was a requirement compelling a director to have a certain number of shares. It was very broadly argued that no other qualification can be imposed by the articles except a share qualification. The trial Court held further that the resolution was passed in the general interests of the company and it could not be characterised as an oppression of the minority by a majority. As regards the wisdom of the policy underlying the resolution as passed, the Court observed that it was not for the Court to substitute its judgment in the matter in the place of the judgment of the shareholders. It also held that the subject-matter as mentioned in the agenda was wide enough to permit the additional resolution that the qualification newly imposed shall be binding on the past directors as well. The action was accordingly dismissed with costs.

On appeal by the plaintiffs the learned Subordinate Judge took the view that this resolution imposing a qualification of having a fixed deposit of Rs. 1,000 was *ultra vires* of the powers of the company. In its view the Companies Act would

not permit an article of that type. The Court was also of the opinion that it contravened section 5 of the Memorandum of Association. On these grounds the Court declared the resolution to be illegal and void irrespective of the fact whether it was in the general interests of the shareholders or not.

The defendants have now come on appeal against this decree of the Subordinate Judge and contend that the special resolution was perfectly in order and there was nothing in the Companies Act to prohibit the same. On behalf of the respondents it was urged that the only qualification which could be imposed on directors was a share qualification, *i.e.*, a requirement necessitating the holding of a certain number of shares by the director. Reference was made to various sections of the Companies Act wherein share qualification of directors is referred to, particularly, sections 84, 93, 103 and Regulation 70 of Table A and Regulation 77. It is true that these sections and Regulations relate to the share qualification, (if any) of the directors as required by the articles. But there is nothing in these sections or Regulations or in any of the provisions of the Indian Companies Act which precludes a company from having other qualifications in addition for directorship, if the article so provided. After the arguments had proceeded to some extent, learned counsel for the respondents admitted that even a share qualification was not compulsory in the sense that you can be a director without having any shares. I can find nothing in the policy of the Indian Companies Act or in its language which prohibits additional or different qualifications for directorship apart from the holding of shares. The holding of shares as has been already pointed out is not a necessary *sine qua non*. We are aware of familiar instances of *ex officio* directors recognised as such and provided for in the articles without a share qualification at all. Equally it is clear to my mind that the shareholders may well desire to have other qualifications for a person to be a director though it may not be a share qualification. There is nothing unreasonable, for instance, in having a minimum age limit with a view to justify confidence in the mature judgment of the person to be appointed, a literacy qualification or even a technical qualification if the requirement of the company's business should justify the necessity for the same in the opinion of the organisers or promoters or shareholders. Indeed, in some cases, it may even be necessary in the interests of security of the State to prohibit a non-national from being in the directorate of a concern of national importance, for instance, one for the manufacture of atom bombs or hydrogen bombs. The presence of an "alien" in the directorate of such a company promoted by a State would obviously be very undesirable. I can find nothing in the Indian Companies Act to preclude a provision for that. In truth the matter is left entirely to the discretion and judgment of the shareholders. I am therefore of opinion differing from the view of the Subordinate Judge and agreeing with the view of the District Munsif, that this special resolution providing for a holding of a fixed deposit of Rs. 1,000 as an additional qualification for a director is entirely *intra vires* and legal. As a matter of fact it is not uncommon to find in the articles of association of several companies a provision that not more than one partner of a firm consisting of more than one partner, or not more than one member of a joint Hindu family consisting of more than one, can be director of a company. Nor is it unusual to find that a director of one bank cannot be a director of another bank, a provision which has now been statutorily introduced in the recent Banking Act of 1949.

Nor can I agree with the view of the Subordinate Judge that this provision offends section 5 of the Memorandum of Association of this company. As already stated, that merely lays down the capital of the company and there is nothing in this new article which is inconsistent with clause 5 of the memorandum.

Respondents' counsel further argued that in essence this requirement for a Rs. 1,000 deposit would amount to an increase of capital. In my opinion it does not amount to an increase of capital at all. This Rs. 1,000 is a fund which is to be kept in deposit only so long as a person is a director and continues to be a director. If he ceases to be a director, obviously, the amount has got to be returned to him. He is entitled to call for its return. If it is share capital, that could not be the

position. Indeed, if it were share capital and an increase of capital, learned counsel himself had to concede that this resolution can be justified as coming within the share qualification clause which, according to him, was not only permitted but was the only clause in respect of qualification of directors. There is no substance, therefore, in this contention either.

In the result it follows, in my opinion, that the declaration granted by the lower appellate Court that the resolution is invalid and the amendment of the article is inoperative should be vacated.

It was next argued that the portion of the resolution relating to the applicability of the new requirement to past directors was not justified. The lower appellate Court does not deal with this matter, because, in the view it had taken, the main resolution itself was illegal. The trial Court decided that the agenda was sufficiently comprehensive and the general body had every right to introduce this part of the resolution also. While I do not dissent from the view of the District Munsif, I think it is unnecessary, however, to rest this judgment on that basis, because admittedly the term of the directors is now over and the respondents can, if at all, only stand for election under the articles as they stand now. It is not necessary, therefore, to deal with this aspect of the matter.

Nor is it necessary to refer to the last contention on behalf of the respondents that the second portion of the resolution providing that in the absence of the fulfilment of the requirement of Rs. 1,000 deposit within two months, the past directors should vacate their place is not justified under Article 22 of the Articles of Association of the company, as they stand unamended, or under any of the provisions of the Indian Companies Act. These matters have now become merely academic by efflux of time.

The second appeal is therefore allowed with costs here and in the lower appellate Court and the decree of the trial Court restored.

Leave refused.

K.C. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE PANCHAPAKESA AYYAR.

Velaga Venkatappayya and others .. *Appellants**

v.

Tripuramallu Punnayya (died) and others .. *Respondents.*

Madras Agriculturists Relief Act (IV of 1938, as amended by Act XXIII of 1948), S. 3 (iii-a)—Interest, meaning of—Construction—Whether can be construed in the light of Explanation to section 8.

"Interest" as defined in section 3(*iii-a*) of the Madras Agriculturists Relief Act would mean anything paid or intended or agreed to be paid over and above the principal sum borrowed. Produce delivered by the debtor to the creditor admittedly if of higher value is certainly a thing paid in excess of what has been borrowed. The excess paid would be 'interest' within the meaning of the section.

Sub-clause (*iii-a*) of section 3 cannot be construed in the light of Explanation II added to section 8 of the Act.

Appeal against the decree of the Court of the Subordinate Judge of Tenali in A.S. No. 164 of 1947, preferred against the decree of the Court of the District Munsif, Tenali, in O.S. No. 267 of 1946.

P. Somasundaram and *P. Suryanarayana* for Appellants.

Y. G. Krishnamurthy for Respondents.

The Judgment of the Court was delivered by

Subba Rao, J.—The question in this second appeal turns on the construction to be put upon section 3 (*iii-a*) of Madras Act IV of 1938.

Some material facts may be briefly stated. The first and second defendants, for themselves and the first defendant as guardian of defendants 3 and 4, executed

* S.A. No. 777 of 1948. 28th September, 1950.

a mortgage deed dated 29th November, 1940, in favour of the plaintiff. The principal sum was Rs. 1,000. It was stipulated therein that the loan should be discharged by delivery of eight annual instalments of 35 bags of paddy each and, in default, each of the instalments should carry interest at 12 per cent. per annum. The defendants paid four instalments. As default was made in regard to the 5th and 6th instalments, the mortgagee filed O.S. No. 267 of 1946 on the file of the District Munsif Court, Tenali, for recovery of the produce payable to him valuing the same at Rs. 11 per bag. Though under the terms of the document, he was entitled to claim interest at 12 per cent. per annum, he was content with claiming $6\frac{1}{4}$ per cent. per annum. The defendants contended that the debt should be scaled down under the provisions of Madras Act IV of 1938. The learned District Munsif held that section 13 of the Act applied, and he accordingly scaled down the debt. He also found that the entire debt on scaling down, came to Rs. 1,368-6-5, and, deducting Rs. 1,115 being the money value of the instalments of paddy already paid, held that the balance payable to the mortgagee would be Rs. 253-6-5. In appeal, the learned Subordinate Judge took the view that, as no interest was payable under the document, the debt was not liable to be scaled down under section 13. The defendants have preferred this second appeal.

Pending the second appeal, the Madras Agriculturists Relief Act was amended by Act XXIII of 1948. In the Amending Act interest has been defined in the following manner :

"'Interest' means any amount or other thing paid or payable in excess of the principal sum borrowed or pecuniary obligation incurred, or where anything has been borrowed in kind, in excess of what has been so borrowed, by whatsoever name such amount or thing may be called, and whether the same is paid or payable entirely in cash or entirely in kind or partly in cash and partly in kind and whether the same is expressly mentioned or not in the document or contract if any."

Under this definition, anything paid or intended or agreed to be paid over and above the principal sum borrowed would be deemed to be "interest" under the Act. As the produce delivered by the defendants to the plaintiff was, admittedly, of higher value than the principal amount to the extent of the excess, it is certainly a "thing paid" in excess of what has been borrowed. If so, the excess paid would be "interest" within the meaning of section 3 (*iii-a*) of Madras Act IV of 1938.

But Mr. Krishnamurthi, learned counsel for the respondent, argued that to constitute "interest" within the meaning of the definition, the parties to the agreement should be able to predicate on the date of the agreement that there would be an amount in excess of the principal advanced. This argument is contrary to the plain meaning of the express words used. Under the terms of the section, the recitals in the document are not relevant. Indeed, section 3 (*iii-a*) clearly says that if the other conditions are complied with it is immaterial whether "interest" is expressly mentioned or not in the document or contract. The only condition is that the debtor should have paid some amount or thing which was in excess of the money advanced.

It is then contended that if the Legislature intended to give the aforesaid connotation to the word "interest", they need not have added an Explanation to section 8. The Explanation relied on is Explanation II to section 8. It reads :

"Where the principal was borrowed in cash with an agreement to repay it in kind, the debtor shall, notwithstanding such agreement, be entitled to repay the debt in cash, after deducting the value of all payments made by him in kind, at the rate, if any, stipulated in such agreement, or if there is no such stipulation, at the market rate prevailing at the time of each payment."

We cannot construe sub-clause (*iii-a*) of section 3 in the light of an Explanation added to another section. The counsel says that Explanation II was added as the definition of "interest" would not take in a case provided by the Explanation. In our view, it is not permissible to construe section 3 (*iii-a*) in the way learned counsel asks us to do.

Learned counsel for the respondent relied on an unreported decision of Patanjali Sastri, J., in S.A. No. 1141 of 1940. In that case, in regard to a similar document, the learned Judge observed :

"It seems to me clear that they did not contemplate any interest payable on the sum advanced and that all that was intended was that the quantity of paddy fixed should be regularly delivered year by year in consideration of the sum originally advanced no part of which was repayable, apart from the paddy delivered. I do not consider that there is any interest in such a case to be scaled down under the provisions of the Act."

We should think that the word "interest" was introduced by the Amending Act to get over the view expressed by the learned Judge. We, therefore, hold that the judgment of the learned District Munsif is correct. The decree of the appellate Court is set aside and that of the District Munsif restored. The second appeal is, therefore, allowed, but, in the circumstances of the case, without costs. Time for redemption extended by three months from to-day.

K.C. ——— *Appeal allowed.*

[FULL BENCH].

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SUBBA RAO, MR. JUSTICE PANCHAPAKESA AYYAR AND MR. JUSTICE BALAKRISHNA AYYAR.

M. Desikachariar .. *Petitioner**

v.

Ramachandra Reddiar .. *Respondent.*

Madras Agriculturists Relief Act (IV of 1938), section 20—Order on application for stay of execution—Appealability—Revision—Maintainability—Civil Procedure Code (V of 1908), sections 2 (2) and 47—"Decree"—Scope—Order on application for stay of execution—When appealable.

An appeal lies against an order staying or refusing to stay execution of a decree only if the order conclusively determines the rights of the parties so far as the executing Court is concerned. An order under section 20 of the Madras Agriculturists Relief Act certainly complies with the characteristics of a "decree". As it is an order relating to the execution of a decree between the parties to the suit, it is covered by section 47 of the Civil Procedure Code. As such an order affects the rights of the parties in different ways under different contingencies, it will be an order determining the rights of the parties with regard to the Court expressing it as the said question cannot be raised again in the executing Court till the final adjudication is obtained in the application filed in the suit. Whether the application is dismissed or allowed, so far as the executing Court is concerned, the order is final. Accordingly an appeal lies against such an order.

(Authorities elaborately reviewed).

By the Bench (Subba Rao and Panchapakesa Ayyar, JJ.) after expression of opinion of the Full Bench:—As an appeal lies against the order a revision petition is not maintainable.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsif, Arni, in E.A. No. 176 of 1946, in E.P. No. 728 of 1945, and in O.S. No. 553 of 1933.

V. S. Rangaswami Aiyangar for Petitioner.

G. R. Jagadisan for Respondent.

This petition coming on for hearing before Subba Rao, J., on 12th April, 1949, His Lordship made the following

ORDER OF REFERENCE TO A BENCH.

This is a revision against the order of the lower Court dismissing the application under section 20 of the Madras Agriculturists Relief Act (hereinafter called the Act) for stay of the execution of the decree in O.S. No. 553 of 1933. The learned counsel for the respondent raised a preliminary objection that a "revision" is not maintainable as an appeal lies against the order of the lower Court. To appreciate his contention, some of the relevant facts may be stated.

The respondent, Ramachandra Reddiar, filed O.S. No. 553 of 1933 on the file of the District Munsif of Arni on a promissory note executed by the petitioner's father. To that suit the petitioner's father was the first defendant, the petitioner was the fourth defendant and his other brothers were impleaded as defendants 2, 3 and 5. The respondent obtained a decree on 3rd August, 1934. After the passing of the Act, the fifth defendant, one of the sons, filed Application No. 1211 of 1943 and obtained stay of execution of 7th September, 1943. He also filed an application I.A. No. 1605 of 1943 under section 19 of the Act and on 21st March, 1944, the decree was scaled down under the Act. After some infructuous attempts at execution, the respondent ultimately filed E.P. No. 728 of 1945 and attached the petitioner's property and is now bringing them to sale. The petitioner

*C.R.P. No. 42 of 1947. 16th August, 1950.

alleging that he was separated from the other members of the family under a registered deed of partition of the year 1931, filed E.A. No. 176 of 1946 for stay under section 20 of the Act to enable him to file an application for scaling down the decree debt. The learned District Munsif dismissed the present application mainly on the ground that successive applications by different judgment-debtors are not maintainable. He held, as the petitioner was a joint debtor and as the debt has already been scaled down by the Court on an application filed by one of the joint debtors, no further scaling down was permissible under the Act. The fourth defendant has preferred the present revision against that order.

Learned counsel for the respondent contended that an appeal lies against that order under section 20 of the Act and therefore the revision is not maintainable. In *Sreenivasa Odayar* v. *Srinivasa Aiyar*[1], Burn and Stodart, JJ., held that an order passed refusing stay of execution under section 20 of the Act is not appealable. The *ratio decidendi* for the judgment is found in the following passages. At page 497 the learned Judges observed :

"The question raised under section 20 is, we think, not a question between the parties to the decree at all. As we have already indicated, section 19 of the Madras Act IV of 1938 provides for the application of the judgment-debtor for the scaling down of the decree and section 20 we consider to be a provision merely ancillary to section 19."

Later on they add :

"A reading of section 20 by itself seems to us to indicate clearly that the only question which arises under that section is a question between the executing Court and the applicant and not a question between the parties to the decree."

It is contended that this judgment is no longer good law in view of the later Privy Council decisions in *Adikappa Chettiar* v. *Chandrasekhara Thevar*[2]. It is necessary to state briefly the facts of that case to appreciate this contention. On 15th September, 1925, a final decree was passed in a mortgage suit. The decree-holder took out execution petition No. 79 of 1933 to enforce the final decree and certain of the mortgaged properties were advertised to sale. But before the sale had been effected, the Act was passed in March 1938. On 8th July, 1938, the judgment-debor filed E.A. No. 237 of 1938 in E.P. No. 79 of 1933 under sections 20, 19, and 8 of the Act and sections 47 and 151, Civil Procedure Code. On 3rd August, 1938, the judgment-debtor has made an independent application, I.A. No. 361 of 1938, for amending the decree in accordance with the provisions of the Act. E.A. No. 237 of 1938 was dismissed on the ground that the judgment-debtor was not an agriculturist. I.A. No. 361 of 1938 was also dismissed on the same ground. Appeals were filed against both the orders and this Court held that no appeal lay against the order in I.A. No. 361 of 1938 but permitted the appellant to convert his appeal into a civil revision petition and allowed the revision. This Court allowed the other appeal and set aside the lower Court's order and remanded it for fresh disposal. The Judicial Committee held that the order in I.A. No. 361 of 1938 was a decree and an appeal lay to the High Court and therefore the revision should not have been entertained. As regards the appeal against the order in E.A. No. 237 of 1938, their Lordships made the following observation :

"The appeal against the order of the 25th July, 1938, was rightly entertained. That order related to the execution, discharge or satisfaction of a decree within the meaning of section 47 of the Code and an appeal therefore lay under section 96."

If these observations meant that every order under section 20 of the Act comes under section 47, Civil Procedure Code and is therefore appealable under section 96, this revision is liable to be dismissed. But the learned counsel for the petitioner contended that the Judicial Committee was dealing only with the order in E.A. No. 237 of 1938 which was certainly one covered by section 47, Civil Procedure Code. He pointed out that the application was under sections 20, 19 and 8 of the Act and sections 47 and 151, Civil Procedure Code and in that application, the Court held that the judgment-debtor was not an agriculturist and therefore dismissed it. His contention was that the said order was passed between the parties in execution conclusively determining their rights within the meaning of the definition of a "decree" in section 2 (2), Civil Procedure Code. He argued that that judgment has no bearing to the present case where the order is simply one refusing to stay the execution of the decree. In the present case also the application under section 20 was dismissed on the ground that the decree was not liable to be scaled down at the instance of the petitioner. It certainly negatives the right of the petitioner to have the decree scaled down and that order was also passed in execution proceedings as the decree was being executed and the properties were brought to sale. Though the present application is not a comprehensive one including the prayer for scaling down, applying the principle laid down by the Judicial Committee, I am inclined to hold that an appeal lies against the lower Court's order. But in view of the aforesaid Bench decision taking a different view, it is desirable to have an authoritative ruling on this point. Further it is necessary to elucidate the scope of the Privy Council judgment in regard to the question of appealability against orders under section 20 of the Act.

It has also been argued that orders in applications for stay of execution are not appealable in view of the fact that the words "or to the stay of execution thereof" which occurred in section 244 of the Civil Procedure Code of 1882 were deliberately omitted in section 47 of the present Code. There was a conflict of decisions on this question between the various High Courts though our High Court took the view that the words omitted might have been regarded as superfluous, for a plea that the

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1. (1939) 2 M.L.J. 495.
2. (1948) 1 M.L.J. 41 : L.R. 74 I.A. 264 : I.L.R. (1948) Mad. 505 (P.C.).

execution of the decree may be stayed is equivalent to the plea that the decree should not be executed and was thus a question "relating to the execution" of the decree (see *Subramania Pillai* v. *Kumaravelu Ambalam*[1] and *Chidambaram Chettiar* v. *Krishna Vathiar*[2]).

For the reasons mentioned above and to avoid a conflict of decisions on a question of procedure which must necessarily arise very frequently, I am of the view that this revision must be posted before a Bench of two Judges.

Pursuant to the above Order this petition coming on before Subba Rao and Panchapakesa Aiyar, JJ., on 9th January, 1950, the Court made the following

ORDER OF REFERENCE TO A FULL BENCH.

This is a revision against the order of the District Munsiff, Arni, dated 17th May, 1945, in E. A. No. 176 of 1946, in E. P. No. 728 of 1945, in O.S. No. 539 of 1933, dismissing the petitioner's application for stay of execution under section 20 of the Madras Agriculturists Relief Act. This petition has been referred by Subba Rao, J., to a Bench of two Judges, in view of the conflict of decisions as to whether an appeal will lie in such cases precluding the maintainability of a revision petition, as the learned counsel for the respondent raised a preliminary objection that only an appeal would lie and not a revision. The learned District Munsiff had dismissed the application mainly on the ground that successive applications by different judgment-debtors were not maintainable and that, as the 5th defendant had filed an application for scaling down and the decree had been scaled down already, another application for scaling down by the petitioner, the fourth defendant and a joint judgment-debtor, would not lie.

The learned counsel for the respondent relied on the ruling in *Swaminatha Odayar* v. *Srinivasa Aiyar*[3], wherein Burn and Stodart, JJ., held that an order refusing stay of execution under section 20 of the Madras Agriculturists Relief Act is not appealable. The *ratio decidendi* for the decision was that the question raised under section 20 was not a question between the parties to the decrees at all and was merely a question between the executing court and the applicant, section 20 being merely ancillary to section 19. The learned counsel for the petitioner relied not merely on various earlier and later decisions holding that the question under section 20 was a question relating to the execution of the decree falling within the section 47, Civil Procedure Code, but also contended that the Privy Council decision in *Adaikappa Chettiar* v. *Chandrasekhara Thirar*[4], had overruled, by implication, the decision in *Swaminatha Odayar* v. *Srinivasa Iyar*[3]. We have looked into the Privy Council decision relied on, and are of opinion that it has not overruled the decision in *Swaminatha Odayar* v. *Srinivasa Aiyar*[3], having not considered this question separately or given a decision on it at all. It merely held that where a petition had been filed under sections 20, 19 and 8 of the Madras Agriculturists Relief Act, in a case where the Court passing the decree and the Court executing it was the same, an appeal would lie under section 47, Civil Procedure Code, if an execution petition were pending, or under section 96, Civil Procedure Code, if an execution petition were not pending, and that in either case, a revision petition would not lie. It held that, in the circumstances of that case, the separate application under section 20 appeared to be redundant. It did not discuss whether an appeal would lie when an application was filed merely under section 20 and where it was not redundant was dismissed. So, it merely overruled the Full Bench ruling in *Nagappa Chettiar* v. *Annapoorni Achi* alias *Karuppayi Achi*[5], which had held that orders under section 19 were not appealable as the right of appeal had not been conferred by the Madras Agriculturists Relief Act holding that a general right of appeal under the Civil Procedure Code (section 47 or section 96) would do.

Then the question is whether we should follow the Bench ruling in *Swaminatha Odayar* v. *Srinivasa Aiyar*[3], as it has held the field for more than ten years, in the interests of uniformity of decision, as urged by the learned counsel for the petitioner, and hold that an appeal would not lie in this case and that a revision petition would lie. But we feel grave doubts about the correctness of the decision in that case, in view of a long line of cases, before and after, taking the view that the question in an application under section 20 is a question relating to the execution, discharge or satisfaction of a decree, under section 47, Civil Procedure Code, and that the correctness of that decision should, therefore, be referred to a Full Bench as the question is an important one arising for decision often, and therefore deserving to be settled authoritatively. In *Chidambaram Chettiar* v. *Krishna Vathiar*[2], a full Bench decision of this Court in 1916 about the construction of an analogous provision, and in *Subramania Pillai* v. *Kumaravelu Ambalam*[1], *Venkatapadu* v. *Ramamurthi*[6], and *Sundaresan* v. *Venkatesiah*[7], this Court has held that the question of the dismissal of a stay application, like the one here, will fall under section 47, Civil Procedure Code and that an appeal will lie. In *Sundaresan* v. *Venkatesiah*[7], which is a decision of 1948, Horwill, J., discussed the case-law relating to the question of the dismissal of an application for stay like this before holding that the question would fall under section 47, Civil Procedure Code and that an appeal would lie against an order refusing stay of execution in a petition under Act XV of 1946, a very similar order to the one here. So, the decision in *Swaminatha Odayar* v. *Srinivasa Aiyar*[3], has not been followed uniformly, earlier and

1. (1915) I.L.R. 39 Mad. 541.
2. (1916) 32 M.L.J. 13 : I.L.R. 40 Mad. 233 (F.B.).
3. (1939) 2 M.L.J. 495.
4. (1948) 1 M.L.J. 41 : L.R. 74 I.A. 264 : I.L.R. 1948 Mad. 505 (P.C.).
5. (1941) 1 M.L.J. 164 : I.L.R. 1941 Mad. 261 (F.B.).
6. (1939) 2 M.L.J. 853.
7. (1948) 2 M.L.J. 421.

later decisions having taken a contrary view. Hence it is necessary to refer the question to a Full Bench in order to set the matter at rest by getting an authoritative ruling. The question referred is whether an order under section 20 of the Madras Agriculturists Relief Act is appealable under section 47, Civil Procedure Code or whether only a revision petition will lie. We accordingly place the matter before the Chief Justice for constituting a Full Bench for considering and deciding this question.

Pursuant to the above Order of Reference this petition coming on for hearing the Court expressed the following

OPINION : *Subba Rao, J.*—The question referred to the Full Bench is whether an order under section 20 of the Madras Agriculturists Relief Act (IV of 1938) is appealable.

Section 20 of the Act reads as follows :

"Every Court executing a decree passed against a person entitled to the benefits of this Act, shall, on application, stay the proceedings until the Court which passed the decree has passed orders on an application made or to be made under section 19 :

Provided that where within 60 days after the application for stay has been granted the judgment-debtor does not apply to the Court which passed the decree for relief under section 19 or where an application has been so made and is rejected, the decree shall be executed as it stands, notwithstanding anything contained in this Act to the contrary."

Under this section, every person entitled to the benefits of the Act may apply for the reliefs mentioned therein. It is, therefore, obligatory on the Court to decide whether the applicant is an agriculturist and is otherwise entitled to the relief under Madras Act IV of 1938. If he is entitled to the said relief stay will be granted, otherwise the application will be dismissed. If stay be granted, the decree-holder will be prevented from executing the decree till the expiry of 60 days from the date of the order if no application under section 19 is filed and if filed till that application is disposed of in his favour. If the application under section 19 goes against him, the stay granted by the Court in effect becomes absolute and the only remedy of the decree-holder is to execute the amended decree. If the application under section 20 is dismissed, the properties of the judgment-debtor may be sold to his prejudice. So, under this section apart from the fact that the Court decides the right of the applicant to relief under the Act, the order passed therein will certainly affect the rights of the parties under the decree.

Whether an appeal lies against such an order will have to be decided on a combined reading of the provisions of section 47, section 2, sub-section (2) and section 96 of the Civil Procedure Code. Sub-section (2) of section 2 of the Civil Procedure Code runs thus :—

"'Decree' means the formal expression of an adjudication which so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint the determination of any question within section 47 or section 144, but shall not include—

(*a*) any adjudication from which an appeal lies as an appeal from an order, or

(*b*) any order of dismissal for default."

The relevant provisions of section 47 of the Code read :

"47. (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit."

Section 96 says :

"96. (1) . . . . . an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court."

It is apparent from the aforesaid provisions that an appeal from an order would lie only if the following three conditions are complied with :

"(1) the order must relate to execution, discharge or satisfaction of the decree between the parties to the suit ;

(2) it shall conclusively determine the rights of the parties with regard to all or any of the matters in controversy ;

(3) such conclusive determination of the rights is with reference to the Court in which such rights are decided."

No doubt, the definition of "decree" in section 2 lends support to an argument that if an order is covered by section 47 of the Civil Procedure Code, it will be deemed to be a decree for the purpose of an appeal. But if this construction be accepted it will make every order made in execution proceedings, whether interlocutory or otherwise, appealable, and the result would be that the execution proceedings would be arrested at every step. An order refusing an adjournment, an order issuing or refusing to issue notice or an order granting or refusing process for the examination of witnesses and many other such orders would be subjected to a right of appeal. I cannot accept such a construction unless the words used in the section are clear and unambiguous. When a formal expression of an adjudication in a suit would be a decree only if it conclusively determines the rights of the parties, I do not see any principle by which an order under section 47 of the Civil Procedure Code should be a decree without complying with that necessary condition. Orders under section 47, Civil Procedure Code, have been brought in under the extended meaning of the decree as they otherwise would not be covered by the main definition as the said orders are not made in a suit. But to attain the status of a decree such orders must possess the characteristics of a decree as defined in the main part of the section. If the meaning of the provisions is, as I have indicated, the order under section 20 of the Madras Agriculturists Relief Act certainly complies with the characteristics of a decree. As it is an order relating to the execution of a decree between the parties to the suit, it is covered by section 47 of the Code. As the right of the applicant for an appropriate relief under the Madras Agriculturists Relief Act in respect of the reliefs granted under the decree is in issue and as the order affects the rights of the parties in different ways under different contingencies, it will be an order determining the rights of the parties. It would also be a conclusive determination of the rights of the parties with regard to the Court expressing it as the said question cannot be raised again in the executing Court till the final adjudication is obtained in the application filed in the suit. Whether the application is dismissed or allowed, so far as the executing Court is concerned, the order is final.

The learned counsel for the appellants contended that an order under section 20 of the Madras Agriculturists Relief Act is summary in character and ancillary to the execution and therefore does not embody any conclusive determination of the rights of the parties, whereas the learned counsel for the respondent pressed on us the extreme contention that *any* order which comes in under section 47 of the Civil Procedure Code is automatically appealable as it would be a decree within the meaning of sub-section (2) of section 2, Civil Procedure Code. His alternative contention was that an order under section 20 of the Madras Agriculturists Relief Act conclusively determines the rights of the parties so far as the executing Court is concerned and therefore is a decree, and appealable. The judgment of Horwill, J., reported in *Veeraraghavayya* v. *Rattamma*[1], certainly supports the learned counsel in his first contention. In that case, the Court dismissed the application filed for stay of execution of the decree pending an appeal. After setting out the provisions of section 47, Civil Procedure Code, the learned Judge observes :

"So if any question arising in execution is determined under section 47, Civil Procedure Code, it automatically becomes a decree by virtue of the wording of section 2 (2) of the Code, whether the order conclusively determines the rights of the parties or not; so that it would seem to follow that if the decision in *Subramania Pillai* v. *Kumararelu Ambalam*[2], was properly decided, then it would directly follow that an order on an application for stay would be a decree within the meaning of section 2 (2) of the Civil Procedure Code."

I cannot agree with the construction put upon the provisions of section 2 (2) of the Civil Procedure Code, by the learned Judge. As I have already pointed out this construction would lead to startling results. Further, so far as I am aware,

1. (1948) 1 M.L.J. 425.

2. (1915) I.L.R. 39 Mad. 541.

the section has never been understood in the manner expressed by the learned Judge.

That an order on a stay petition relates to execution of a decree admits of no doubt. Indeed, in section 244 of the Code of 1882, which corresponds to the present section 47, Civil Procedure Code, the word "as to the stay of execution thereof" occur after the words "execution, discharge or satisfaction of the decree" but those words have been omitted in section 47 of Act V of 1908. But notwithstanding such an omission, Courts have held that the words were omitted as superfluous, for a plea that execution of a decree may be stayed is equivalent to the plea that the decree should not be executed, and, therefore, is a question relating to the execution of the decree. In *Subramania Pillai* v. *Kumaravelu Ambalam*[1], an application was made to the executing Court by one of the judgment-debtors to enter up satisfaction of the decree as against him on the ground that there was an agreement to that effect entered into between himself and the decree-holder prior to the passing of the decree. When an argument was built upon the omission of the words "or to the stay of execution thereof" in section 47, Civil Procedure Code, the learned Judges remarked :

"We are not satisfied that the omission of these words in section 47 of the present Code is any indication that matters relating to stay of execution are not within the section. The words omitted may have been regarded as superfluous."

When a similar argument was advanced in *Chidambaram Chettiar* v. *Krishna Vathiar*[2], Abdur Rahim, O.C.J., observed at page 237 :

"No doubt section 244 of the Code of 1882 specifically mentions 'stay of execution' as a question to be decided by the Court executing the decree but the scheme of the corresponding section 47 of the present Code is not to specify particular questions at all but to include all questions relating to the execution, discharge or satisfaction of a decree as being within its scope."

No doubt, Phillips, J., who differed, struck a different note. In *Jami Venkatappadu* v. *Kannepalli Ramamurti*[3], the learned Judges held that all petitions under sections 19 and 20 of the Madras Agriculturists Relief Act (IV of 1938) must be deemed to be petitions which raised questions relating to the execution, discharge or satisfaction of the decree and therefore come within matters covered by section 47 of the Civil Procedure Code, though the view of the learned Judges that questions under section 19 related to execution has been dissented from and even overruled in later Full Bench decision, their view in regard to the scope of a petition under section 20 cannot be questioned in view of the observations in *Subramania Pillai* v. *Kumaravelu Ambalam*[1] and *Chidambaram Chettiar* v. *Krishna Vathiar*[2]. But though those three decisions support the contention that an application for stay is an application relating to execution within the meaning of section 47, Civil Procedure Code, the learned Judges deciding those cases were neither called upon to decide, nor did they decide, that any order passed therein automatically becomes appealable.

The leading decision defining an order in execution vis-a-vis the definition of decree is reported in *Jogodishwary Debee* v. *Kailash Chandra Lahiri*[4], the learned Judges say :

"It is not every order made in execution of a decree that comes within section 244. If that were so, every interlocutory order in an execution proceeding, such as an order granting or refusing process for the examination of witnesses, would be appealable ; and far greater latitude would be given of appealing against orders in such proceedings than is allowed as against orders made in suits before decree—a thing which could hardly have been intended. An order in execution proceedings can come under section 244 only when it determines some question relating to the rights and liabilities of parties with reference to the relief granted by the decree ; not when, as in this case, it determines merely an incidental question as to whether the proceedings are to be conducted in a certain way."

I accept the said statement as the correct exposition of law relating to the appealability of orders under section 47, Civil Procedure Code. In *Srinivasa Prosad Singh* v. *Kesho Prasad Singh*[5], Mookerjee, J., states his opinion to the same effect but in different words thus :

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1. (1915) I.L.R. 39 Mad. 541.
2. (1916) 32 M.L.J. 13 : I.L.R. 40 Mad. 233 (F.B.).
3. (1939) 2 M.L.J. 853.
4. (1897) I.L.R. 24 Cal. 725 at 739 (F.B.).
5. (1911) 14 C.L.J. 489 : 12 I.C. 745.

"It is not every interlocutory order passed in the course of execution proceedings even though it may decide any point of law which may arise incidental to the decree that can come under section 47 but it must be an order which must determine the rights of the parties in controversy in the execution proceedings."

This statement of law is accepted by Thiruvenkatachariar, J., in *Somu* v. *Chelliah*[1]. The question there was whether an order of the District Munsiff directing the arrest of the appellant was a decree within the meaning of section 2 (2), Civil Procedure Code. The learned Judge held that it was not a decree. He observed :

"The order passed is no doubt one which falls within the terms of section 47 as an order relating to the execution of the decree. But it is not an order relating to the execution of the decree which amounts to a decree as defined in section 2 (2), Civil Procedure Code. The order to have the force of a decree must not only relate to a question which falls within section 47, but it must also determine the rights of the parties with regard to any matter in controversy between them as regards the decree. There are many orders passed under section 47, which though they relate to execution are mere interlocutory orders which do not determine any rights but regulate the procedure as regards the steps which may be taken in aid of the execution of the decree."

This view is also accepted by the Allahabad High Court in *Behari Lal* v. *Badri Prasad*[2]. The order in that case was that the decree-holder must first proceed to realise the balance of the decretal money from defendants 1 to 3 and if he was unable to realise his money from them then alone he could proceed against defendants 4 and 5. The learned Judges held that the order was not appealable. At page 130 the learned Judges expressed the construction of the relevant section in the following manner :

"We think that the word 'determination' in section 2 (2) must be read in the sense of conclusive determination. In other words, the determination must have the characteristics of a 'decree' as defined in the first sentence of section 2 (2). We cannot believe that it was the intention of the Legislature that every order of every description (including interlocutory orders) passed by an execution Court, determining any question at issue between the parties in relation to execution of a decree, should be appealable as a decree."

Venkatasubba Rao, J., in *Beerankutti* v. *Amath Mammu*[3], also understood the section in a similar manner. He accepted the view succinctly stated in *Srinivasa Prasad Singh* v. *Kasho Prasad Singh*[4], as follows :

"Clause (2) of section 2 then provides that the term 'decree' shall be deemed to include the determination of any question within section 47, but shall not include any adjudication from which an appeal lies as an appeal from an order. This extended definition of the term 'decree,' it will be observed, follows the primary definition that the term 'decree' means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit."

In that case as the order was only one of amendment of an execution petition, the learned Judge held that that was not a final adjudication conclusively determining the rights of the parties.

In *Gopalaswami Mudaliar* v. *Thyagarajaswami Devasthanam*[5], Rajamannar, J., (as he then was) considered the judgment of Venkatasubba Rao, J., in *Beerankutti* v. *Amath Mammu*[3], and did not accept the position that interlocutory orders are not appealable. But a perusal of the judgment does not show that the learned Judge did not accept the long-established construction of section 2 (2), Civil Procedure Code, for he held that the order in question though interlocutory in nature was appealable because the order definitely negatived the right claimed by the decree-holder which was the subject-matter of the amendment petition.

In *Mst. Durga Devi* v. *Hansraj*[6], the question was whether an order staying execution till the decision of the appeal fell under section 2 (2) read with section 47, Civil Procedure Code, 1908 and was appealable. The combined effect of section 47, Civil Procedure Code and section 2 (2), Civil Procedure Code, was expressed by the learned Judges in the following manner :

"The combined effect of these sections is that an order passed in execution proceedings will be tantamount to a 'decree' if (*a*) so far as regards the Court passing it, *it conclusively determines*

1. A.I.R. 1929 Mad. 718.
2. 1931 A.L.J. 895.
3. (1936) 71 M.L.J. 256.
4. (1911) 12 I.C. 745.
5. (1947) 2 M.L.J. 235.
6. (1929) I.L.R. 11 Lah. 402.

a question; (b) *arising between the parties* to the suit, in which the decree was passed, or their representatives, and (c) *relating* to the execution of a decree;"

At page 407 the learned Judges quoted with approval the following view of Le Rossignol, J., in *Sardar Khan* v. *Fateh Din*[1]:

"Under the present law, all questions without exception, *i.e.*, all questions which determine the rights and liabilities of the parties in the matter of the execution of the decree are appealable. Now, a decision that execution shall not take place does determine a right for the time being and may have very far-reaching results. Stay of execution is a question relating to execution; it stops execution dead."

In *Kunhikavu* v. *Thattan Kesavan*[2], Panchapagesa Sastri, J., held that an appeal lay against an order under the Madras Tenants and Ryots Protection Act (XVII of 1946). The learned Judge accepted as well established and uncontroverted position when he observed:

"Of course an order sought to be appealed against must involve a final determination of the rights."

Numerous decisions which have not found their way into the law reports have also accepted the same position.

I should not be understood to have accepted the conclusion arrived at on the facts of each case by the learned Judges in the various decisions cited by me, but I have referred to them only in support of the position that unless an order under section 47, Civil Procedure Code, conclusively determines the rights of the parties, so far as that Court is concerned no appeal lies against that order.

The next question is whether in the present case, an order under section 20 of the Madras Agriculturists Relief Act, conclusively determines the rights of the parties so far as the executing Court is concerned. Though there is a practical unanimity on the question whether an order in a stay petition relates to execution or not, there is a sharp cleavage of judicial opinion on the question whether it finally determines the rights of the parties.

I shall now proceed to consider the cases cited before me in an attempt to evolve a principle to reconcile, if possible, the various decisions. The learned counsel for the appellant contended that an order granting or refusing stay under section 20 of the Madras Agriculturists Relief Act is summary in character and is only ancillary to the main application under section 19 of the Act; and in support of this contention he relied upon a number of decisions of this Court.

In *Swaminatha Odayar* v. *Srinivasa Aiyar*[3], Burn and Stodart, JJ., held that no appeal lay against an order under section 20 of the Act. Two grounds were given in support of that view: (1) The question raised under section 20 is one between the executing Court and the applicant; and (2) that section 20 is only ancillary to section 19 and the enquiry contemplated by section 20 was an enquiry of a summary kind and that all that was necessary was that the applicant should show the Court that *prima facie* he was entitled to the benefits of the Act. I cannot agree with the learned Judges when they said that the question under section 20 is one between the Court and the petitioner. As I have already pointed out, under section 20 the Court will have to find out whether the petitioner is entitled to relief under the Act and therefore the order would certainly affect the rights of the parties. When such is the nature of the order it is impossible to say that the question is a matter between the Court and the petitioner. The application will certainly have to be decided between the parties after giving the requisite notice. Even in regard to the second ground I do not see any justification in the provisions of section 20. The Court will have to decide whether the petitioner is *entitled* to relief under the Act. The section does not prescribe the mode of enquiry. It does not say that the Court can pass an order under section 20 on its *prima facie* view. But assuming that the disposal is summary, it does not affect the real question to be decided in

1. (1922) 68 I.C. 751.
2. (1950) 1 M.L.J. 347.
3. (1939) 2 M.L.J. 495.

the case, namely, whether that disposal is a conclusive determination between the parties so far as the Court passing the said order is concerned.

In *Saraswati Ammal* v. *Arabusa Sahib*[1], Wadsworth, J., held that the period of limitation prescribed under the proviso to section 20 does not apply when an application under section 20 of the Act was dismissed for default. In dealing with that question the learned Judge no doubt observed that the executing Court had to be satisfied *prima facie* that the applicant was a person who would be entitled to present the application under section 19 of the Act ; and that section 20 did not contemplate any final decision on the question of the right of the applicant to apply under section 19. The learned Judge also gave other reasons for his view by holding that a dismissal of an application under section 20 for default would not bar a substantive application under section 19. I am not concerned here with the question whether the order under section 20 finally decides the question of the right of the applicant to apply under section 19. I am only concerned with the question whether the decision of an executing Court under section 20 is a final decision conclusively determining the rights of the parties so far as the executing Court is concerned.

In *Narasimha Raju* v. *Brundavanasahu*[2], Abdur Rahman and Somayya, JJ., were dealing with the question whether applications under sections 20 and 19 would lie in the Berhampore Sub-Court under the appellate jurisdiction of the Patna High Court in regard to execution proceedings pending in that Court with reference to the properties which were excluded from its jurisdiction by reason of the constitution of the Orissa Province. If the application under section 20 related to execution it would be maintainable in the Subordinate Judge's Court, Berhampore, by reason of some transitory provisions. In dealing with that question, the learned Judge observed :

"The application under section 20 of Act IV of 1938, could only be made to the Court executing the decree and would have to be regarded in the absence of any authority to the contrary as an application ancillary to the proceedings in execution—its main object being to stay proceedings in execution and nothing more. In that respect it would be like an ordinary application for adjournment which though not an application relating to execution, discharge or satisfaction of a decree must be *prima facie* held to be ancillary in its purpose and not independent in the sense that it would affect the liability under the decree either wholly or partially."

As in their view the proceedings under section 20 were ancillary to execution they held that it was maintainable in the Berhampore Sub-Court. The question whether the proceedings were ancillary or independent may be relevant for an enquiry in that case ; but in this case the question to be considered is whether an order under section 20, whether the proceedings were ancillary or independent conclusively determines the rights of the parties so far as the executing Court is concerned.

The learned counsel for the appellant cited a long catena of cases where it was held that an order in a stay application is not appealable.

In Mangat Rai v. *Babu Ram*[3], a Bench of the Allahabad High Court held that no appeal lies against an order rejecting an application for stay of sale as the order does not involve any question relating to the execution of the decree which would amount to an adjudication conclusively determining the rights between the parties with regard to matters in controversy. The order in that case was a simple one of dismissal of an application for stay of sale.

In *Inayat Beg* v. *Umrao Beg*[4], a Bench of the Allahabad High Court held that an order refusing stay of execution is not a decree within the meaning of section 2 and that no appeal lay against that order. No reasons are given for that view.

In *Janardhan Triambak* v. *Martand Triambak*[5], an application was filed for stay of a decree pending the disposal of another suit in which the petitioner prayed for a declaration that the decree sought to be stayed was void and incapable of execution against him. The learned Judges held that the order was not a decree

1. (1941) 1 M.L.J. 296.
2. (1943) 2 M.L.J. 31.
3. A.I.R. 1929 All. 85 : 112 I.C. 620.
4. A.I.R. 1930 All. 121 (1).
5. (1920) I.L.R. 45 Bom. 241.

on the ground that the question relating to the stay of execution was within the discretion of the Court to which the application was made and that it was certainly not desirable to extend the number of the appealable orders unless there was a distinct authority for such an extension. They also relied upon the omission of the words "or to stay of execution thereof" in section 47.

In *Beharilal* v. *Badri Prasad*[1], the order of the executing Court was that the decree-holder should first proceed to realise the balance of the decretal money from defendants 1 and 2 and if he was unable to realise the money from them, then alone he should proceed against defendants 4 and 5. It was contended for the appellant that the order was one passed by the executing Court under section 47, determining the rights of the parties in execution and it was argued that an appeal lay against that order, but the learned Judges rejected the contention on the ground that the order did not conclusively determine any question in issue between the parties relating to the execution of the decree but merely decided the mode in which the execution should proceed.

In *Hussain Bhai* v. *Beltie Shah Gilani*[2], the learned Judges held that no appeal lay from an order of stay of execution of decree for a definite period. They held that the order did not determine the rights and liabilities of the parties with reference to the relief granted by the decree but merely decided the incidental question whether execution should proceed at once or after an interval of two months.

The learned counsel for the respondent cited before us cases where appeals were entertained against orders of stay. In *Lingam Krishnabhupati Devu* v. *Kandula Sivaramayya*[3], a Bench of this Court held that an appeal lay from an order refusing stay of execution under section 243, Civil Procedure Code (Order 21, rule 29, Civil Procedure Code) pending another suit between a decree-holder and the judgment-debtor. The learned Judges followed the decision of other Courts, but there is no discussion in the judgment.

In *Mst. Durga Devi* v. *Hansraj*[4], the question was whether an order staying execution pending the decision of an appeal is appealable. The learned Judges held that the said order falls under section 2 (2) read with section 47, Civil Procedure Code, and is therefore appealable. The reasoning of the decision is found at page 407, and it is thus stated :

"I respectfully and whole-heartedly agree with the learned Judge that an order, which stays execution of a decree, pending disposal of the appeal against the decree, finally and conclusively determines (so far as the Court passing such an order is concerned,) the very important right of the decree-holder to reap forthwith the fruits of the decree. It is no doubt true that the execution proceedings may, and will be revived after the disposal of the appeal. But in that event, and from that stage, the execution will really be that of the decree of the appellate Court which will have superseded the trial Court of which execution was stayed by the order in question."

This principle equally applies to an order under section 20 of the Madras Agriculturists Relief Act.

In *Har Narainlal* v. *Mathura Prasad*[5], it was held that an order staying execution of a decree in accordance with the provisions of the Temporary Postponement of Execution of Decrees Act amounts to a decree and is appealable. At page 520 the learned Judges observed,

"Now, in the present instance there was a controversy between the parties as to the judgment-debtor's right to have the execution of the decree postponed during the operation of the Temporary Postponement of Execution of Decrees Act. That Act conferred upon judgment-debtors who were agriculturists a very valuable right. The right conferred by section 3 was one which was in dispute between the parties in the execution Court. The order of the Court proceeded upon a determination of that question. The Court conclusively and finally decided that the judgment-debtor was an agriculturist and entitled to the benefit of section 3 of the Act. Once the judgment-debtor had established that he was an agriculturist, then he was, of right, entitled to stay of the execution of the decree against him."

1. A.I.R. 1931 All. 129.
2. (1924) I.L.R. 46 All. 733.
3. (1896) I.L.R. 20 Mad. 366.
4. (1929) I.L.R. 11 Lah. 403.
5. I.L.R. (1940) All. 517 (F.B.).

These observations apply to the facts of the present case.

In *Nagar Chandra Sardar* v. *Kali Pado Das*[1], it was held that an order staying or refusing to stay execution of a decree on the ground that execution was or was not barred was still an order made under section 47, Civil Procedure Code and was subject to appeal as a decree. Stay was asked on the ground that the judgment-debtors were debtors within the meaning of the Bengal Agricultural Debtors Act. The learned Judges held that the decision of the executing Court that the judgment-debtors were not debtors within the meaning of the Act would preclude them from pleading it in a subsequent stage of the execution proceedings and therefore it determined conclusively the question relating to the judgment-debtors' liability with reference to the relief granted by the decree.

In *Mukimannussa* v. *Rameswar*[2] in execution of a decree against the judgment-debtor his holding was sold. The judgment-debtor made an application for setting aside the sale. Subsequently, a notice was issued by the executing Court under section 34 of the Bengal Agricultural Debtors Act but the executing Court refused to stay further proceedings and proceeded with the application for setting aside the sale. It was held that the order refusing to stay the execution was appealable.

In *Sundaresan* v. *Venkatesiah*[3], Horwill, J., held that an order under section 7 of Madras Act XV of 1946 refusing stay of execution was appealable.

I have already considered the decision in *Kunhikkavu* v. *Kattan Kesava*[4], where Panchapagesa Sastri, J., held that an order under section 4 of Act XVII of 1946 is appealable if it involved a final determination of the rights.

Though there is an apparent conflict of authority on the question to be decided, the learned Judges accepted the principle that an appeal lies against an order staying or refusing to stay execution of a decree if the order conclusively determines the rights of the parties. They differed only in regard to the application of the principle to the facts of each case. It is therefore not possible to say that every order in a stay application is appealable. It would be appealable only if it involves a conclusive determination of the rights of the parties so far as the executing Court is concerned. In the present case, as I have already stated, very valuable rights of the parties are decided. In one contingency the temporary stay granted would be extended till the disposal of the application under section 19. If the decree is satisfied after scaling down under section 19, no question of further execution of the decree would arise. If amended, only the amended decree will be executed. Only if the application under section 19 is dismissed can the decree, as it stands, be executed. But till that contingency happens the judgment-debtor would be saved from further execution of the decree. Even from the point of view of the decree-holder his rights would substantially be affected.

At this stage it will be convenient to consider the decision of the Judicial Committee in *Adaikappa Chettiar* v. *Chandrasekhara Thevar*[5], on which the learned counsel for the respondent strongly relied. The facts of that case may be briefly stated. On the 15th of September, 1925, a final decree was passed in a mortgage suit. The decree-holder took out execution petition No. 79 of 1933 to enforce the final decree, and certain of the morgaged properties were advertised for sale; but, before a sale had been effected, the Madras Agriculturists Relief Act came into operation, in March, 1938. On the 8th July, 1938, the judgment-debtor filed E. A. No. 237 of 1938, in E. P. No. 79 of 1933, under sections 20, 19 and 8 of the Act and under sections 47 and 151 of the Civil Procedure Code. On 3rd August, 1938, the judgment-debtor had made an independent application, I. A. No. 361 of 1938, for amending the decree in accordance with the provisions of the Act. E. A. No. 237 of 1938 was dismissed on the ground that the judgment-debtor was

1. I.L.R. (1940) 1 Cal. 393.
2. A.I.R. 1941 Cal. 264.
3. (1948) 2 M.L.J. 421.
4. (1950) 1 M.L.J. 347.
5. (1948) 1 M.L.J. 41 : L.R. 74 I.A. 264 : I.L.R. (1948) Mad. 505 (P.C.).

not an agriculturist. I. A. No. 361 of 1938 was also dismissed on the same ground. Appeals were filed against both the orders, and the High Court held that no appeal lay against the order in I. A. No. 361 of 1938, but permitted the appellant to convert his appeal into a civil revision petition and allowed the revision. This Court allowed the other appeal and set aside the lower Court's order and remanded it for fresh disposal. The Judicial Committee held that the order in I. A. No. 361 of 1938 was a decree and that an appeal lay to the High Court and that therefore, the revision should not have been entertained. As regards the appeal against the order in E. A. No. 237 of 1938, their Lordships made the following observation :

"The appeals against the order of the 25th July, 1938, was rightly entertained. That order related to the execution, discharge or satisfaction of a decree within the meaning of section 47 of the Code, and an appeal, therefore, lay under section 96."

The Judicial Committee pointed out in the judgment that the order made in I. A. No. 361 of 1938 was in the suit itself and that that order was a decree as such and therefore appealable. In regard to the other order in E. A. No. 237 of 1938, their Lordships held it related to execution, discharge or satisfaction of the decree within the meaning of section 47 of the Code, and an appeal therefore lay under section 96. Though the Court happened to be the same, the application under section 19 could not be filed in execution, but it should be by way of an application for the amendment of the decree. Therefore, the fact that sections 19 and 8 were also clubbed up with section 20 could not have empowered the executing Court to decide questions other than those that arose under section 20 of the Act. I am, therefore, inclined to hold that, on the same reasoning, an application under section 20 is a decree appealable under section 96. It may be possible to distinguish the Judicial Committee's decision on the ground that the executing Court in that case purported to decide questions arising under sections 8 and 19 also in execution and that, therefore, an appeal lay against the order purporting to decide valuable rights. But it is not necessary to import fresh reasoning into the judgment of the Judicial Committee as even in an application under section 20 of the Madras Agriculturists Relief Act the rights of the parties are decided. In my view, this decision goes a long way in support of the contention of the learned counsel for the respondent.

In the result, I hold that an appeal lies against an order under section 20 of the Madras Agriculturists Relief Act.

Panchapakesa Ayyar, J.:—I agree.

Balakrishna Ayyar, J. :—I too agree with the answer proposed.

(After the expression of the Opinion of the Full Bench, the Court, Subba Rao, J., delivered the following)

JUDGMENT : As an appeal lies against the order of the lower Court the revision petition is not maintainable.

The petition is dismissed without costs.

K. S. *Petition dismissed.*

[FULL BENCH].

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO, MR. JUSTICE PANCHAPAKESA AYYAR AND MR. JUSTICE BALAKRISHNA AYYAR.

Ps. Ar. Ar. Arunachalam Chettiar .. *Appellant**

v.

Narayanaswami Goundar .. *Respondent.*

Madras Agriculturists Relief Act (IV of 1938)—Person who was insolvent on 1st October, 1937 and 22nd March, 1938, but whose adjudication was subsequently annulled—If has saleable interest in the property.

A debtor who was an insolvent on 1st October, 1937, and 22nd March, 1938, but whose adjudication was subsequently annulled has a saleable interest in the property on the two crucial dates.

Kudithipudi Venkatramayya v. *Mallacharuvu Purdarsekakshudu*, (1942) 1 M.L.J. 491, explained.

Sakhamuri Peapa v. *Nimmaraju Kondayya*, (1948) 1 M.L.J. 290 : I.L.R. (1948) Mad. 872 and *Ganoji Venkata Ramakrishna Rao v. Sambamoorthi*, (1949) 2 M.L.J. 833, approved.

Appeal against the order of the District Court, Coimbatore, dated 14th August, 1948, in A. S. No. 39 of 1948, preferred against the order of the Court of the District Munsiff, Tirupur, dated 26th November, 1947, in I. A. No. 905 of 1946, in O. S. No. 109 of 1924.

N. Sivaramakrishna Aiyar for Appellant.

K. V. Ramachandra Aiyar and *S. Thyagaraja Aiyar* for Respondent.

(This appeal coming on for hearing before Subba Rao and Panchapakesa Ayyar, JJ., on 16th February, 1950, the Court made the following Order of Reference to the Full Bench) :—

This appeal presents a problem, the solution of which depends upon the legal effect of the annulment of an adjudication in an insolvency.

The material facts may be stated. Palani Goundan and his son Chinnathambi Goundan were adjudicated insolvents by the Subordinate Judge of Coimbatore on the 26th September, 1928. In the year 1935 their adjudication was annulled by the Subordinate Judge under section 35 of the Provincial Insolvency Act. On appeal the District Judge reversed that decision and set aside the order of annulment. The High Court, in a revision petition, by an order dated 15th November, 1939, restored the order of the Subordinate Judge annulling the adjudication. After annulment the High Court directed the assets of the insolvents to be handed over to them, except a sum of Rs. 3,600 which the insolvent paid fraudulently to one Periakaruppa Chettiar. In regard to this, the same was vested in the Official Receiver for distribution among the creditors under section 37 of Provincial Insolvency Act.

The petitioner, Arunachalam Chettiar, obtained a decree against Palani Goundan, Chinnathambi Goundan and the respondent, in O. S. No. 109 of 1924. That suit had a prolonged existence on account of the intervening insolvency and the varying situations that arose and in view of the different orders of the Courts. After the annulment of the adjudication by the High Court, the respondent, who is the 4th defendant in the suit, filed I. A. No. 905 of 1946 on the file of the Court of the District Munsiff, Tirupur, for scaling down the decree under Madras Act IV of 1938. The decree-holder contended that the petitioner was not entitled to the relief under the Act in respect of the insolvents' shares in the debt, as when the insolvency was pending, a dividend had been declared out of their assets. Both the District Munsiff and on appeal the Subordinate Judge held that section 21 of Madras Act IV of 1938 had no application as the adjudication was annulled and therefore there was no pending insolvency. The plaintiff has preferred the above appeal.

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*Appeal Against Appellate Order No. 8 of 1949. 16th August, 1950.

Mr. Sivaramakrishna Aiyar, learned counsel for the appellant, contends that though adjudication was annulled in the year 1939, the insolvents had no saleable interests either on 1st October, 1937, or 22nd March, 1938, and therefore the respondent, not being an agriculturist within the definition of the Act, would not be entitled to a relief thereunder. In support of his argument he relied upon a decision of Wadsworth and Patanjali Sastri, JJ., in *Kudithipudi Venkatramayya* v. *Mallacheruvu Pundareekakshudu*[1]. On the other hand learned counsel for the respondent argued that the effect of annulment of adjudication was as if the adjudication had never taken place and therefore on the crucial dates the respondent had saleable interests. To substantiate his contention he pressed into service the decision of Horwill and Balakrishna Aiyar, JJ., in *Gamoji Venkata Ramakrishna Rao* v. *Gullapalli Sambamoorthi*[2].

We find it difficult to reconcile the two decisions on any sound principle of law. The relevant facts in the decision in *Kudithipudi Venkatramayya* v. *Mallacheruvu Pundareekakshudu*[1] are :

The first defendant had been adjudicated an insolvent in November, 1932. On the 1st November, 1938, the insolvency Court passed an order annulling the adjudication owing to the default of the insolvent and directing that under section 37 of the Provincial Insolvency Act the properties should vest in the Official Receiver. After the order was passed the first defendant filed an application for scaling down the debt. The vesting order under section 37 continued to be in force when the said application came to be disposed of. Two contentions were raised before the learned Judges : (1) that section 21 of Act IV of 1938 applied to any person who had been adjudicated insolvent whether or not he remained an adjudicated insolvent during the relevant period, and (2) that by reason of the vesting order the insolvency continued so that the section applied even though it referred to only insolvencies which continued up to the date of the application. The two arguments were negatived. The first contention was negatived on the ground that the words 'who has been adjudicated insolvent under section 21' implied that the debtor should continue to be an insolvent at the time of the application. The second contention was not accepted as the order of annulment relegated the debtor to the position which he occupied before he was adjudicated and the vesting order under section 37 of the Act would not affect the question. As the debtor was an insolvent on the 1st of October, 1937, and 22nd March, 1938, they held that the debtor had no saleable interest on those two crucial dates and therefore he would not be entitled to a relief despite the fact that the adjudication was annulled in 1939.

The facts in *Gamoji Venkata Ramakrishna Rao* v. *Gullapalli Sambamoorthi*[2] may briefly be noticed. In that case a decree was sought to be scaled down. The debtor was adjudicated insolvent on 16th April, 1937. On account of his own *laches* the adjudication was annulled on 5th March, 1941. There was no order vesting the properties or any part thereof in the Official Receiver or any other nominee of the Court under section 37 of the Provincial Insolvency Act. On the facts the learned Judges held that the effect of the annulment of adjudication was to bring about the same state of affairs as if the adjudication has never taken place and therefore on the relevant dates, *viz.*, 1st October, 1937 and 22nd March, 1938, the properties vested in the debtor and he had a saleable interest in the same. The decision in *Kudithipuri Venkatramayya* v. *Mallacheruvu Pundareekakshudu*[1] was cited before the learned Judges. They distinguished that case as follows :

"In that case as in the present case the relevant dates occurred during the period between the adjudication and the annulment of the adjudication. But the learned Judge (District Judge) overlooked the distinction between that case and this, in that there, upon the annulment of the adjudication, it was ordered that the property should continue to vest in the Official Receiver. If it had revested in the insolvent then the date on which the revesting would be deemed to have taken place would be the date on which the original order of adjudication was passed, which would in effect mean the wiping out of the intermediare period. Where, however, at the time of annulment of the adjudication the order is passed continuing the property in the Official Receiver, no question arises.

1. (1942) 1 M.L.J. 491.

2. (1949) 2 M.L.J. 833.

of revesting of the property in the insolvent, nor does the annulment of adjudication have the effect of putting the insolvent in the same position with regard to his properties as he would have been in, had he not been adjudicated an insolvent".

It is apparent from the above passage that the learned Judges held that different consequences would follow if adjudication was annulled simpliciter and if though the adjudication was annulled, an order was passed by the Court vesting the properties in its nominee for a particular purpose. In our view this distinction is not based upon any legal principle. Indeed the learned Judges who decided *Kudithipudi Venkatramayya* v. *Mallacheruvu Pundareekakshudu*[1], did not accept such a contention. At page 495 they say :—

"A further contention has been advanced that by reason of the vesting order the insolvency continues even after the adjudication has been annulled. This contention seems to us unsound. The annulment of the adjudication relegates the debtor to the position which he occupied before he was adjudicated, except in so far as the vesting order places the residue of the properties at the disposition of the appointee for the benefit of the creditors. Although to this limited extent the administration of the estate continues to be in insolvency the debtor ceases to be an insolvent."

They relied upon for this view on the Full Bench decision in *Official Receiver, Guntur* v. *Secretary of State for India*[2]. Whether a debtor has a saleable interest or not on the crucial dates does not depend upon the question whether his properties continued to be vested in an appointee of the Court under section 37 for a specific purpose. It turns upon the question whether the adjudication was annulled or not. If the adjudication was annulled two views are possible : (1) that the effect of the annulment of the adjudication is to bring about the some state of affairs as if the adjudication had never taken place and (2) that for the purpose of ascertaining whether a debtor had saleable interest or not on 1st October, 1937, and 22rd March, 1938, it would be enough if as a matter of fact he was an adjudicated insolvent on the crucial dates. The aforesaid two decisions express conflicting views and it is necessary to resolve the conflict. We therefore refer the following two questions for an authoritative decision by a Full Bench of this Court :

1. Whether a debtor who was an insolvent on 1st October, 1937 and 22nd March, 1938, but whose adjudication was subsequently annulled has saleable interest in the property on the two crucial dates ?

2. Would it make any difference if, though the adjudication was annulled, the properties of the insolvent either, in whole or in part, were vested in an appointee of the court under section 37 of the Provincial Insolvency Act and continued to be so vested at the time when the application for scaling down was filed ?

The papers may be placed before His Lordships, the Chief Justice, for constituting a Full Bench.

(In pursuance of the aforesaid Order of Reference, this appeal coming on for hearing the Court expressed the following)

OPINION : *Balakrishna Aiyar, J.*—The two questions referred to the Full Bench are :

1. Whether a debtor who was an insolvent on 1st October, 1937, and 22nd March, 1938, but whose adjudication was subsequently annulled has saleable interest in the property on the two crucial dates ?

2. Would it make any difference if, though the adjudication was annulled, the properties of the insolvent, either in whole or in part, were vested in an appointee of the Court under section 37 of the Provincial Insolvency Act and continued to be so vested at the time when the application for scaling down was filed ?

These are the circumstances under which the two questions have arisen : In 1927 one Palani Goundan and his son executed a mortgage over some of their immoveable properties in favour of one of their creditors named Somasundaram Chettiar. Another creditor named Arunachalam Chettiar applied to have the mortgagors adjudicated insolvents on the ground that the mortgage in favour of

1. (1942) 1 M.L.J. 491. 2. (1935) 69 M.L.J. 856 : I.L.R. 58 Mad. 1014.

Somasundara amounted to a fraudulent preference. The mortgagors did not enter appearance and in September, 1928, an order of adjudication was passed without opposition. Thereafter in October, 1929, Arunachala applied to the Court for an order under the provisions of section 54 of the Provincial Insolvency Act for setting aside the mortgage in favour of Somasundara. The Subordinate Judge allowed the application and set aside the transaction. In appeal to the District Court the order of the Subordinate Judge was set aside. Arunachala then came up to this Court in second appeal but this Court agreed with the District Court in holding that there was no fraudulent preference and dismissed the appeal. It thus having been established that there had been no fraudulent preference the mortgagors applied in March 1935, to the Sub-Court for annulment of their adjudication. The petition was allowed and the adjudication set aside under section 35 of the Provincial Insolvency Act. On appeal the District Judge reversed that decision whereupon there was a second appeal to this Court which was disposed of in 1940 (The case has been reported in *Periakaruppan* v. *Arunachala*[1].) This Court discharged the order of the District Judge and restored the order of the Subordinate Judge. In respect of the properties of the insolvent this Court made the following Order :

"The petitioning creditor here asks that certain other assets in the hands of the Official Receiver should be distributed by him amongst the creditors. There are no special circumstances which justify an order of this nature. The Official Receiver will be directed to deliver the assets, other than the Rs. 3,600, to the debtors two months hence. The properties will be handed over to them then, subject, of course, to any order of the Court which may be passed in the meantime."

In 1946 one Narayanaswami Goundar, a son of one of the mortgagors, applied in I. A. No. 905 of 1946 to the District Munsiff, Tirupur, to scale down the decree debt in O. S. No. 108 of 1924, on the file of this Court under the provisions of Madras Act IV of 1938. The decree in that case had been passed against the father and the grandfather of the petitioner, who had been adjudged insolvents. The petition was opposed on the ground that the petitioner was not an agriculturist either on 1st October, 1937, or 22nd March, 1938, because on those dates both the petitioner's father and grandfather had been adjudicated insolvents and their properties remained vested in the Official Receiver. The District Munsiff overruled this objection and held that the petitioner was entitled to have the decree debt scaled down. An appeal to the District Court having failed a second appeal was preferred to this Court. When the appeal was before a Division Bench Mr. Sivaramakrishna Aiyar the learned counsel for the appellant contended on the strength of the decision in *Kudithipudi Venkatramayya* v. *Mallacheruvu Pundareekakshudu*[2], that notwithstanding the annulment of the adjudication the insolvent had no saleable interest in any agricultural property either on 1st October, 1937 or 22nd March, 1938 and that therefore, the debt was not liable to be scaled down. The learned advocate for the respondent however argued on the basis of the decision in *Gamoji Venkata Ramakrishna Rao* v. *Gullapalli Sambamoorthi*[3], that the effectof the annulment of the adjudication was to restore the *status quo ante* and that the true position was as if there had been no adjudication at all and that in consequence both on 1st October, 1937, and 22nd March, 1938, the respondent had a saleable interest in agricultural land. The Division Bench felt that it was difficult to reconcile these two decisions and hence formulated the two questions extracted above for determination by a Full Bench.

So far as the second of these two questions is concerned, it may be stated at once that in view of the fuller exposition of the facts that was made before us it does not really arise. The direction which this Court gave in 1940 was that except in respect of the sum of Rs. 3,600, the Official Receiver should deliver the properties back to the debtors "two months hence". That period of two months expired long before Narayanaswami Goundan made his application out of which the present proceedings have arisen. The properties did not continue to remain vested in an appointee of the Court under section 37 of the Provincial Insolvency Act

1. (1940) 1 M.L.J. 228 [I.L.R. (1940) Mad. 441 (F.B.).
2. (1942) 1 M.L.J. 491.
3. (1949) 2 M.L.J. 833.

at the time when the application for scaling down the debt was filed. It is therefore sufficient to answer the first question.

Before proceeding to examine the authorities cited on either side let us try to find out what would happen in a simple case like this: let us suppose that a debtor who owns some agricultural land, some flocks of sheep, some money in a savings bank account and some shares in companies, is adjudicated an insolvent on the 1st January, 1937. Let us also suppose that the adjudication is annulled on the 1st of January, 1939 and no vesting order is made in respect of any of these properties under section 37 of the Act. If during this period arrears of rent have accrued in respect of his lands, if there has been a natural increase to his flocks, if interest has been earned on his deposits in the savings bank account and if dividends have been declared in respect of the shares he held who would be entitled to these? Obviously, the debtor. But he would be entitled to them only if he had remained the owner of these properties thoughout the period, which means that on 1st October, 1937, and 22nd March, 1938, also he must have been their owner. And if he was their owner it goes without saying that he would have a saleable interest in them. That is a conclusion which emerges as a matter of first impression and also of principle. Now excepting one or two passages in the decision in *Kudithipudi Venkataramanayya* v. *Mallacheruvu Pundareekakshudu*[1], which Mr. Sivaramakrishna Aiyar cited, there is nothing in any of the other authorities to which our attention was drawn which requires or even suggests that a different view should be taken.

The case of *White* v. *Chitty*[2], is the oldest of the cases cited before us. In that a testator devised freeholds to *C* for life, with a clause of forfeiture on bankruptcy. In the testator's lifetime, *C* was adjudicated a bankrupt, and had not obtained his order of discharge at the time the testator died. But no creditors' assignee was appointed and within four months after the death of the testator, the bankrupt applied for and obtained an annulment of the bankruptcy. The Official Assignee had not, during the interval, applied for or obtained possession of the rents, *C* himself having been in occupation of the estate. The Court held that the forfeiture had not occurred. In disposing of that case the learned Judges observed:

> "Down to the case of *Smallcombe* v. *Olivier*[3], it seems to have been thought that the effect of annulling a bankruptcy was to render the state of things such as if the bankruptcy had never taken place. But the Court of Exchequer held, not only that there was, or ought to be, indemnity for all acts done before the annulment, but that, before and upto the annulling of the *fiat*, everything remained as it was by force of the bankruptcy—that upto that period the bankruptcy operated fully; and according to that *ratio decidendi*, although the adjudication of bankruptcy may have been most improper, the act of the sheriff would have been right; because, at the time of the return, the sheriff could know no better, and, therefore, made a proper return of *nulla bona*".

Though Mr. Sivaramakrishna Aiyar did not state so explicitly, he seemed to suggest at one stage of his arguments that the old English rule that on an annulment of an adjudication the position would be as if there had been no bankruptcy at all would not apply where the properties had vested in the Official Receiver. We do not think that there is any warant for such an assumption in this decision. All that this decision is an authority for is that if there had been no vesting of properties in the Official Receiver the position on the annulment of an adjudication would be as if there had been no bankruptcy at all; but acts done in pursuance of the order of adjudication would be valid. The principle of this decision is that subject to what has been done the insolvency is wiped out.

The second decision is of the year 1868 and it is reported in *Cox* x. *Fonblanque*[4]. In that case a legacy was given to *A* "if not an uncertificated bankrupt at the testator's death". *A* was a bankrupt at the testator's death, but his bankruptcy was annulled four months afterwards. The Court held in that case that *A* was not entitled to the legacy because the bequest of the annuity was made on the express condition that the annuitant should not be a bankrupt at the testator's

1. (1942) 1 M.L.J. 491.
2. (1866) L.R. 1 Eq. Cas. 372.
3. (1844) 13 M. and W. 77 : 153 E.R. 32.
4. (1868) L.R. 6 Eq. Cases 482.

death, and that condition had not been fulfilled. On the question before us this decision throws no light whatsoever; it turned wholly on the construction of the will.

More interesting is the case of *Bailey* v. *Johnson*[1]. That was a case decided under section 81 of the English Bankruptcy Act, 1869. The facts were these: The defendant was adjudged a bankrupt on a debtor summons issued by a banking firm of Harvey and Hudson; a trustee was appointed, who realised the estate and paid the proceeds into the bank of Harvey and Hudson. Subsequently the firm of Harvey and Hudson were adjudged bankrupts. The sum paid in by the trustee in the bankruptcy of the defendant was then standing to his credit in their books. Subsequently the order adjudicating the defendant bankrupt, was reversed on appeal, and no vesting order was made under section 81 of the Bankruptcy Act as to his property. The plaintiff as trustee in the bankruptcy of Harvey and Hudson, sued the defendant to recover the amount due from him. The defendant then claimed to set-off the money that had been paid by the trustee in his bankruptcy. The Court of Exchequer allowed the set-off and there was an appeal from that decision. Affirming the decision of the Court of Exchequer, Cockburn, C.J., observed as follows:

"The effect of section 81 is, subject to any *bona fide* disposition lawfully made by the trustee prior to the annulling of the bankruptcy, and subject to any condition which the Court annulling the bankruptcy may by its order impose, *to remit the party whose bankruptcy is set aside to his original situation*. Here the Court of Bankruptcy had imposed no condition; the general provision of the section has therefore its full effect, and that effect is to remit the bankrupt, at the moment the decree annulling his bankruptcy is pronounced, to his *original powers and rights in respect of his property*. We must therefore look at the money as though it were money paid in his name instead of in the name of Bullard, (the trustee for the estate of the defendant), for having become his by virtue of the annulling of his bankruptcy, it is to be considered as his *at the moment when it was paid in*; . . . . . ."

Brett, J., in concurring stated:

"I am of the same opinion, and I agree with the Lord Chief Justice that it is impossible logically to stop short of giving to the word *revert* in section 81 the full interpretation which he has placed upon it."

That the English Bankruptcy Act, 1914, has made no change as regards this part of the Bankruptcy Law appears from page 152, 16th Edition of Williams on Bankruptcy:

"As to the consequences of 'annulling' the law was but little changed by the Act of 1869, and in this respect the present section does not seem to differ from section 81 of that Act."

Now section 37, of our Provincial Insolvency Act is practically in the same terms as section 29 of the English Bankruptcy Act, 1914.

Coming to the decisions of this Court: The case in *Venkatasubbiah* v. *Venkatasubbaiah*[2], throws no light on the question bfore us because in that case there was an order under section 37 of the Act vesting the properties in the Official Receiver and it was held that the properties did not revert to the insolvent. The case in *Suryanarayanamurti* v. *Veeraju*[3], is more to the point. The material facts in that case were these: A Hindu father was adjudged an insolvent. He had only one son at the time and that son filed a suit for partition. Subsequently, a second son was born to him. Thereafter, the adjudication was annulled. The District Court passed a vesting order under section 37 of the Insolvency Act but on appeal this Court set aside the order of the District Judge in so far as it vested the properties of the insolvent in the Official Receiver but directed that officer to retain the cash realisations in his hands pending the disposal of certain appeals. On this state of things, Patanjali Sastri, J., who delivered the judgment of the Court remarked:

"The position, therefore, is that the properties of the first defendant which had, on his adjudication, vested in the Official Receiver, now 'reverted' to him as provided in section 37 of the Provincial Insolvency Act.

The question next arises as to whether, on such reverter, the properties are held by the first defendant as his separate properties, or as family properties liable to be divided among the members along

1. (1872) L.R. 7 Exch. Cases 263.
2. (1942) 1 M.L.J. 311.
3. (1945) 1 M.L.J. 292.

If, after such payments are made, any surplus is left, it will revert to the joint family, unless there has been in the meantime a disruption of the status of the family. Exactly so too with the funds realised by the Official Receiver by selling the shares of the sons in exercise of the father's power to do so. Putting the matter in another form, the effect of the vesting would be to take out or abstract from the joint family the properties that so vest in the Official Receiver and the funds realised by him by the sale of the properties must also be deemed to have been abstracted or taken out from the joint family. Those funds would be at the disposal of the Official Receiver for payment to the creditors of the insolvent father, subject always, of course, to the reverter of any surplus.

There appears to be no authority directly bearing on the question but the decision in *Official Receiver of Ramnad* v. *Devarayan Chettiar*[1] lends some support to the conclusion I have reached. In that case a creditor obtained a decree against a Hindu father and his two sons in 1934. In 1935 the father was adjudged an insolvent. In 1936 the Official Receiver took possession of two villages belonging to the joint family and realised the rents and profits accruing therefrom. In 1942 the sons instituted a suit for partition to which the Official Receiver was made a party. The Official Receiver had in his hands funds which represented the collection of rents from the two villages for the years 1936 to 1945. The creditor sought to proceed against the shares of the sons in the moneys in the hands of the Official Receiver. This Court held that the creditor could do so in respect of the sums realised after the institution of the partition suit but not in respect of sums realised earlier ; because the receiver who collected the rents from the shares of the sons in the properties after the institution of the suit for partition cannot be said to have collected them in the exercise of the power of the father for the purpose of applying them to discharge the debts of the father since that power had come to an end with the institution of the partition suit. This decision, therefore, implies that till the institution of the partition suit, moneys realised should, in the first instance, go to pay the father's debts. As I said before, this decision is not directly in point ; nevertheless, it indirectly supports the conclusion I have arrived at.

In the result, both the revision petitions are dismissed with costs, one set.

K.S.

Petitions dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE CHANDRA REDDI.

Boddu Seetharamaswami and others .. *Appellants**

v.

Bhagavathi Oil Company .. *Respondent.*

Vegetable Oils and Oil Cakes (Forward Contracts Prohibition) Order, 1944—Forward contract—Enforceability—Benefit of exclusion—Availability—Test.

In a suit for recovery of damages for breach of a contract to sell ground-nut oil, the plaintiff's case was that they had applied for delivery of goods on the date mentioned in the contract but that the defendants wanted more time and ultimately as the market was rising the defendants with a view to escape from their liability under the contract alleged that the contract was cancelled at the instance of plaintiff. Therefore the plaintiff claimed the difference in the market rate and the price stipulated in the contract. The defence raised contained a plea that by reason of the provisions of the Vegetable Oils and Oil Cakes (Forward Contracts Prohibition) Order, 1944, the contract became invalid and unenforceable.

Held, that unless there is a prohibition in the contract preventing the parties from transferring a delivery order or a railway receipt or a bill of lading even though the contract on its face does not contemplate such delivery order, the benefit of the exclusion does not apply. In the circumstances it follows that the plaintiff is not entitled to the benefit of the exclusion and the contract is unenforceable and hence he will not be entitled to damages for breach of contract.

1. (1948) 2 M.L.J. 415.

*Appeal No. 354 of 1948.

3rd August, 1950.

Appeal against the decree of the Court of the Subordinate Judge of Vizagapatam dated 19th December, 1947, and made in O. S. No. 33 of 1945.

B. V. Ramanarasu for Appellants.

D. Narasaraju for Respondent.

The Judgment of the Court was delivered by

Satyanarayana Rao, J.—The defendants are the appellants. The suit which has given rise to this appeal was instituted by the respondent to recover damages in a sum of Rs. 7,392 for breach of the contract to sell 2,800 tins of ground-nut oil. The plaintiff is a firm of merchants with their registered office at Calcutta, but they have a branch also at Vizianagaram. The defendants are brothers being members of an undivided Hindu family and carry on business at Vizianagaram under the name and style of Boddu Pydanna and Sons. They deal in ground-nut oil and other commodities. On the 9th November, 1944, the defendants agreed to sell to the plaintiff 2,800 tins of ground-nut oil at Rs. 148 per candy, the delivery of goods to continue from 8th December, 1944. The plaintiff's case was that they had applied for the delivery of the goods on the 8th December, 1944, but the defendants wanted more time, and ultimately as the market was rising the defendants with a view to escape from their liability under the contract alleged in their reply notice that the contract was cancelled at the instance of the plaintiff. The plaintiff claimed in the suit the difference in the market rate and the price stipulated in the contract, and it is on that basis he arrived at the damages claimed by him. There were various defences to the suit, the primary question of fact being whether the plaintiff was in default or the defendants. There was also a legal objection raised by the defendants based upon the Vegetable Oils and Oil Cakes (Forward Contracts Prohibition) Order, 1944. According to the contention of the defendants the suit contract was invalid and unenforceable by reason of the provisions of the said Order. The learned Subordinate Judge disagreed with the contentions put forward on behalf of the defendants and granted a decree to the plaintiff for a sum of Rs. 2,548 together with interest thereon at 6 per cent. per annum from the date of the plaint till payment. He arrived at this sum by reducing the claim for damages, as, according to him, the market rate was lower than what was claimed by the plaintiff.

In this appeal by the defendants the sole point that arises for consideration is whether in view of the Vegetable Oils and Oil Cakes (Forward Contracts Prohibition) Order, 1944, the contract is enforceable. The Order in question was promulgated by the Government of India on the 8th January, 1944, and came into force immediately. Clause 3 of the Order prohibited a person from entering into any forward contract in respect of any article to which the Order applied, and clause 4 laid down that notwithstanding any custom, usage or practice of the trade or the terms of any contract or any regulation of an Association relating to any contract, the contracts already entered into should be settled in the manner provided in sub-clauses (1), (2) and (3) thereto. They applied only to forward contracts entered into prior to the date of the Order. Under clause 5 power was given to the Central Government by notification in the Official Gazette to exclude from the operation of the Order any contract or class of contracts. On the 12th January, 1944, the Central Government in the exercise of the powers conferred upon them under clause 5 of the Order excluded from the provisions of the Order certain classes of contracts. The exclusion read as follows :

"Forward contracts for specific qualities or types of any article to which the said Order applies, and for specific delivery at a specified price, delivery orders, railway receipts or bills of lading against which contracts are not transferable to third parties."

While the defendants contend that the forward contract in suit was unenforceable by virtue of the provisions of the Order, the plaintiff claims that he is within the exclusion set out above, and that therefore the contract is enforceable.

The scope and ambit of this exclusion were considered by this Court by two Division Benches and also by the Bombay High Court. There is one point on which

with the other assets of the family; for, as has been stated, the third defendant was born after the first defendant was adjudicated and his share (then one half) in the family properties was vested in the Official Receiver, and if such share now reverts to him as his spearate property the plaintiff and the third defendant would each be entitled only to a fourth share, while, if the first defendant's share comes back to him only as family property, which it undoubtedly was when it vested in the Official Receiver, the father and the sons would each be entitled to a third share in the entire properties."

The Court decided:

"We are accordingly of opinion that on the annulment of the adjudication the surplus assets in the hands of the Official Receiver reverted to the first defendant as joint family property".

Now this decision practically destroys the case which Mr. Sivaramakrishna Aiyar had been consistently urging. His reasoning was that when an adjudication is annulled and no vesting order is made under section 37, the property merely *re-vests* in the insolvent and does not revert to him. In other words, the argument of Mr. Sivaramakrishna Aiyar was that though the property goes back to the insolvent it goes back only with effect from the date of annulment and not with effect from any anterior date. It must be clear that if the true legal position is that the property merely re-vests in the insolvent and does not revert to him the Court could not have given the decision it did in *Suryanarayanamurthy's case.*[1]

The position is made even clearer in the decision that appears as *Sakhamuri Peraya* v. *Nimmarju Kondayya*[2]:

"The effect of the present section 37 has been considered by Beasley, C.J., in *Lingappa* v. *Official Receiver of Bellary*[3], King, J., in *Dharmasamarajya* v. *Sankarana*[4] and Somayya, J., in *Ratnavelu Chettiar* v. *Francisca Udayar*[5] and the learned Judges have held that the effect of the annulment of the adjudication *relates back to the date of the adjudication* and is as if no adjudication had taken place, except as regards the acts of the Court and the Official Receiver which are validated by that section. Section 37 says:.....Somayya, J., very pertinently points out in *Ratnavelu Chettiar* v. *Francisca Udayar*[5], that if the annulment was not to have retrospective effect, there would be no need for the clause validating acts done by the Court or by the Receiver, as they would be valid: because they were done at a time when the insolvent had been adjudicated and before the adjudication had been annulled; and so had jurisdiction to do the acts they did. If, however, the annulment were to date back to the date of adjudication, it would, unless validating clauses were introduced, have the effect of setting at nought all that they had done to disturb the rights in property created by the Court and the receiver".

And this legal position is stated again in *Venkataramakrishna Rao* v. *Sambamurti*[6].

It will thus be seen that of the decisions that have been placed before us the only one that can be pressed into service to support the contention of Mr. Sivaramakrishna Aiyar is the one in *Kudithipudi Venkataramanayya* v. *Mallacheruvu Pundareekakshudu*[7]. In the penultimate paragraph of the judgment in that case, the following sentences occur:

"The position therefore is that the appellant on 1st October, 1937, and on 22nd March 1938, was not an agriculturist *because his property was vested in the Official Receiver* and he had no saleable interest therein. We cannot accept the view of the District Judge that after the annulment of the adjudication he had a saleable interest in the properties vested in the Official Receiver. The most that he could have had in those properties was a possible expectation of a surplus, if any, after satisfying the creditors. That is not, in our opinion, to be treated as a saleable interest in those properties".

The argument of Mr. Sivaramakrishna Aiyar here was that the learned Judges meant to say that because the properties remained vested in the Official Receiver on the 1st October, 1937 and on the 22nd March 1938, the insolvent could have had no saleable interest in them on either of those dates. In view of the earlier statement in the same paragraph that

"the annulment of the adjudication relegates the debtor to the position which he occupied before he was adjudicated, except in so far as the vesting order places the residue of the properties at the disposition of the appointee for the benefit of the creditors."

It is not very clear whether the learned Judges meant to go as far as Mr. Sivaramakrishna Aiyar suggess they did. However if they did mean to go so far and say that because on the 1st October, 1937, and 22nd March, 1938, the properties

1. (1945) 1 M.L.J. 292.
2. (1948) 1 M.L.J. 290.
3. (1937) 47 L.W. 366.
4. (1943) 1 M.L.J. 166.
5. (1945) 1 M.L.J. 472.
6. (1949) 2 M.L.J. 833.
7. (1942) 1 M.L.J. 491.

remained vested in the Official Receiver, the result would be that in spite of the reverter on the annulment of the adjudication the insolvent would not be the owner of the properties on the 1st October, 1937, and 22nd March, 1938, I would say with respect that they were wrong.

The answer to the first question referred to the Full Bench is therfore in the affirmative.

Subba Rao, J.—I agree. I am not expressing my views on the second question referred to the Full Bench as it does not arise for consideration.

Panchapakesa Aiyar, J.—I agree. I too consider that the second question does not arise for consideration here. So I do not express any opinion on it.

This appeal coming on for final hearing before the Court, after the expression of the opinion of the Full Bench, the Court (Subba Rao, J.,) delivered the following

JUDGMENT: (8th September, 1950).—After the judgment delivered by the Full Bench this case comes up before me for final disposal. Mr. Sivaramakrishna Aiyar raised a further point namely that under section 21 of the Madras Agriculturists Relief Act, if, prior to the coming into force of the Act, a dividend has been declared out of the assets of an insolvent, the fact that the adjudication has been subsequently annulled would not affect his rights. This question was expressly raised in *Venkataramayya* v. *Pundarikakshudu*[1], and negatived by a Bench of this Court. I am bound by this decision. The civil miscellaneous second appeal therefore fails and is dismissed with costs.

(Leave to appeal is refused).

K.S. ——— *Appeal dismissed.*

[FULL BENCH].

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SUBBA RAO, MR. JUSTICE PANCHAPAKESA AYYAR AND MR. JUSTICE BALAKRISHNA AYYAR.

Vinnakota Veerraju .. *Appellant* *

v.

Kamarsu Balakoteswara Rao and others .. *Respondents.*

Madras Agriculturists Relief Act (IV of 1938), sections 8 (4) and 9 (2)—Creditor, if entitled to retain any excess payments made to him after 1st October, 1937, towards interest.

A creditor is not entitled to retain payments made after 1st October, 1937, towards interest in excess of the interest payable under the provisions of the Madras Agriculturists Relief Act without adjusting them towards the principal. In regard to this matter there is no distinction in principle between a debt to which the provisions of section 8 of Act IV of 1938 apply and that governed by the provisions of section 9 of that Act.

Mohamed Sahib v. *Kunthanal Sowcar*, (1940) 2 M.L.J. 185 and *Lakshmivenkayamma* v. *Venkatapatiraju*, (1941) 1 M.L.J. 25, overruled.

Ganapathisubramania Iyer v. *Gopalaswami Naidu*, (1949) 2 M.L.J. 394, distinguished.

Appeal against the order of the Court of the Subordinate Judge, Eluru, dated 27th August, 1946 in O.P. No. 83 of 1945.

P. Satyanarayana Raju for Appellant.

A. Sundaram Ayyar and *Ch. Suryanarayana Rao* for the first Respondent.

(This appeal coming on for hearing on 22nd November, 1949, the Court, Subba Rao and Somasundaram, JJ., made the following order of reference to the Full Bench) :—(Delivered by Subba Rao, J.) :

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1. (1942) 1 M.L.J. 491.

*A.A.O. No. 142 of 1947. 16th August, 1950.

The material facts may be stated. The first respondent for himself and as guardian of his minor sons, executed a mortgage deed dated the 10th August, 1946 in favour of the appellant for a sum of Rs. 5,000 with interest at nine per cent per annum. The consideration for the mortgage deed was made up of the following items :

(1) a sum of Rs. 2,892 due on a promissory note executed by the first respondent on 8th December, 1935.

(2) a sum of Rs. 70 taken for the purchase of stamps ;

(3) a sum of Rs. 1,000 paid for discharging the debt due on a promissory note, dated 28th December, 1925 executed by the first respondent in favour of one Vinnakota Yellamraju ; and

(4) a sum of Rs. 1,038 received for discharging the promissory note, dated 24th April, 1935 executed by the first respondent in favour of one Mallina Rattamma.

The promissory note, dated 8th December, 1935 was in renewal of other promissory notes, the earliest being of the year 1929. On 1st October, 1942, the first respondent paid an amount of Rs. 2,790 specifically toward interest. He filed an application in the Court of the Subordinate Judge of Ellore under section 19-A (1) of the Madras Agriculturists Relief (Amending) Act, XV of 1943 for declaring the debt due by him and the learned Subordinate Judge scaled down the debt to Rs. 1,191-13-4 together with interest thereon at 6¼ per cent. per annum from 5th February, 1946 till the date of payment. The mortgagee preferred the above appeal. The question is whether out of the sum of Rs. 2,790 so paid towards interest any amount in excess of the interest payable to the creditor under the provisions of Madras Act IV of 1938 is liable to be adjusted towards principal.

The relevant provisions of Madras Act IV of 1938 may now be set out :

" Section 8. Debts incurred before the 1st October, 1932, shall be scaled down in the manner mentioned hereunder, namely :—(1) All interest outstanding on the 1st October, 1937 in favour of any creditor of an agriculturist whether the same be payable under law, custom or contract or under a decree of Court and whether the debt or other obligation has ripened into a decree or not, shall be deemed to be discharged, and only the principal or such portion thereof as may be outstanding shall be deemed to be the amount repayable by the agriculturist on that date. . . . . (4) Subject to the provisions of sections 22 to 25, nothing contained in sub-section (1), (2) and (3) shall be deemed to require the creditor to refund any sum which has been paid to him, or to increase the liability of a debtor to pay any sum in excess of the amount which would have been payable by him if this Act had not been passed.

Section 9. (1) Debts incurred on or after the 1st October, 1932, shall be scaled down in the manner mentioned hereunder, namely :—(1) Interest shall be calculated upto the commencement of this Act at the rate applicable to the debt under the law, custom, contract or decree of Court under which it arises or at 5 per cent. per annum simple interest whichever is less, and credit shall be given for all sums paid towards interest, and only such amount as is found outstanding, if any, for interest thus calculated shall be deemed payable together with the principal amount or such portion of it as is due ; provided that any part of the debt which is found to be a renewal of a prior debt (whether by the same or a different debtor and whether in favour of the same or different creditor) and shall be deemed to be a debt contracted on the date on which such prior debt was incurred and if such debt had been contracted prior to the 1st October, 1932 shall be dealt with under the provisions of section 8.

(2) Subject to the provisions of sections 22 to 25 nothing herein contained shall be deemed to require the creditor to refund any sum which has been paid to him or to increase the liability of the debtor to pay any sum in excess of the amount which would have been payable by him if this Act had not been passed."

Under section 8 all interest outstanding on the 1st October, 1937 is discharged and for the subsequent period the interest will have to be paid at the rate provided by section 12 of the Act, whereas in the case of debts to which section 9 applies, though the entire interest is not wiped out, only interest at the rate of 5 per cent. or less, if the contract rate is less than 5 per cent, is payable from the date of the debt. In either case, therefore, a contingency might arise of the amounts paid towards interest being in excess of the amount payable towards interest under the provisions of the Act, but neither section specifically provides for the manner of the adjustment of such excess. There would not be any difficulty in applying the

sections if the entire debt is wiped off in which case under sub-section (4) of section 8 and sub-section (2) to section 9 the creditor is not bound to refund the same. But if the principal amount be outstanding, as in this case, the question arises whether such excess amount should be adjusted towards principal or whether the creditor can claim the principal without giving credit to the amount in his hands representing the excess payment towards interest. There is no apparent distinction on principle between a debt under section 8 and that under section 9 of the Act. In either case, the amount is an excess payment towards interest. There are two Bench decisions of this Court applying one rule to a debt covered by section 8 and another to that covered by section 9. Though superficially the two may be distinguished on the ground that one was in respect of a decree debt to which the provisions of section 8 and the proviso to section 19 of the Act applied and the other is only a simple debt to which section 9 of the Act applied, we do not think on principle any such distinction is sustainable in law. The two decisions are *Suryanarayanamurti* v. *Viramma*[1] and *Lakshmivenkayamma* v. *Venkapatiraju*[2]. In the first case the facts are, there was a debt anterior to 1st October, 1932 which resulted in a decree dated 30th September, 1936. After the decree had been passed, between 1st October, 1937 and 23rd March, 1938 when the Act came into force, three payments were made. The learned Judges held that the payments made should first be adjusted towards costs, secondly towards the amount outstanding towards interest as on the dates of payment after cancelling the interest outstanding on 1st October, 1937 and thirdly, adjusting any balance towards the principal debt. This is a case under section 8 of the Act and it was assumed that the excess payments made towards interest after the Act came into force, should after the debt was scaled down, be adjusted towards principal. But relying on section 7 of the Act it was argued that amounts paid towards interest and appropriated as such between 1st October, 1937 and 23rd March, 1938 could not be reappropriated and readjusted; but that argument was negatived relying on the provisions of section 8 and the proviso to section 19 of the Act. *Lakshmivenkayamma* v. *Venkatapathiraju*[2] is a case under section 9 of the Act. The question in that case was whether payments made towards interest which are in excess of the interest actually payable under the Act would be liable to reduction of the principal amount. At page 383 the learned Judges say:

> "It results in the conclusion that if the payments made towards interest are in excess of the amount of interest as scaled down, that excess amount will be retained by the creditor and will not be adjusted in reduction of principal; but there is nothing contrary to general principles in allowing a creditor to retain that which has been willingly paid to him."

The same view is expressed by Wadsworth, J. in *Arunagiri Chettiar* v. *Kuppuswami Chettiar*[3]. In our view it is necessary to resolve this conflict. We therefore refer the following questions to a Full Bench.

"(1) Whether a creditor is entitled to retain payments made towards interest in excess of the interest payable under the provisions of the Act without adjusting them towards the principal?

(2) Whether there is any distinction in principle in this matter between a debt to which the provisions of section 8 apply and that governed by the provisions of Section 9?"

The papers may therefore be placed before my Lord, the Chief Justice, for being referred to a Full Bench.

In pursuance of the aforesaid Order of Reference to the Full Bench, this appeal coming on for hearing the Court expressed the following

OPINION: *Panchapakesa Ayyar, J.*—The points referred by the Bench to this Full Bench for an authoritative decision are:

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1. (1940) 2 M.L.J. 547.
2. (1941) 1 M.L.J. 25.
3. (1942) 2 M.L.J. 275.

(1) Whether a creditor is entitled to retain payments made towards interest in excess of the interest payable under the provisions of the Act without adjusting them towards the principal?

(2) Whether there is any distinction in principle in this matter between a debt to which the provisions of section 8 apply and that governed by the provisions of section 9?

The material facts are these: The first respondent, for himself and as guardian of his minor sons, executed a mortgage deed, Exhibit D-1, dated 10th August 1936, in favour of the appellant for a sum of Rs. 5,000, with interest at 9 per cent. per annum. The consideration for the mortgage deed was made up of the following items:

(1) A sum of Rs. 2,892 due on a promissory note executed by the first defendant on 8th December, 1935 in renewal of other promissory notes, the earliest of them being of the year 1929.

(2) A sum of Rs. 70 taken by him for purchase of stamps.

(3) A sum of Rs. 1,000 paid for discharging the debt due on a promissory note, dated 28th December, 1935 in favour of one Yellamma Raju.

(4) A sum of Rs. 1,038 paid for discharging the promissory note, dated 24th April, 1935, executed by the first respondent in favour of one Rattamma.

It will be obvious that some of the liabilities were incurred before 1932 and some others after 1932; hence the second question referred to us, namely, whether there is any distinction in principle between a debt to which the provisions of section 8 of the Madras Agriculturists Relief Act applies, and that governed by the provisions of section 9, becomes material. On 1st October, 1942, the first respondent paid an amount of Rs. 2,790 specifically towards the interest, and this amount was appropriated towards interest due to him by the appellant. The first respondent filed O.P. No. 83 of 1945 on 17th October, 1945, under section 19-A (1) of the Madras Agriculturists Relief (Amending) Act XV of 1948 for declaring the debt due by him under the mortgage deed, Exhibit D-1, after scaling down the debt under sections 8 and 9 of the Madras Agriculturists Relief Act, and deposited Rs. 2,000 in Court as the amount due from him if the debt was scaled down. The appellant had contended in the original petition that though a considerable sum would remain in his hands out of the amount of Rs. 2,790 paid by the first respondent to him on 1st October, 1942 specifically towards interest after deducting the interest due under section 9 of the Madras Agriculturists Relief Act (the interest outstanding on 1st October, 1937 for liabilities contracted before 1932 being wiped out under the Act), but that he was entitled to retain that large excess in his hands, under section 9 (2), as he was not bound to refund any sum paid to him already, and that there should be no readjustment of this excess towards the debt remaining payable on scaling down. The first respondent, of course, contended that section 9 (2) affected only "refunds" or returns of amounts remaining over and above the debt as scaled down, and that there was no bar whatever to readjust the excess interest remaining out of the sum of Rs. 2,790 towards the debt remaining payable on scaling down. The learned Subordinate Judge upheld the contention of the first respondent, rejected the contention of the appellant, and readjusted the excess out of the Rs. 2,790 towards the debt as scaled down, and held that only Rs. 1,191-13-4, together with interest at 6¼ per cent. per annum from 5th February, 1946 till date of payment remained payable under this mortgage, under sections 8 and 9 of the Madras Agriculturists Relief Act. This appeal was therefore filed.

The relevant provisions of Madras Act IV of 1938 may now be set out:

"Section 8. Debts incurred before the 1st October, 1932, shall be scaled down in the manner mentioned hereunder, namely:—

(1) All interest outstanding on the 1st October, 1937, in favour of any creditor of an agriculturist whether the same be payable under law, custom or contract or under a decree of Court and whether the debt or other obligation has ripened into a decree or not, shall be deemed to be discharged, and only the principal or such portion thereof as may be outstanding shall be deemed to be the amount repayable by the agriculturist on that date.

(2) Where an agriculturist has paid to any creditor twice the amount of the principal, whether by way of principal or interest or both, such debt including the principal, shall be deemed to be wholly discharged.

(3) Where the sums repaid by way of principal or interest or both fall short of twice the amount of the principal, such amount only as would make up this shortage, or the principal amount or such portion of the principal amount as is outstanding, whichever is smaller, shall be repayable.

(4) Subject to the provisions of sections 22 to 25, nothing contained in sub-sections (1), (2) and (3) shall be deemed to require the creditor to refund any sum which has been paid to him, or to increase the liability of a debtor to pay any sum in excess of the amount which would have been payable by him if this Act has not been passed.

Section 9. (1) Debts incurred on or after the 1st October, 1932, shall be scaled down in the manner mentioned hereunder, namely :—

Interest shall be calculated up to the commencement of this Act at the rate applicable to the debt under the law, custom, contract or decree of Court under which it arises or at five per cent. per annum simple interest, whichever is less, and credit shall be given for all sums paid towards interest, and only such amount as is found outstanding, if any, for interest thus calculated shall be deemed to be payable together with the principal amount or such portion of it as is due :

Provided that any part of the debt which is found to be a renewal of a prior debt (whether by the same or a different debtor, and whether in favour of the same or different creditor) shall be deemed to be a debt contracted on the date on which such prior debt was incurred and if such debt had been contracted prior to the 1st October, 1932, shall be dealt with under the provisions of section 8.

(2) Subject to the provisions of sections 22 to 25, nothing herein contained shall be deemed to require the creditor to refund any sum which has been paid to him or to increase the liability of the debtor to pay any sum in excess of the amount which would have been payable by him if this Act had not been passed."

Under section 8 all interest outstanding on 1st October, 1937 is discharged, and for the subsequent period, the interest will have to be paid at the rate provided for by section 12 of the Act, whereas in the case of debts to which section 9 applies, though the entire interest is not wiped out, only interest at the rate of 5 per cent. or less, if the contract rate is less than 5 per cent, is payable from the date of the debt. In either case, therefore, a contingency might arise of the amounts paid towards interest being in excess of the amount payable towards interest under the provisions of the Act, but neither section specifically provides for the manner of adjustment of such excess. There would not be any difficulty in applying the sections if the entire debt is wiped off, in which case, under sections 8 (4) and 9 (2), the creditor is not bound to refund the same. This had been held by a Bench of this Court in *Ganapati Subramania Iyer* v. *Gopalaswami Naidu*[1]. But if the principal amount or a portion thereof be outstanding, as in this case, the question arises whether such excess amount should be adjusted towards the principal or whether the creditor can claim the principal without giving credit to the amount in his hands representing the excess payment towards interest. In relation to this question, there appears to me to be no distinction in principle between a debt under section 8 and that under section 9 of the Act. In either case, the amount is an excess payment towards interest, and must be adjusted towards the principal if any part of it remains, especially as section 7 expressly says :

" Notwithstanding any law, custom, contract or decree of Court to the contrary, all debts payable by an agriculturist at the commencement of this Act shall be scaled down in accordance with the provisions of this Chapter ".

Mr. Satyanarayana Raju, for the appellant, conceded that under section 8, the excess interest remaining must be adjusted towards the principal amount remaining. That is undoubtedly so. A Bench of this Court, consisting of Wadsworth and Patanjali Sastri, JJ., has held in *Suryanarayanamurti* v. *Viramma*[2] and in *Anantharamakrishna Aiyar* v. *Sundaram Aiyar*[3], that appropriations towards interest made before 1st October, 1937, one of the most crucial dates fixed by the Madras Agriculturists Relief Act, cannot be reopened and readjusted under section 8 (1) of the Madras Agriculturists Relief Act, but that appropriation made *after* 1st October, 1937 can and must be reopened and readjusted, first towards costs, then towards interest due from 1st October, 1937, and next towards the principal amount due,

1. (1949) 2 M.L.J. 394.
2. (1940) 2 M.L.J. 547.
3. (1940) 2 M.L.J. 550.

and that even payments made between 1st October, 1937 and 22nd March, 1938, when the Madras Agriculturists Relief Act came into operation, would be liable to be reopened and readjusted like that, in view of the express terms of the Act, and that the word "refund" in section 8 (4) means only repayment in cash and is no bar to readjustment of the debt, according to section 8 (1) of the Act. They seem to have referred to the date 22nd March, 1938, simply because all the contested payments in those two cases were between 1st October, 1937 and 22nd March, 1938. Mr. Satyanarayana Raju contended that the same Bench (Wadsworth and Patanjali Sastri, JJ.) have held in *Lakshmi Venkayamma* v. *Venkatapathi Raju*[1] that if the payments made towards interest are in excess of the amount of interest as scaled down under section 9, that excess amount will be retained by the creditor and will not be adjusted in reduction of the principal, and that Horwill, J., has held to the same effect in *Mohamed Sahib* v. *Kunthammal Sowcar*[2]. Indeed, it is those two rulings which have been responsible for this reference to the Full Bench, the question here being whether they have been rightly decided. In my view, those cases have been wrongly decided. I see absolutely nothing to justify the difference sought to be made out between the provisions of section 8 and the provisions of section 9 regarding the readjustment of the excess interest paid. Horwill, J., in *Mohamed Sahib* v. *Kunthammal Sowcar*[2], tried to spell out a difference like this,

> "Section 9 (1) deals entirely with the question of interest. It says that interest shall be calculated up to the date of the commencement of the Act at 5 per cent. simple interest, that credit should be given for the interest already paid, and that the amount outstanding for interest should be added to the principal outstanding, and the plaintiff should be given a decree for the amount so calculated. On 18th November, 1935, the interest outstanding was paid off in full and the plaintiff has made no claim whatever for interest. As he is not bound to pay anything back, he cannot be given less than what he has claimed."

In the Bench decision (delivered by Wadsworth, J.) in *Lakshmi Venkayamma* v. *Venkatapathi Raju*[1], the reason was given as follows :

> "Section 9 (1) stipulates that interest shall be calculated up to the commencement of the Act at the contract rate or at 5 per cent., whichever is less, that credit shall be given for all sums paid towards interest and that only such amount as is found outstanding, if any, for interest thus calculated shall be deemed payable together with the principal amount or such portion of it as is due. It is contended for the plaintiff who is the petitioner that the whole of the process laid down in this portion of section 9 is a process in reduction of the debt for interest and that it does not contemplate any reduction of the amount due for principal. The process is firstly to calculate the interest which would have been due at the rate of 5 per cent, then give credit for any payments actually made towards interest, then give a decree for interest on the basis of this calculation together with the amount due for principal. It is contended that if the scaling down process results in a smaller amount of interest than what has actually been paid as interest, there is no provision in section 9 for carrying over this excess interest in reduction of principal, On the other hand, it is contended for the respondent that the words 'credit shall be given for all sums paid towards interest' must be read as if they were 'credit shall be given in reduction of the debt for all sums paid towards interest' and that the final words 'or such portion of it as is due' contemplate the reduction of principal by the process of carrying over the excess amount paid towards interest. It seems to us that the interpretation of the respondent involves not only the addition to the section of words which are not in it, but also entails the solution of an ambiguity by giving the benefit of the doubt to the expropriator, which, as we have frequently held, is not permissible in interpreting an Act of this nature. The view for which the petitioner contends is in accordance with the plain language of the section. It is also the view adopted by Horwill, J., in *Muhammad Sahib* v. *Kunthammal Sowcar*[2], and we are of opinion that it is the correct view. It results in the conclusion that if the payments made towards interest are in excess of the amount of interest as scaled down, that excess amount will be retained by the creditor and will not be adjusted in reduction of principal ; but there is nothing contrary to general principles in allowing a creditor to retain that which has been willingly paid to him."

I am not convinced by the reasoning in either case. The decision in those cases would involve far more additions to and modifications in the wording of section 9 than applying the same principle regarding the readjustment of the excess interest to the principal would involve. Indeed, it is impossible to hold that section 9 deals only with interest as it begins with the phrase "*Debts* incurred on or after 1st October, 1932, shall be scaled down in the manner mentioned hereunder." and "debts" admittedly include both the principal and interest. Section 9 (1)

1. (1941) 1 M.L.J. 25.
2. (1940) 2 M.L.J. 185.

expressly says "and credit should be given for *all* sums paid towards interest" thereby showing no intention of allowing the creditor to keep any excess interest on the ground of appropriation *after* 1st October, 1937, and the clause "nothing herein contained shall be deemed to require the creditor to refund any such sum which has been paid to him" occurs not in section 9 (1) but in section 9 (2), after the entire process of the scaling of the debt is completed, just as it occurs in section 8 (4) after the entire process of the scaling down of the debt is completed, and can therefore have reference only to the return of any excess paid to the creditor and remaining with him after the entire debt as scaled down by him have been discharged. It can have no reference to any readjustment towards a debt remaining after scaling down, as here. As already stated, it has been held by the same Bench which decided *Lakshmi Venkayamma* v. *Venkatapathiraju*[1] in *Suryanarayanamurthi* v. *Viramma*[2] and *Ananthapmakrishna Aiyar* v. *Sundara Aiyar*[3], that a readjustment of the excess interest would not amount to a refund by the creditor prohibited by sections 8 (4) and 9 (2) of the Madras Agriculturists Relief Act. I cannot agree with the argument that the agriculturist debtor in section 9 is an "expropriator" and so should not get the benefit, when the Madras Agriculturists Relief Act itself is intended to benefit him. I cannot also agree with the contention of Mr. Satyanarayana Raju, that, under section 9, the Legislature divides the debt incurred after 1st October, 1932 into two compartments, namely, the principal and the interest, and applies the prohibition of the refund of the excess in either compartment. This contention is far fetched and cannot be spelt out of the words of section 9. As already stated the word "refund" does not occur in section 9 (1), first paragraph, dealing with interest, but occurs in section 9 (2) after the second paragraph of section 9 (1), has given further instructions regarding the scaling down of the debt, thereby showing that the scope of section 9 (2) is only regarding the refund of the excess remaining after the entire debt as scaled down is satisfied.

Mr. Satyanarayana Raju relied on the ruling in *Ganapathi Subramania Iyer* v. *Gopalaswami Naidu*[4], and on the general observations therein that the creditor is entitled under section 8 (4) and 9 (2) to retain any excess payments made to him. But those general observations must be read in the context of that case, and the points arising for decision there, and can only refer to the creditor's non-liability to refund any excess remaining with him after the entire debt as scaled down is satisfied.

In the end, therefore, I hold that *Mohamed Sahib* v. *Kunthammal Sowcar*[5] and *Lakshmi Venkayamma* v. *Venkatapathiraju*[1] were wrongly decided. My answer to the points referred to us is as follows :

(1) A creditor is not entitled to retain payments made after 1st October, 1937 towards interest in excess of the interest payable under the provisions of the Act without adjusting them towards the principal ; and

(2) In regard to this matter, there is no distinction in principle between a debt to which the provisions of section 8 apply and that governed by the provisions of section 9.

Subba Rao, J.—I agree.

Balakrishna Ayyar, J.—I too agree.

(After the opinion of the Full Bench this appeal coming on for hearing before Subba Rao, J., on 8th September, 1950, the Court delivered the following) :—

JUDGMENT :—Following the Full Bench decision in A.A.O. No. 142 of 1947 the A.A.O. No. 142 of 1947 is dismissed with costs.

K.S. *Appeal dismissed.*

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1. (1941) 1 M.L.J. 25.
2. (1940) 2 M.L.J. 547.
3. (1940) 2 M.L.J. 550.
4. (1949) 2 M.L.J. 394.
5. (1940) 2 M.L.J. 185.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

Gadiraju Chinna Krishnamraju and others ... *Appellants* *

v.

Chintalapudi Reddamma and others ... *Respondents.*

Hindu Law—Maintenance grant—Immoveable property given to a female—Nature of interest conferred.

In the absence of any evidence that lands set apart for the maintenance of a female member of a Hindu family were not to be resumed on her death, the presumption is that they are resumable.

Malleti Venkatappiah v. *Jonnalagadda Venkatasubbiah*, (1906) 16 M.L.J. 352, followed.

Appeal against the decree of the Court of the Subordinate Judge, Amalapuram in A.S. No. 94 of 1945, preferred against the decree of the Court of the District Munsif, Amalapuram, in O.S. No. 7 of 1945.

B. V. Subramaniam for Appellants.

K. Bhimasankaram for Respondents.

The Court made the following

ORDER.—This Second Appeal raises a question of competing title as between the alienees from the last maleholder Ramaswami's widow, Seshamma, the appellants before me, and the contesting defendants in the Court of trial on the one hand and the settlees from her mother-in-law, Ramamma, on the other, of whom the plaintiff in the trial Court, the first respondent before me, is the last surviving brother. It was the primary part of the plaintiff's case in the plaint that there was a usufructuary mortgage by the plaintiff and his deceased brothers in about 1935 in respect of the suit properties in favour of the first defendant which became discharged before the date of suit, and that the first defendant was not entitled to remain in possession. It may be noted that this part of the plaintiff's case was put forward as accounting for the defendant's admitted possession for some years prior to suit. It was his further case that the first defendant got Seshamma, the sixth defendant, after her mother-in-law's death to alienate the suit properties to defendants 2 and 4 clandestinely, under Exhibits D-1 and D-2, dated 23rd March, 1944, to the prejudice of the plaintiff who, along with his brothers, had become entitled when they were alive, and solely after their deaths, under the settlement deed from her mother-in-law in favour of the plaintiff and his brothers, Exhibit P-3, dated 17th May, 1916. The contesting defendants denied the usufructuary mortgage set up in the plaint, asserted their own title as vendees from Seshamma and put the plaintiff to proof of his title and his possession within 12 years prior to suit. The learned District Munsif of Amalapuram dismissed the suit upholding the defendants' pleas, and the learned Subordinate Judge of Amalapuram on appeal decreed the suit ignoring the plaintiff's case and version of the usufructuary mortgage and finding the plaintiff's title as under Exhibit P-3 and possession within the statutory period as against the contesting defendants' title under Exhibit D-1 and D-2 and as against their possession as lessees from Seshamma from 1935 to 1944 and as vendees from her thereafter which had been found by the trial Court and which was not found against by the lower appellate Court.

I am not prepared to disturb the finding of the lower appellate Court as to the plaintiff's possession within the statutory period in support of which Exhibit P-4 series have been filed. The finding on the question of plaintiff's title however stands, in my opinion, on a different footing. The contesting defendants are *prima facie* entitled as alienees from the widow of the last male holder who would be the person, if nothing more existed, competent to deal with the properties in suit. Their *prima facie* title is sought to be defeated by the plaintiff on whom undoubtedly the onus lies by means of the recitals of Exhibit P-3, the settlement deed in favour of himself and his brothers, by Ramamma, the mother of the last maleholder.

S.A. No. 1552 of 1946. 21st March, 1950.

Seshamma is not a party thereto. Neither she nor persons claiming under her can be held bound by its recitals. Even assuming the recitals of Exhibit P-3 to be true, I am of the view that they are insufficient to make out an absolute title in Ramamma which she could convey to the plaintiff and his brothers. The learned Subordinate Judge went too far, in my opinion, in holding that there was a binding arrangement between Seshamma and her mother-in-law Ramamma that the properties in suit should be held by the latter for an absolute estate pursuant to a direction of the last maleholder, even if such direction were the fact as recited in Exhibit P-3. The settlement attributable to the last maleholder according to the recitals of Exhibit P-3 does not suggest anything more than that in order that his mother Ramamma and his wife should have no disputes in future regarding the former's maintenance the suit properties should be enjoyed by the former while the remaining half of his estate should be enjoyed by the latter. Enjoyment for maintenance does not ordinarily connote anything more than enjoyment during the lifetime of the person entitled to maintenance, and there is nothing in the context to indicate that the last maleholder meant to make of his mother a co-owner with his widow in all respects so that his mother might alienate the properties in favour of whomsoever she liked to the prejudice of the widow, even if she survived his mother. The only material that we have in the case with reference to the nature of the estate taken by Ramamma under the arrangement between her and her daughter-in-law is that furnished by the contents of Exhibit P-3, and the mere fact that Ramamma dealt with the properties under Exhibit P-3 purporting to convey an absolute title does not necessarily mean that she did have the absolute title which she purported to convey, especially in view of the fact that there is nothing in its recitals about the settlement by the last maleholder suggesting that he desired his mother to take the suit properties except for purposes of maintenance or to hold them more or less as a co-owner with his widow without a reverter to the latter on the death of the former. The presumption in the case of a maintenance grant when nothing else is known and where the document of grant is not forthcoming, and, if forthcoming, ambiguous in its terms, is that it is intended to enure for the lifetime of the grantee, not beyond, and there is nothing in the recitals of Exhibit P-3 to rebut that presumption. The mother died in 1931, and within four years thereafter the defendants appear on the scene first as lessees of the widow and afterwards as vendees from her. The possession of the plaintiff and his brothers under Exhibit P-3 which continued for a few years after the death of Ramamma, while it might be sufficient to satisfy the requirement of Article 142 of the Indian Limitation Act as to plaintiff's possession within 12 years prior to suit would not confer upon the plaintiff the right to remain in possession of the properties as against the vendees from Seshamma such as the defendants appellants are.

My attention has been drawn by Mr. Bhimasankaram, learned counsel for the respondent, to the decision of this Court reported in *Mangamma* v. *Dorayya*[1], wherein it has been held that in the absence of direct evidence one way or the other there is no presumption as to the quantum of interest which a Hindu female takes in respect of immoveable property given to her. There is nothing in that judgment which militates against the view I am taking here. The question decided in *Mangamma* v. *Dorayya*[1], does not arise here, although if the question arose it might be pertinent to observe that, as will be seen from the reference made in the judgment to the rule as stated in Mullah's Principles of Hindu Law, 8th ed., 467, and to the decision of the Privy Council reported in *Mahomed Shumsool* v. *Shewukram*[2], the learned Judges were prepared to hold that a Hindu donor must be presumed to have made his gift to a Hindu female with the notion present to his mind that as a rule Hindu females take only a limited estate in property inherited by them from male relations. A ruling perhaps more pertinent to the case on hand is a Bench decision reported in *Malladi Venkatappiah* v. *Jonnalagadda Venkatasubbiah*[3],

1. (1936) 1 M.L.J. 688 : I.L.R. 1937 Mad. 335.
2. (1874) L.R. 2 I.A. 7.
3. (1906) 16 M.L.J. 352.

which holds that in the absence of any evidence that lands set apart for the maintenance of a female member of the family (in that case a coparcener's widow) were not to be resumed on her death, the presumption is that they are resumable. Applying the principle of that decision to the present case it seems to me that the suit lands would, *prima facie*, be liable to revert to Seshamma, unless she is proved to have extinguished her right of survivorship by any binding agreement.

Mr. Bhimasankaram has, with his usual resourcefulness, also sought to maintain the decree of the lower appellate Court on the basis of a title by adverse possession on the part of the plaintiff and his brothers commencing from the date of Exhibit P-3; but a case of prescriptive title as such has not been raised in the pleadings, and I am not prepared to construe the issue of title in the circumstances of this case as covering a case of title by prescription or to entertain in second appeal the point raised for the respondent with reference to such case.

The equities arising out of the state of the record as to possession and the considerations connected with the question of title seemed to my mind during the progress of the hearing of the appeal so evenly balanced that I was wondering whether to accept the appeal or reject it; but having reserved judgment I have definitely made up my mind in favour of the appellants on a careful consideration of the true legal perspective indicated by me in the foregoing as applicable to the case. The decree of the lower appellate Court is accordingly set aside and the decree of the trial Court restored with costs here and in the lower appellate Court.

No leave.

Mr. Bhimasankaram tells me, as I have finished reading this judgment, that, since the lower appellate Court has not found one way or the other on the question of the usufructuary mortgage set up by the plaintiff but has merely ignored the case and version about the mortgage, because apparently it found it possible to decree the case without a finding upon it, I must send the case back to the lower appellate Court for a finding on the question which forms the subject-matter of issue No. 1. I think Mr. Bhimasankaram is right. Although this point was not mentioned to me at the time of the argument, the respondent is certainly entitled to have a finding called for on this question from the lower appellate Court. I accordingly direct the learned Subordinate Judge of Amalapuram to submit his finding on this question within six weeks from the date of the receipt of this judgment. Time for objections one week thereafter.

(Finding . . . . . .)

After the receipt of the finding, the Court delivered the following

JUDGMENT.—The finding is accepted. The appeal is allowed with costs throughout. No leave.

V.P.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

Puthen Veetil Karuvankandi Unichira and others .. *Appellants**

v.

Karamora Raru Nayar Karnavan and others .. *Respondents.*

Limitation Act (IX of 1908), Article 182 (5)—Application for execution by person who was not the legal representative of the deceased decree-holder—If and when can save limitation for application for execution by the real legal representatives of the decree-holder.

S obtained a decree on 10th June, 1932, for arrears of rent. *S* while alive filed in succession three petitions for execution, the last of which was disposed of on 17th July, 1939. After the death of *S* one *K* claiming to have become the karnavan of the tavazhi filed an execution petition for the recovery of the decree amount. Notice was ordered to the judgment-debtors and eventually on 11th August, 1942, the petition was dismissed for non-payment of batta. On 5th July, 1944, *K* in the same capacity filed another execution petition. In this also notice was issued to the judgment-debtors who in the counter which they filed pleaded *inter alia* that *K* was neither the heir nor the

* A.A.A.O. No. 31 of 1948. 25th August, 1950

legal representative of the deceased *S*, that the property did not belong to the tavazhi of *S*, but that it was his separate and personal property. The execution petition was eventually dismissed on 5th July, 1944. In June, 1945, the widow and children of *S* filed a petition to execute the decree claiming that the properties in relation to which the decree had been obtained were the separate and personal properties of *S* and that on his death they became his heirs in respect of the properties. The District Munsif took the view that the properties belonged to the tavazhi and in that view dismissed the execution petition. On appeal the Subordinate Judge found that the properties were the separate properties of *S*, but that the execution petition filed by the widow and children of *S* was barred by time. On second appeal,

Held :—As *K* did not purport to act on behalf of the widow and children of *S* in making the applications for execution and as the widow had not interposed and asked that the decree should be executed for her benefit before the time within which the execution application had to be made, the execution petition filed by the widow and children of *S* was barred by limitation. Nor can the notice ordered to the judgment-debtor on the application for execution filed by *K* amount to a step-in-aid of execution which will save limitation. The prayer in the application of *K* to be brought on record as the legal representative of *S* is not tantamount to a step-in-aid of execution as *K* was not in fact the legal representative of *S*.

Appeal against the order of the Court of the Subordinate Judge, Tellicherry, dated 18th July, 1947, in A.S. No. 9 of 1947 preferred against the order of the Court of the District Munsif, Quilandy, in R.E.P. No. 370 of 1945 in O.S. No. 219 of 1932.

V. P. Gopalan Nambiar for Appellants.

The Advocate-General (*K. Kuttikrishna Menon*) and *T. R. Sangameswaran* for Respondents.

The Court delivered the following

JUDGMENT.—The question for determination in this second appeal is whether a certain execution petition is in time.

On 10th June, 1932, one Sankaran, who subsequently died, obtained a decree for arrears of rent in O.S. No. 219 of 1932 on the file of the District Munsif of Quilandy. When he was alive, Sankaran filed in succession three execution petitions, the last of which was E.P. No. 324 of 1939. This was disposed of on 17th July, 1939. After the death of Sankaran, one Kunhi Raru, claiming to have become the karnavan of the tavazhi filed E.P. No. 553 of 1942 for the recovery of the decree amount. Notice was ordered to the judgment-debtors and eventually on 11th August, 1942, the petition was dismissed for non-payment of batta. On 5th July, 1944, Kunhi Raru in the same capacity filed another E.P. No. 272 of 1944. In this also notice was issued to the judgment-debtors. In the counter which they filed, the judgment-debtors pleaded *inter alia* that Kunhi Raru was neither the heir nor the legal representative of the deceased Sankaran, that the property did not belong to the tavazhi of Sankaran but that it was his separate and personal property. Referring to the decree debt they stated as follows :

"It has been obtained for realisation of the arrears of pattam due from private properties and for Court expenses, etc. In that circumstance, except the wife and children of the decree-holder, the deceased Ukkandan *alias* Sankaran, the petitioner has no manner of right to execute the above decree . . . . . The wife and children of the petitioner should be impleaded as parties in this petition."

This execution petition was finally dismissed on 5th July, 1944. In June, 1945, the widow and children of Sankaran filed a petition R.E.P. No. 370 of 1945 to execute the decree, their claim being that the properties in relation to which the decree had been obtained, were the separate and personal properties of Sankaran and that on his death they became his heirs in respect of the properties. The question thus arose whether the properties in respect of which the decree for arrears of pattam had been obtained belong to the tavazhi of Sankaran or whether they were his separate and personal properties. The District Munsif took the view that the properties belonged to the tavazhi and in that view dismissed R.E.P. No. 370 of 1945. On appeal, the learned Subordinate Judge found that the properties were the separate properties of Sankaran but that the execution petition filed by the widow and children of Sankaran was barred by time. In that view, that execution petition was held to fail. In Civil Miscellaneous Second Appeal No. 7 of 1948, disposed of on 27th August, 1950, I found that these properties were

the separate and personal properties of Sankaran. The proper persons therefore entitled to execute the decree are his widow and children. The question therefore arises whether R.E.P. No. 370 of 1945 is in time.

Mr. Gopalan Nambiar, the learned advocate for the appellant here, tried to make out in a number of different ways, that the execution petition is in time. In the present case it will be noticed that if it can be held that E.P. No. 553 of 1942 and E.P. No. 272 of 1944 filed by Kunhi Raru were proper applications made in accordance with law, R.E.P. No. 370 of 1945 would be in time. In some cases it has been held, in the circumstances set out in them that an execution petitioner can avail himself of a previous application filed by some one else to meet the plea of limitation set up by the judgment-debtor. Mr. Nambiar tried to argue on the analogy of those decisions that the widow and children of Sankaran were entitled to utilise the execution petition filed by Kunhi Raru to defeat the plea of limitation set up by the judgment-debtors. But on an examination it will be seen that all those decisions proceeded on principles, none of which can be properly invoked in the present case.

In *Ghanaya Lal* v. *Madho Parshad*[1], an execution petition was filed by the guardian of a minor after the minor had really attained majority. But the minor ratified the application within three years of his attaining majority. The Court ruled that the ratification rendered the application valid from the date of ratification. It is clear that this case proceeded on the ordinary rule of agent and principal. In the case before us Kunhi Raru did not purport to act on behalf of the widow and children of Sankaran. The second case cited by Mr. Nambiar is reported in *Annapurnamma* v. *Venkamma*[2]. The decree in that case was obtained on 9th September, 1926. On 15th October, 1928, a nephew of the decree-holder who had died in the interval applied for the execution of the decree, alleging that the decree belonged jointly to his uncle and himself. The widow interposed with a petition asking that the petition of the nephew should be dismissed and that she should be brought on record as the sole representative and that the decree should be executed for her sole benefit. In 1931, the widow filed her own execution petition and it was held that she could avail herself of the execution petition filed n 1928 to bring her application within time. The distinction between *Annapurnamma* v. *Venkamma*[2] and the present case is that even before the expiration of the time within which the application had to be made, the widow had interposed and made a claim and asked that the decree should be executed for her sole benefit. Whereas here there was no such interposition.

In *Hari Krishnamurthi* v. *Suryanarayanamurthi*[3], the person who applied for execution (and whose application, it was held, was available later on for those properly entitled to execute the decree) was the only person who, on the face of the record, was competent to execute the decree. An executing Court cannot go behind the decree and it was ruled that so long as there was a person on record as a decree-holder, the Court is bound to entertain his application for execution. It will be noticed that in the present case Kunhi Raru was not a person who appeared on the record as a decree-holder. The principle of *Hari Krishnamurthi* v. *Suryanarayanamurthi*[3] is not therefore available for Mr. Nambiar. He could have utilised the applications made by Kunhi Raru if he could possibly have contended that he had been acting as his clients' agent or on their behalf, and that his clients had ratified the steps he had taken. If that had been the case the ordinary law of agency would apply. But here not only is there nothing to show that Kunhi Raru had been constituted an agent by the widow and children of Sankaran, but on the other hand he was putting forward a claim which was definitely and actively hostile to them.

Mr. Nambiar then pressed another line of reasoning before me. He contended that on the application filed by Kunhi Raru, the Court ordered notice to the

1. (1931) 135 I.C. 207.
2. (1938) 1 M.L.J. 135.
3. (1919) 38 M.L.J. 271 : I.L.R. 43 Mad. 424

judgment-debtors and that when a Court orders issue of notice, that would amount to a step-in-aid of execution. The decision referred to for this proposition is *Satyanarayana* v. *Kajireddi*[1]. It was there categorically stated :.

"The prayer contained in the petition of the 27th January, 1938, for the issue of a notice under rule 22 of Order 21 was a step-in-aid of execution. There are two decisions of this Court directly in point *Pachiappa Achari* v. *Poojali Servai*[2] and *Kamakshi Pillai* v. *Ramaswami Pillai*[3]. In each of these cases the decision was by a Division Bench and the decision was that the prayer for the issue of notice was a step-in-aid of execution. The same opinion was expressed by a Full Bench of the Calcutta High Court in *Gopal Chunder Manna* v. *Gossain Das Kaley*[4]."

I have not examined the facts of the cases referred to in this passage ; but the decision in *Satyanarayana* v. *Kajireddi*[1] has no application because the application in that case was made by the decree-holder himself and not as was the case here by a person who was a stranger to the decree.

Mr. Nambiar's next argument was that Kunhi Raru had applied to be brought on record as legal representative of deceased Sankaran and that this prayer of his was tantamount to a step-in-aid of execution. In this connection he referred to the decision in *Venkatachalam Chetti* v. *Ramaswami Servai*[5] and *Jaynarayana* v. *Polayya*[6]. In the former case at page 377 the following passage appears :

"……There is a decision in *Appaviengar* v. *Dharai Mudali*[7], which has some bearing on the point. In that case it was held by Benson and Miller, JJ., that an application by the legal representative of a decree-holder for an order recognising him as a decree-holder is not prohibited by the Civil Procedure Code and consequently, such an application is a step-in-aid of execution within the meaning of clause 4 of Article 179, Limitation Act of 1877."

From the very passage quoted, it will be apparent that the application in the case decided by Benson and Miller, JJ., was made by the person who was the proper legal representative. But in this case, as I have stated more often than once, Kunhi Raru was not the legal representative of Sankaran at all. Mr. Nambiar argued that nevertheless his application was available to save limitation and in support of that argument read the decision in *Jaynarayana* v. *Polayya*[6]. It is no doubt true that in this case the person who made the application had ceased to have any interest in the decree at the time he made the application ; but he was the original decree-holder and he was the person whose name appeared on the record and as such he was entitled to execute the decree and an application made by him would therefore be in order. That decision too does not therefore apply. Similar remarks may be made in respect of the decision in *Sreepada Brahmayya Pantulu* v. *Parasuramayya*[8], which was the next case that Mr. Nambiar referred to. In that case the application was made by the person who at the time of the application was the only person legally competent to make it. Such a remark cannot be made of Kunhi Raru here.

In the present case the applications relied on by Mr. Nambiar were made by Kunhi Raru who at the time he made those applications had not been recognised as the heir of Sankaran and who it has been found was not his heir in respect of these properties. It is difficult to see how any application that he made can be availed of by persons who right through had been setting up a title hostile and adverse, to him. Before the argument of Mr. Nambiar can be accepted, one must be prepared to hold that any application made by a person who, though it may ultimately turn out, was a total stranger to the decree, would avail the proper legal representative of the deceased decree-holder if it can be shown that the person who made the application had a fair claim of right or acted *bona fide*. None of the decisions read before me has gone so far, and the absence of the clearest authority which compels me to so hold, I am not prepared to endorse this proposition.

The last argument of Mr. Nambiar which requires to be noticed is that there has been a valid acknowledgment of the liability by the judgment-debtors within

1. (1945) 2 M.L.J. 427 : I.L.R. (1946) Mad. 542.
2. (1905) I.L.R. 28 Mad. 557.
3. (1908) 18 M.L.J. 14.
4. (1898) I.L.R. 25 Cal. 594 (F.B.).
5. (1931) 62 M.L.J. 1 : I.L.R. 55 Mad. 352 (F.B.).
6. (1934) 68 M.L.J. 392.
7. (1907) 17 M.L.J. 475.
8. (1902) 12 M.L.J. 348.

the meaning of section 19, Limitation Act. In answer to the claim made by Kunhi Raru in R.E.P. No. 369 of 1945, the judgment-debtors filed a counter in which they stated that Kunhi Raru was not entitled to execute the decree and that the proper persons entitled to do so were the wife and children of Sankaran. Reading that statement in relation to the claim made, Mr. Nambiar argued that it amounted to an admission of liability within the meaning of section 19, Limitation Act. That it amounts to an admission seems to be a fair enough inference. But that will not help Mr. Nambiar because the admission he relied on was made more than three years after the dismissal of the last petition filed by Sankaran. That admission therefore was not made " before the expiration of the period prescribed for a suit or application " in the opening portion of section 19 of the Act. The admission having been made up after the period had expired cannot avail to revive a debt that had become barred.

In the result the Civil Miscellaneous Second Appeal is dismissed with costs. Leave to appeal is refused.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VISWANATHA SASTRI.

S. A. Seshadri Ayyangar .. *Appellant**

v.

A. Narayana Nair .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XV of 1946) and Madras Non-residential Buildings Control Order (1945), section 9 (2-A)—Revision petition pending before Provincial Government on 30th September, 1946, when the Control Order expired—Order on 19th March, 1947, allowing the petition—Validity—Proceedings for execution of eviction order before City Civil Judge—Nature of—Appeals—Sustainability.

The Madras Non-residential Buildings Control Order, 1945, expired on 30th September, 1946 and the Madras Buildings (Lease and Rent Control) Act (XV of 1946) came into force on 1st October, 1946. A landlord who had obtained an order for eviction under section 8 of the Order on 29th May, 1946 (which was confirmed by the Collector on appeal on 15th July, 1946) applied on 2nd August, 1946, to the City Civil Court for execution of the order for eviction. The tenant preferred a revision petition to the Provincial Government against the order of the Collector under section 9 (2-A) of the Order. Though there was no similar provision in Act XV of 1946, the Provincial Government passed an order on 19th March, 1947, allowing the revision petition and setting aside the order for eviction. Acting upon this order, the City Civil Judge dismissed the execution petition filed by the landlord. An appeal having been dismissed the landlord preferred a Letters Patent Appeal.

Held, (*i*) In executing the order for eviction the City Civil Court Judge was functioning as an ordinary Civil Court and doing the ordinary business of an executing Court with regard to whose procedure and orders the provisions of the Code of Civil Procedure, including those providing for a right of appeal would apply. The order of the City Civil Judge dismissing the execution petition of the landlord attracted to itself the provisions of sections 2 (2) and 47 of the Civil Procedure Code, with the consequential right of appeal given by section 96, Civil Procedure Code. Accordingly an appeal against the dismissal of the execution petition is maintainable.

(*ii*) The Provincial Government was a tribunal invested with wide powers of revision by section 9 (2-A) of the Order but with the expiry of the life of the Order on 30th September, 1946, the tribunal also ceased to exist. There is no provision in the Act XV of 1946 corresponding to section 9 (2-A) of the Order and the Provincial Government is not one of the tribunals created or invested with any jurisdiction by the Act. The Provincial Government having become *functus officio* on the expiry of the Order there was no tribunal that could thereafter deal with the revision petition which had been presented by the tenant but which remained undisposed of at the date of the expiry of the Order. Accordingly the order allowing the revision petition was one passed wholly without jurisdiction and was null and void. The City Civil Judge erred in acting on that order and dismissing the execution petition.

Appeal against the judgment of His Lordship, Mr. Justice Balakrishna Ayyar, in A. A. O. No. 570 of 1947 on the file of the High Court (E. P. No. 1109 of 1946, City Civil Court, Madras, in L. Dis. No. 1420 of 1946, on the file of the House Rent Controller, Madras).

Appellant in person.

S. Venkatachala Sastri for Respondent.

*L. P. A. No. 73 of 1949. 6th October, 1950.

The Judgment of the Court was delivered by

Viswanatha Sastri, J.—The landlord of a non-residential building in the City of Madras is the appellant and the tenant is the respondent in this Letters Patent Appeal. The Madras Non-residential Buildings Control Order, 1945, hereinafter referred to as the Order, expired on 30th September, 1946 and the Madras Buildings (Lease and Rent Control) Act (XV of 1946), hereinafter referred to as the Act came into force on 1st October, 1946. The landlord obtained an order from the Rent Controller for eviction of the tenant under section 8 of the Order on 29th May, 1946 and this order was confirmed by the Collector on appeal on 15th July, 1946. On 2nd August, 1946, the landlord applied to the City Civil Court for execution of the order for eviction in accordance with section 8 (3) of the Order which provided that such order

"shall be executed . . . . . by the Principal Judge of the Madras City Civil Court . . . . . as if it were a decree passed by him."

On the same day the tenant preferred a revision petition to the Provincial Government against the order of the Collector under section 9 (2-A) of the Order which ran thus :—

"The Provincial Government may call for the record of any case which has been decided by the Controller or Collector and make such order in the case as they think fit. Any such order shall be final and shall not be called in question in any Court of law."

The Act designedly omitted to enact a similar provision vesting the Provincial Government with revisional power. Nevertheless the Provincial Government passed an order on 13th March, 1947, allowing the revision petition presented by the tenant and setting aside the order for eviction passed by the Controller and confirmed by the Collector on appeal. Acting upon this order of the Government the learned Judge of the City Civil Court dismissed the execution petition filed by the landlord for delivery of possession. An appeal preferred by the landlord to this Court against the order of dismissal of his execution petition was dismissed by Balakrishna Ayyar, J., from whose judgment this Letters Patent Appeal has been preferred.

A preliminary objection was taken to the maintainability of the appeal to this Court against the order of the Judge of the City Civil Court on the ground that neither the Order nor the Act in terms gave such a right of appeal. Both section 8 (3) of the Order and section 9 of the Act provided that every order for eviction passed by the Rent Controller or an appellate authority should be executed by the specified Civil Court, as if it were a decree of that Court. Section 18 (1) of the Act provided that proceedings in execution filed under the provisions of the Order and pending at the commencement of the Act, shall be deemed to have been filed under the corresponding provisions of the Act and continued accordingly. It is trite law that a right of appeal against a judicial order does not exist unless given by statute. But it is equally well-settled that

"When a question is stated to be referred to an established tribunal without more, it. . . . . imports that the ordinary incidents of the procedure of that court are to attach, and also that any general right of appeal from its decisions likewise attaches."

Per Viscount Haldane, L.C., in *The National Telephone Co., Ltd.* v. *Postmaster General*[1] and *Canada Cement Co.* v. *East Montreal (Town)*[2]. In executing the order for eviction, the City Civil Court Judge was functioning as an ordinary civil Court and doing the ordinary business of an executing Court with regard to whose procedure and orders the provisions of the Code of Civil Procedure, including those providing for a right of appeal, would apply. See *Secretary of State* v. *Chelikani Rama Rao*[3] and *Hem Singh* v. *Basant Das*[4]. The true principle applicable to cases of this kind was stated by Lord Simonds delivering the judgment of the Judicial Committee in *Adaikappa Chettiar* v. *Chandrasekhara Thevar*[5] in these terms :

1. (1913) A.C. 546, 552.
2. (1922) 1 A.C. 249, 252.
3. (1916) 31 M.L.J. 324 : L.R. 43 I.A. 192 : I.L.R. 39 Mad. 617 (P.C.).
4. (1936) L.R. 63 I.A. 180 : I.L.R. 17 Lah. 146 (P.C.).
5. (1948) 1 M.L.J. 41, 44 : L.R. 74 I.A. 264 : I.L.R. (1948) Mad. 505 (F.C.).

"The true rule is that where a legal right is in dispute and the ordinary Courts of the country are seized of such dispute the Courts are governed by the ordinary rules of procedure applicable thereto and an appeal lies, if authorised by such rules, notwithstanding that the legal right claimed arises under a special statute which does not in terms confer a right of appeal."

The order of City Civil Judge dismissing the execution petition of the landlord attracted to itself the provisions of sections 2 (2) and 47 of the Civil Procedure Code with the consequential right of appeal given by section 96, Civil Procedure Code. The objection to the maintainability of the appeal is therefore overruled.

The contention of the appellant is that since section 9 (2-A) of the Order which conferred a revisional power on the Provincial Government and indeed the whole order had expired by efflux of time on 30th September, 1946, the Provincial Government lost all jurisdiction on that date and its order purporting to be passed on the revision petition of the tenant on 13th March, 1947, was null and void. The argument of the respondent, accepted by the learned Judge, is that even before 30th September, 1946, the tenant had acquired a vested right to take up his case in revision to the Provincial Government under section 9 (2-A) of the Order and this right was not lost on the expiry of the period for which the Order was in force. It is also urged that the Act recognises that rights acquired under the Order while it was in force, could be enforced even after its expiry. The validity of these contentions has to be examined.

The learned Judge proceeded on the assumption that a right to invoke the revisional jurisdiction of the Provincial Government was analogous to a right of appeal. With reference to a right of appeal, it has been held that a repealing enactment should not, in the absence of a specific provision to that effect, be so construed as to

"deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right"

when he instituted the action, *Colonial Sugar Refining Co.* v. *Irving*[1]. This is in accordance with the general principle that an enactment which takes away substantive rights is not to be interpreted as having retrospective effect unless it is so provided either expressly or by necessary implication. Compare section 6 of the General Clauses Act. A right of appeal is a substantive right within the meaning of this general rule. See section 154, Civil Procedure Code. It has also been recognised that where a right of appeal is granted by statute that right becomes vested in a litigant on the commencement of the proceedings in the trial Court itself. In re *Vasudeva Swamiar*[2], *Delhi Cloth and General Mills, Ltd.* v. *Commissioner of Income-tax*[3]. It is, however, open to question whether a right to invoke a discretionary power of revision couched in the terms of section 9 (2-A) of the Order can be placed on the same footing as a right of appeal which entitled the suitor to take his case to an appellate tribunal for adjudication and obliges the appellate tribunal to set right errors of fact or law. The power of revision given by the order is not circumscribed by any limit of time within which it should be invoked nor is it a condition of the exercise of the power that the aggrieved party should even move the Government by a revision petition. The power of revision is purely discretionary and need not be exercised even if there is any error of fact or law in the order of the Rent Controller or Collector sought to be revised. In these respects a right of appeal differs from a right to apply for relief by way of revision. This aspect of the case was, however, not touched upon in the arguments before us and we do not therefore rest our decision on the distinction that might be drawn between a right of appeal and a discretionary remedy available by way of revision.

We have already stated that the order was only a temporary measure enacted so as to be operative for a specified period ending with 30th September, 1946. There is a distinction between an enactment which is repealed and one which expires owing to its purely temporary validity. Section 6 of the General Clauses

1. (1905) A.C. 369.
2. (1928) 56 M.L.J. 369: I.L.R. 52 Mad. 361 (F.B.).
3. (1927) 53 M.L.J. 819: L.R. 54 I.A. 421 (P.C.).

Act enacts that, unless a different intention appears, the repeal of an enactment or regulation :

"shall not . . . . (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed . . . . (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation . . . . and any such investigation, legal proceeding or remedy may be instituted or enforced . . . . as if the repealing Act had not been passed."

With reference to enactments expiring by their own force on a particular day, the Federal Court observed :

"The provisions of section 6 of the General Clauses Act apply only to repealed enactment and not to expiring statutes and the general rule in regard to the expiry of a temporary statute is that unless it contains some special provision to the contrary, after a temporary Act has expired, no proceedings can be taken upon it and it ceases to have any further effect. Therefore offences committed against temporary acts must be prosecuted and punished before the Act expires and as soon as the Act expired, any proceedings which are being taken against a person will *ipso facto* terminate."

J. K. Gas Plant Manufacturing Co. v. *Emperor*[1]. Their Lordships quoted with approval the statement of the law at page 347 of Craies on Statute Law (4th Edn.)- A temporary Act comes to an end for all purposes at the end of the period for which it is enacted. Unreasonable results might follow in some cases from this view of the law. If a man broke a penal regulation a week or two before it expired, he could not be punished unless indeed the trial had ended in his conviction before the regulation expired. Even if the prosecution had been started before the regulation expired, still if the trial was not over, then at the moment the regulation expired, the trial would necessarily cease and the man would go free. To avoid these consequences special legislative provision is sometimes made to the effect that notwithstanding the expiry of a temporary enactment or regulation, proceedings could be instituted in respect of acts done or omitted contrary to the expired enactment or regulation or such proceedings, if previously instituted, might be continued as if the enactment or regulation had not expired. Ordinance XII of 1946, amending section 1, sub-section (4) of the Defence of India Act, 1939, as interpreted by the Federal Court in the case above cited is an instance in point.

It is, we apprehend, with a realisation of the distinction between an expiring enactment and a repealed enactment, that section 18 (1) of the Act was enacted in these terms :—

"All proceedings commenced and action taken under the Madras Non-residential Buildings Rent Control Order, 1945, and pending at the commencement of this Act, shall so far as may be, be deemed to have been commenced or taken under the provisions of this Act."

There is here no unqualified saving of all pending proceedings but only a limited provision hedged in with conditions. Proceedings initiated under the Order while it was in force but which had not terminated before its expiry, could be continued only if and to the extent to which, a corresponding provision is made in the Act. Those proceedings have to be continued only subject to the provisions of the Act. The Provincial Government was a tribunal invested with wide powers of revision by section 9 (2-A) of the Order but with the expiry of the life of the Order that tribunal also ceased to exist. There is no provision in the Act corresponding to section 9 (2-A) of the Order and the Provincial Government is not one of the tribunals created or invested with any jurisdiction by the Act. It is true, as pointed out by Balakrishna Ayyar, J., that the Provincial Government has survived the expiry of the order and continues to exist and function as a Government but it ceased to be a tribunal empowered by statute to adjudicate upon claims by landlords for eviction of tenants, once the order expired. The Act has made a radical departure from the order and has deliberately not included the Provincial Government among the tribunals invested with jurisdiction under it. The Provincial Government having become *functus officio* on the expiry of the Order, there was no tribunal that could thereafter deal with the revision petition which had been presented by the tenant but which remained undisposed of at the date of the expiry of the Order. The Order of the Provincial Government dated 13th March, 1947, allowing the revision petition of the tenant having been passed

1. (1947) 2 M.L.J. 402, 412 : (1947) F.L.J. 71 (F.C.).

after the expiry of the Order and after the Provincial Government lost all jurisdiction over the subject-matter, has no effect whatever. As a tribunal the Provincial Government was purely the creature of the Order and with the Order the tribunal created also ceased to exist. In the circumstances we are constrained to hold that the order of the Provincial Government dated 13th March, 1947, was one passed wholly without jurisdiction and was null and void. The City Civil Court erred in law in acting upon that Order and dismissing the execution petition of the landlord.

Reference had been made in the judgment of the learned Judge to two decisions of the Judicial Committee as having a bearing on the question now under consideration. The decision in *Keshoram Poddar* v. *Nundo Lal Mullick*[1] is, in our opinion, distinguishable because there the Court had to deal with a "living Act" and an existing tribunal, though the powers and jurisdiction of the tribunal before and after a particular date, were differently prescribed by the Act then in question. It was for this reason that Lord Dunedin in delivering the judgment of the Board, observed :

> "Their Lordships think that the discussions as to the different effects of a repealing Act on the one hand, and an expiring Act on the other, which bulk largely in the judgments given, are really beside the point."

In *Canada Cement Co., Ltd.* v. *East Montreal (Town)*[2], what was taken away was not the right of appeal but the very Court to which the appeal lay, namely, the Superior Court of Montreal sitting in review. The right of appeal was transferred by statute from the abolished Court to the Appellate Side of the Court of King's Bench in Quebec, but no provision was made for the transference of appeals which would have lain to the abolished Court to the newly constituted appellate Court. In these circumstances the Judicial Committee held that an appeal from the Circuit Court to the Court of the King's Bench did not lie. This is the sense in which this decision was understood by a Full Bench of five Judges in In re *Vasudeva Swamiar*[3].

Section 18 (1) of the Act authorises the continuance of execution proceedings initiated before the expiry of the Order in the City Civil Court as if they had been instituted under section 9 of the Act. The revisional order of the Provincial Government purporting to be passed on 13th March, 1947, after the expiry of the Order is null and void and is therefore no bar to the execution of the Order for eviction passed under section 8 of the Order. This appeal is allowed and the execution petition is directed to be restored and disposed of according to law. As the appellant appeared in person, there will be no order as to costs.

K.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

Mathradas Vadilal Gandhi .. *Appellant**

v.

Sri Kishen Jhavar .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XV of 1946), section 9—City Civil Court Judge executing order for eviction—Competency to entertain application of person for coming on record as legal representative of the landlord—Application to be brought on record as the legal representative—When sustainable as substantive application.

Where in an application by the son of a landlord for execution of an order for eviction under the Madras Buildings (Lease and Rent Control) Act, XV of 1946, it was objected that a separate petition by him to come on record as the legal representative was necessary, and he filed an application for that purpose, it cannot be contended that the application is not maintainable in law as a substantive application by itself, without the prayers of a regular execution petition.

1. (1927) 52 M.L.J. 655 : L.R. 54 I.A. 152 : I.L.R. 54 Cal. 508 (P.C.).
2. (1922) 1 A.C. 249.
3. (1928) 56 M.L.J. 369 : I.L.R. 52 Mad. 361 (F.B.).

* A. A. O. No. 675 of 1949. 3rd October, 1950.

Ramachandra Aiyar v. *Subramania Chettiar*, (1903) 14 M.L.J. 393, distinguished.

Under the terms of section 9 of the Rent Control Act, the City Civil Court being the only Court which has to execute the order for eviction as if it were a decree passed by itself, has the jurisdiction to entertain the petition of the landlord's son to come on record as the legal representative of his father.

Kandaswami v. *Neelamegham Pillai*, (1946) 2 M.L.J. 368 and *Thangasami Chettiar* v. *Rapoo Shaikh*, (1949) 2 M.L.J. 699, relied on.

Appeal against the order of the City Civil Court, Madras, dated 7th December, 1949, in E. A. No. 1929 of 1949, in E. P. No. 2779 of 1949 (L. Dis. 365 of 1948, H. R. A. No. 1018 of 1948, on the file of the House Rent Controller, Madras).

D. Ramaswami Aiyangar and *L. Krishna Das* for Appellant.

P. V. Subramanyam for Respondent.

The Court delivered the following

JUDGMENT :—This Civil Miscellaneous Appeal arises out of E. A. No. 1929 of 1949 in E. P. No. 2779 of 1949, on the file of the City Civil Court of Madras. That Court ordered the E.A., and the respondent therein appeals. The E. P. and E. A. were in connection with an order for eviction passed in favour of the applicant in the court below, that is, of the respondent before me, in a proceeding for eviction under section 7 of the Madras Buildings (Lease and Rent Control) Act XV of 1946. Under section 9 of the Act, so far as material to the present case, every order made under section 7 shall be executed in the City of Madras by the Principal Judge of the Madras City Civil Court as if it were a decree passed by him.

Mr. Ramaswami Aiyangar has taken two points before me against the order of the court below. The first is that an execution application by a person seeking to come on record as a legal representative is not maintainable in law as a substantive application by itself, without the prayers of a regular execution petition. He relies on a judgment of this court reported in *Ramachandra Aiyar* v. *Subramania Chettiar*[1]. Mr. Justice Bhashyam Aiyangar has ruled in that case that a transferee decree-holder can only apply to execute the decree under section 232, Civil Procedure Code and that he can make no application merely for recognising him as a transferee as there is no provision of law requiring the Court to recognise the validity of the transfer before the transferee applies for execution. The ruling has, in my opinion, no application to the facts of the present case. The son of the landlord applied in the present case for execution in E. P. No. 2779 of 1949, asking to be recognised as a transferee decree-holder, and asking to have the order for eviction executed. Since it was objected that a separate petition by him to come on record as legal representative was necessary, he filed E. A. No. 1929 of 1949. There was nothing irregular, much less illegal, about what the respondent before me did. He did in fact the only right thing that he could do in the circumstances of the case. I must accordingly repel this contention of the learned advocate for the appellant.

The next argument of Mr. Ramaswami Aiyangar is one founded on the analogy of certain decisions of this Court which have held that where there is a decree passed by a certain Court which has transmitted it for execution to another Court, it is not the latter Court but the former which has the power to entertain an application to bring on record a person as legal representative of the decree-holder. *Prima facie* that line of decisions has, in my opinion, no relevancy to the case on hand because we are not concerned here with a case of rival jurisdiction between two Courts between which it is necessary to determine which has jurisdiction but with the question how far under the terms of section 9 of the Rent Control Act, the City Civil Court has the jurisdiction to bring on record the petitioner as the legal representative of the original applicant for eviction. Looking at the language of the section, it seems to me that the City Civil Court being the only Court which has to execute the order for eviction as if it were a decree passed

1. (1903) 14 M.L.J. 393.

by itself, it has the jurisdiction to entertain the petition of the respondent before me to come on record as the legal representative of his father. Mr. Ramaswami Aiyangar argues that the expression "shall be executed as if it were a decree passed by him" has reference only to the procedure to be adopted by the Principal Judge of the Madras City Civil Court in the process of execution, but has no reference to the right of the respondent to execute the order for eviction, which right is under challenge here. I am not satisfied that this restricted interpretation of the expression is correct. It seems to me that once the City Civil Court became seised of the case for the purpose of execution, it had the right to execute it as if it were a decree passed by that Court itself in every sense of the term. The determination of the question whether the respondent before me has the right to come on record as legal representative of his father is itself part of the procedure which has to be gone through by that Court under section 9 in the matter of execution. As pointed out by Mr. Justice Chandrasekhara Aiyar in *Kandaswami* v. *Neelamegham Pillai*[1], the words: "as if it were a decree of this Court" in section 7-A (2-A) of the Madras House Rent Control Act, has the effect of rendering the order of the Rent Controller, the decree of the particular Court for purposes of execution. So in the view of the learned Judge, the provisions of section 47 of the Civil Procedure Code become applicable to the case, and the parties had a right of appeal from orders of the executing Court. The question that arose before His Lordship was whether the provisions of section 47, Civil Procedure Code, became applicable to the case of an order of the executing Court so as to give the parties a right of appeal therefrom, although the order of the Rent Controller himself directing eviction was final and could not be challenged in the civil Court. The question was answered by the learned Judge in the affirmative. This ruling has been followed in a later case decided by a Bench of this Court (Horwill and Balakrishna Ayyar, JJ.), which is reported in *Thangasami Chettiar* v. *Bapoo Sahib*[2]. In that case, in an application for eviction of a tenant on the ground of arrears of rent the landlord obtained an order for eviction and actually got possession of the building in execution. On appeal to the Subordinate Judge, the appellate authority, the order was reversed. After five days the tenant applied to the Subordinate Judge himself for restitution and re-delivery, which was ordered, and on appeal to this Court against that order on the ground of want of jurisdiction in the sub-Court to make such an order, it has been held by the learned Judges, that the application for restitution is an application for execution and that once execution proceedings under the Madras Act XV of 1946 come to be placed in the hands of the ordinary Courts, the provisions of the Civil Procedure Code relating to the subject must apply *mutatis mutandis* and so far as the machinery set up by the Act and the provisions thereof permitted. Reference is made in the course of the decision to the principle of the House of Lords decision in *National Telephone Co., Ltd.* v. *Post Master-General*[3]:

> "When a question is stated to be referred to an established Court without more, it imports that the ordinary incidents of the procedure of that Court are to attach, and also that any general right of appeal from its decision likewise attaches."

The argument for the appellant is opposed to principle as well as precedents which have construed the relevant provisions of the statute and must accordingly be repelled.

Mr. Subramanyam for the respondent has, in support of the order of the Court below also drawn my attention to certain decisions under the Madras Co-operative Societies Act, reported in *Kannappa Mudali* v. *Varadachariar*[4] and *Munisami Chetti* v. *Chenchu Naidu*[5], the principle of which is according to learned counsel applicable to the case on hand. Both are decisions of the same Judge, Mr. Justice Wadsworth, and are to the same effect. The question which arose in these cases was the competency of the executing Court to recognise the assignment of an award

1. (1946) 2 M.L.J. 368.
2. (1949) 2 M.L.J. 699.
3. (1913) A.C. 546.
4. (1929) 2 M.L.J. 596.
5. (1940) 2 M.L.J. 816.

decree which had been passed by the Registrar of Co-operative Societies. At page 599 of the report of the former case this is what the learned Judge observes :

"There is very little authority on this subject. Cases under the old Co-operative Societies Act have no direct bearing, for under the old rules the award of the Registrar of Co-operative Societies could be executed only by a procedure similar to that applicable to an award of an ordinary arbitrator. It is established that under the old Act when an award was transferred to the Civil Court for execution the Civil Court had the necessary power to treat the decree as its own decree efor purposes incidental to execution including the granting of a certificate transferring the decree to any Court for execution, vide *Krishnaji Shridhar* v. *Mahadeo Sakharam*[1]. There is authority for the view that the award of an arbitrator when it has been filed in Court and has become the decree of the Court can be assigned and the assignment can by recognised by the Court in which that award is filed. *Gladstone Wyllie* v. *Joosub Pir Mahmood*[2]. It is contended for the appellants that the provision of Rule 15, sub-rule 8, is significant and that this rule contemplates that the person to be recognised as the decree-holder by the Civil Court must always be the person in whose favour the Registrar has granted an award and cannot be his assignee, for the original holder of the award is given the power to apply to the Court for the return of the award with a certificate of non-satisfaction. It seems to me to be going too far to hold that because the person in whose favour an award has been passed may apply to the Court for its transfer back to the Registrar, the Court has necessarily no power to recognise an assignment."

It is not necessary for me to express any opinion in regard to the correctness of the point of view of the learned Judge expressed in those two cases. It is sufficient for me to say that, for the reason that I have already given, *viz.*, that the language of section 9 of the Madras Rent Control Act is sufficiently wide to cover the case of an execution application like the one filed by the respondent before me this appeal must fail and be dismissed with costs.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE BASHEER AHMED SAYEED.

Sri Narayana Dossju Varu, the Mahant of Sri Hathiramjee Mutt, Tirupati .. *Appellant**

v.

The Madras Hindu Religious Endowments Board, by its President at Nungambakkam High Road, Madras .. *Respondent.*

Civil Procedure Code (V of 1908)—Order 39, rule 1—Suit under section 63 of the Madras Hindu Religious Endowments Act—Application for injunction to restrain Board from appointing executive officer or giving effect to the scheme—Court appointing receiver—Propriety.

The appellant in this case was recognised and installed as the Mahant of a Mutt and the properties in the possession of an interim trustee were handed over to him. A scheme was subsequently framed by the Hindu Religious Endowments Board for the management of the Mutt under section 62 of the Hindu Religious Endowments Act. In a suit under section 63 the appellant asked for modification and setting aside of the scheme framed. Pending the suit, he applied to the Court for an order of temporary injunction restraining the Hindu Religious Endowments Board from appointing an executive officer or in any way giving effect to the provisions of the scheme. The Court appointed a Receiver. On appeal

Held : That the Court's order appointing a Receiver in an application for injunction was not proper. Even the words "make such other order" in Order 39, rule 1, of Civil Procedure Code, does not contemplate appointment of a Receiver.

Appeal against the order of the District Court, Chittoor, dated 10th April, 1950, in I. A. No. 18 of 1950, in O. S. No. 1 of 1950.

K. Bashyam and *T. R. Srinivasan* for Appellant.

M. Seshachalapathi for Respondent.

K. E. Rajagopalachari for Receiver.

The Judgment of the Court was delivered by

Govinda Menon, J.—This is an appeal by Sri Narayana Dossju Varu, the present Mahant of Sri Hathiramji Mutt, Tirupati, one of the most well-known

1. (1921) I.L.R. 46 Bom, 128.
2. A.I.R. 1924 Cal. 117.

*A. A. O. No. 242 of 1950. 1st November, 1950.

mutts of South India, against the order of the learned District Judge of Chittoor, appointing a Receiver for the purpose of taking possession and managing the properties as well as the assets belonging to the mutt pending disposal of O. S. No. 1 of 1950. The plaintiff was recognised as the Mahant for a concordat as it were to use the language of the learned counsel for the respondent, on 15th January, 1948. But pending such recognition, the Endowments Board had appointed one Mr. Bhujanga Rao to be in possession of the properties, after the death of the previous Mahant, which took place on 5th October, 1947. When once the appellant was recognised and installed as the Mahant, the interim trustee appointed by the Board handed over possession of the properties to the Mahant along with cash to the tune of more than Rs. 1,70,000 and the jewels belonging to the Mutt. It is not necessary for us to specifically describe the proceedings which took place between the date of handing over of the assets to the appellant and the time when a scheme was framed by the Board for the management of the Mutt under section 62 of the Hindu Religious Endowments Act. Suffice it for the present purpose to state that the Hindu Religious Endowments Board, not being satisfied with the management of the Mutt properties by the appellant, framed a scheme, which in great detail dealt with various matters as to how the Mutt has to be conducted, what expenses have to be incurred for various things and so on. O. S. No. 1 of 1950 was a suit under section 63 of the Hindu Religious Endowments Act for modifying or setting aside the scheme framed by the Board filed by the appellant as plaintiff. Pending that suit, he applied to the learned District Judge by I. A. No. 18 of 1950 for an order of temporary injunction restraining the Hindu Religious Endowments Board from appointing an executive officer or in any way giving effect to the provisions of the scheme settled by the Board on 18th November, 1949, till the disposal of O. S. No. 1 of 1950. That was supported by an affidavit, to which the Hindu Religious Endowments Board filed a counter alleging various acts of mismanagement, malversation and misappropriation of trust funds. It was also alleged by the Board that the appellant had arrogated to himself ownership of certain properties, which according to the Board, belonged to the Trust, and in such arrogation, the appellant had filed O. S. No. 48 of 1949, on the file of the Subordinate Judge's Court, Chittoor, for a declaration that certain cash and other properties did not belong to the Mutt, but were the private properties of the appellant. This application was heard by the learned District Judge, who without stating whether an order of injunction should be passed or refused, expressed his opinion that the interests of the Mutt necessitated the appointment of a Receiver and thereupon a member of the Bar, who was one of the persons in the panel of Receivers of that district, was appointed as Receiver. Aggrieved by that order, the plaintiff has preferred this appeal.

We have heard lengthy and exhaustive arguments on various aspects of the question from the learned counsel on either side. But, in our opinion, it is not proper in the circumstances of the case and in the view which we are taking, to give expression to any views of our own. The learned District Judge has not considered the question as to whether the property in dispute is in danger of being wasted, damaged, or alienated, or wrongfully sold in execution of a decree, as is necessary if Order 39, rule 1, has to be invoked in favour of the appellant. Nor has the learned District Judge considered the question as to whether it is just and convenient to appoint a receiver. We may remark that there was no application either by the appellant or by the respondent for the appointment of a Receiver. The only way in which the order of the learned District Judge appointing a receiver can be justified is by invoking the words in Order 39, rule 1, namely "make such other order." It cannot be stated that this contemplated the appointment of a Receiver. No authority has been brought to our notice, which holds that if a plaintiff in a suit asks for an injunction restraining the defendant from interfering with his possession of the properties, it is open to the Court to appoint a Receiver and thereby dispossess the plaintiff. As we are not expressing any opinion on the merits it seems to us that the reasons given by the learned District Judge for the appointment of a Receiver in paragraph 5 of the judgment need not be canvassed

at this stage. But, we feel that the lower Court erred in appointing a Receiver on this application for injunction by the plaintiff.

As the procedure adopted by the learned District Judge is not one, which commends itself to our acceptance, we set aside the order of the learned District Judge and remand I. A. No. 18 of 1950 for disposal according to law in the light of the observations contained in this judgment. Costs of this appeal will abide and follow the result of the fresh disposal.

K.C. ——— *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VISWANATHA SASTRI.

S. Ramalinga Pillai .. *Appellant**

v.

G. R. Jagadammal *alias* Jagadamba Ammal and another .. *Respondents.*

Specific Relief Act (I of 1877), section 22—Discretion exercised by Court—If and when open to review in second appeal—Damages which will compensate disappointed party—If ground for dispensing with specific performance.

Where a decree for specific performance granted by the trial Court is reversed by the appellate Court in disregard of the relevant statutory provisions or legal principles recognized by judicial precedents, the judgment of the lower appellate Court is liable to be reviewed in second appeal by the High Court. The discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal.

A party entering into a contract for sale of immoveable property should not be allowed to avoid its performance to suit his own convenience by offering to pay damages and pleading that the disappointed party might well be compensated thereby.

Appeal against the decree of the District Court, Chittoor, dated 6th September, 1946, in A. S. No. 154 of 1946, preferred against the decree of the Court of the District Munsiff, Chittoor, dated 14th December, 1945, in O. S. No. 468 of 1943.

S. Jagadisa Aiyar for Appellant.

D. Ramaswami Aiyangar, T. Rangaswami Aiyangar and *V. Vedantachari* for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff, whose suit for specific performance of a contract for sale of land belonging to the 1st defendant was decreed by the trial Court but dismissed on appeal, has preferred this second appeal. The 1st defendant is the wife of the 2nd defendant. Under Ex. P.-1 dated 11th October, 1943, in the handwriting of the husband and bearing the thumb impressions of the wife, two plots of land belonging to the wife were agreed to be sold to the plaintiff for Rs. 1,750 out of which a sum of Rs. 150 was recited as having been paid in advance. The time for completion of the conveyance and payment of the balance of the price was fixed at one month from the date of the contract and it was provided that an encumbrance certificate should be furnished by the vendor to the purchaser before the execution of the conveyance. The plaintiff alleged that on 22nd October, 1943, the title deeds of the property were handed over to him, that the tenant of the land was also made to attorn to him and that he purchased stamp papers and had the conveyance engrossed thereon, but the defendants acting in concert evaded performance of the contract and eventually resiled therefrom. The plaintiff averred that he was ready and willing to perform his part of the contract and prayed for specific performance or for damages in the alternative in the sum of Rs. 1,200. He deposited in Court Rs. 1,600, the balance of the purchase money along with his plaint. The 1st defendant denied that she entered into the contract Ex. P-1 or received the advance of Rs. 150, or promised to furnish an encumbrance certificate. She denied all knowledge of the delivery of the title deeds of the land or of the attornment by the tenant to the plaintiff or of the purchase of stamp papers and the engrossing of a conveyance thereon. She alleged that her husband took

*S. A. No. 689 of 1947. 23rd March, 1950.

her thumb impressions to a paper representing that it was required for effecting a sale of the groundnut crop on the land for Rs. 150 and that even that sum had not been paid to her. Her case was that there was some temporary estrangement between her and her husband at the time of the contract and that the agreement Ex. P-1, if true, must have been brought about by the plaintiff, and her husband in collusion with each other for the purpose of defrauding her of her properties.

The learned District Munsiff discredited the story of the defendants. His findings are as follows : Ex. P-1 was written by the husband in his own hand and the thumb impressions of the wife were affixed on both pages after Ex. P-1 had been written. The plea that the thumb impressions were taken to a blank paper was untrue. A sum of Rs. 150 was paid as advance on the date of Ex. P-1 . The story of a temporary estrangement between the husband and his wife, who had presented him with seven children, of whom the last was a baby a few months old, was untrue and a pretence. The husband and wife were living amicably in the same house throughout. The husband was a shopkeeper and the wife, a shrewd and intelligent lady, who understood the contents of Ex. P-1 before affixing her thumb impressions thereto. The wife's story of a sale of a groundnut crop, which was worth only Rs. 40, for Rs. 150 and the execution of some document in connection with the sale of the crop was untrue. The title deeds of the lands were handed over to the plaintiff by the husband. The tenant of the land was also made to attorn to him. The husband had arranged for the purchase of the suit lands for his wife under Exs. P-1 and P-3 (*a*) for Rs. 235 and Rs. 300 in 1941 and 1942. He had also been looking after the cultivation of the land by the tenant and realising the produce. The husband did not induce the wife to affix her thumb impressions to Ex. P-1 on any misrepresentation as to its contents. The wife resiled from the contract after consultation with her mother and evaded performance. The husband has been acting in the interests of the wife both in entering into the contract and in resiling therefrom. The plaintiff and two of the attestors to Ex. P-1 gave an exaggerated and incorrect version of the events connected with the execution of Ex. P-1 and the payment of the advance of Rs. 150. The husband was attending to the negotiations and details of the transaction evidenced by Ex. P-1, though the wife was aware of the contents of the contract for sale. The plaintiff and his witnesses in their anxiety to connect the wife with every detail of the negotiations gave exaggerated and conflicting versions, as for example, about the order in which the attestors came, the conversation that transpired at the time of the execution of Ex. P-1 the ink that was used for taking the thumb impressions of the wife, the handing over of the advance of Rs. 150 to the husband or the wife or to both. The husband, who filed a written statement supporting his wife's case and engaged an advocate, who cross-examined the plaintiff's witnesses, did not choose to give evidence in the case. This was a serious infirmity in the defendant's case.

At the end of a careful and lucid judgment the learned District Munsiff granted a decree for specific performance on the following findings :

" The price is certainly a fair one and there is no special hardship at all in selling lands for three times the price for which they were purchased."

The learned District Judge susbtantially, but not entirely, agreed with the findings of the District Munsiff and came to the conclusion that the 1st defendant :

" Ought to have been merely made to pay the plaintiff handsome damages and costs and that the plaintiff should have been refused the remedy of specific performance."

The learned District Judge summed up his conclusion in these words :

" I am of opinion that in this case Jagadambal (1st defendant) should have been merely made to pay the plaintiff Rs. 500 as damages for breach of contract, with interest at 6 per cent. per annum thereon from 22nd October, 1943, the date of the breach, till the date of payment, together with the Rs. 10 he had paid that day under Ex. P. 4 (*a*) and interest thereon at 6 per cent. per annum from that date till the date of payment, and the Rs. 60 he had wasted on the stamp paper, with similar subsequent interest, and the Rs. 150 he had paid as advance on 1st October, 1943, with interest thereon at six per cent. per annum from that date till the date of payment, and the entire suit costs of Rs. 334-11-0, with interest thereon at 6 per cent. per annum from 14th December, 1945, the date of the

lower Court's decree till the date of payment, and the taxed costs in both these appeals and the memorandum of cross-objections with interest thereon at 6 per cent. per annum from to-day till the date of payment, besides the interest on the Rs. 1,600 deposited by him in the lower Court at 6 per cent. per annum from the date of deposit till to day, the plaintiff being allowed to withdraw the said sum of Rs. 1,600 forthwith. Of course, the aggregate sum thus arrived at should carry interest at 6 per cent. per annum from to-day till payment, and should be made a charge on the suit lands."

The learned Judge purported to act in the exercise of the discretion vested in him as an appellate Court with a view to redress the hardship caused to the defendants by the decree of the District Munsiff.

I shall presently examine the reasons given by the learned Judge for upsetting the decree of the District Munsiff. I must first repel the argument of Mr. D. Ramaswami Aiyangar, the learned advocate for the respondents, that I cannot interfere in second appeal with the discretion exercised by the learned District Judge. Under section 22, Specific Relief Act :

"The discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal."

Where a decree for specific performance granted by the trial Court is reversed by the appellate Court in disregard of the relevant statutory provisions or legal principles recognised by judicial precedents, the judgment of the appellate Court is liable to be reviewed in second appeal by this Court.

Underlying the judgment of the learned District Judge is the old common law notion that damages ought to satisfy a disappointed party to a contract. It is hardly necessary to point out that the Court has no discretion to dispense parties from keeping their plighted word merely because it does not like the bargain the parties have made. The time is long gone by, when equitable doctrines were moulded according to the predilections of individual Judges. The rules of equity crystallised and embodied in the Specific Relief Act should be our guide. In England the tendency of modern decisions has been towards the grant of relief by specific performance, and if there is a valid contract for the sale of land, specific performance has been the general rule. Under section 12 (*c*) of the Specific Relief Act read with the Explanation to that section, the presumption of law is that a breach of contract to transfer immoveable property cannot be adequately relieved by compensation in money. The intention of the Legislature is that a party entering into a contract for sale of immoveable property should not be allowed to avoid its performance to suit his own convenience by offering to pay damages and pleading that the disappointed party might well be compensated thereby. The decision in *Ramji* v. *Rao Kishore Singh*[1], cited by the respondent was an exceptional case. There the plaintiff financed a litigation on the terms that, if it was finally decided in favour of the borrower, the latter should convey a portion of the property forming the subject-matter of the litigation, and if it was not so decided, should repay with interest the money advanced by the plaintiff. The agreement was a champertous one. The borrower was desparately in need of money, the terms of the bargain were hard and oppressive and the lender merely invested his money on a speculation in the expectation of profit. In those circumstances the Judicial Committee held that the decree of the District Judge awarding damages, in view of the nature of the transactions, the terms of the agreement itself and the other matters mentioned in the judgment, was not open to interference. Beyond setting out *in extenso* the provisions of sections 12, 19, 21 and 22 of the Specific Relief Act, Sir Lancelot Sanderson, who delivered the judgment of the Board, did not formulate any general principle for the guidance of Courts.

It is now necessary to examine the reasons given by the learned District Judge for reversing the decree of the trial Court in the light of section 22 of the Specific Relief Act. The learned Judge states that "he who seeks equity must do equity," that is, he who wants an equitable remedy must come to Court with a true story and clean hands. Of the maxim, "he who seeks equity must do equity," Lord Justice Knight Bruce said that it was less wide in meaning than its expression

1. (1929) 57 M.L.J. 205 : L.R. 56 I.A. 280 (P.C.).

and not always easy to understand or apply—*Gibson* v. *Goldsmith*[1]. In the present case the contract for sale is found to be true and valid ; the defence of *non est factum* is found to be untrue ; the purchaser paid an advance of Rs. 150 ; he was ready to pay the balance of Rs. 1,600 and paid it into Court after filing the suit ; and there was no default on his part at any time in any respect in the matter of performing his part of the contract. The maxim quoted by the learned Judge does not mean that the Court can force on the plaintiff the acceptance of arbitrary terms and conditions which the Court chooses to impose upon him according to its own notions of what is just and equitable. All that it means is that he, who comes to seek the aid of a Court of equity to enforce the claim, must be prepared to submit in such proceedings, to any directions which the known principles of a Court of equity may make it proper to give. The Courts of common law acted differently and held that when the plaintiff was entitled to judgment, the law must take its course and no terms could be imposed. Even the Courts of Chancery held that the equity to be observed by a person claiming equity, must be an equity involved in the terms of the contract and in the subject of the suit—*see* Halsbury, Vol. 13, paragraph 80.

The learned District Judge paraphrased one legal maxim in terms of another equally vague and more loosely worded. Exhibit P-1 the contract of sale has been found to be true and valid and its wholesale denial by the defendants has been found to be false. The transfer of the leasehold interest to the plaintiff, the attornment of the tenant of the land to him and the purchase of stamp papers by the plaintiff are all found to be true by the learned District Judge himself. He however was of the opinion that the plaintiff and some of the attestors to Exhibit P-1 gave an exaggerated, and in part, unacceptable version of the part played by the first defendant in connection with the execution of Exhibit P-1 and the receipt of the advance of Rs. 150. He disbelieved the story of a temporary estrangement between the husband and wife at the time of the contract and held that they were living amicably in the same house with perfect conjugal felicity. The husband was espousing the wife's cause and conducting the case in her interest. Notwithstanding these facts, the plaintiff, it is said, has not come to Court with a " true case and clean hands ". The cleanest of hands sometimes get soiled in their passage through Courts on account of the over-anxiety of parties and their advisers and occasionally on account of the imperfections of human judgments also. The phrase " with clean hands " is not a statement of any definite legal principle.

" This does not mean a general depravity ; the conduct complained of must have an immediate and necessary relation to the equity sued for ; it must be a depravity in a legal as well as in a moral sense "—*see* Halsbury, Vol. 13, paragraph 81.

A mere phrase or jingle of words sometimes gains currency as a legal principle by repetition but it can hardly form the basis of a judicial pronouncement.

The learned District Judge disallowed specific performance on the ground that the preliminary negotiations were carried on with the husband, that the wife was an illiterate lady and that the plaintiff was a vakil's clerk and a broker. Neither sympathy for the weaker sex nor aversion to the tribe of vakils' clerks is a ground for refusing relief to parties who are legally entitled thereto. It is not pretended that the first defendant was a purdanishin lady. Her husband was a merchant carrying on business and she was also doing, according to the evidence of her side, a small trade in oil in her own house. The trial Judge who recorded her deposition stated :

" Jagadambal did not look like a person unable to look after herself or her interests or devoid of a sense of inquisitiveness in respect of such a serious transaction which called for the affixture of her thumb impressions . . . . . She could not have been fooled to part with her lands merely on the procurement by deceitful means of an agreement to sell . . . . . I have refused to believe the case of Jagadambal as to the circumstances under which her thumb impressions came on to this document, Exhibit P-1. I have also given reasons as to why the husband could not possibly have either been able to fool his wife or had motives to cheat her."

1. (1854) 5 De G.M.G. 757 : 43 E.R. 1064.

This lady with a resourcefulness and imagination, which few adult males could command, tried bravely to maintain from the witness box an incredible story which has been disbelieved by the lower Courts. If her evidence were true, there was no contract at all to which she was a consenting party, and even if there was such a contract, it was vitiated by the fraudulent misrepresentation of her husband and the plaintiff, and therefore liable to be rescinded. The lower appellate Court however has by its decree affirmed the validity of the contract and its enforceability by awarding damages and other reliefs.

The next reason given by the learned District Judge for disallowing specific performance was the omission of a reference to a well that existed on the punja land in the contract for sale Exhibit P-1. Says the learned Judge,

"It has been held that in a suit for specific performance where the plaintiff claims something which is not in the document sought to be specifically enforced, he cannot be given specific performance along with that additional thing. Of course, the reason for this is 'He who seeks equity must do equity'."

Except this maxim, which is repeated in the judgment, no other authority has been cited by the learned District Judge. It is not stated whether the well had any appreciable value or whether, as sometimes happens, it was a mere pit or depression. This point was developed from a stray passage in the oral evidence about the existence of a well and was not put forward as a ground for resisting specific performance in the trial Court. When a punja land is conveyed for its full value, a well situated on the land would presumably pass along with the land unless expressly excepted by the conveyance.

The next reason assigned by the learned Judge is best stated in his own words :—

"Again in a suit for specific performance, specific performance will be granted only when there is mutuality, that is, when either side could apply for specific performance of the contract. Here, the plaintiff insisted, in Exhibit P-1, that Jagadambal should, at her expense, obtain an encumbrance certificate in respect of the suit lands within a month and produce it, and that the plaintiff was only bound to buy the lands after such production. So specific performance could not be got against him by her under Exhibit P-1, without fulfilling that condition. It is, therefore, not quite right to give him the right to specific performance under Exhibit P-1."

This conclusion, with all respect to the learned Judge, rests on a total misapprehension of the doctrine of mutuality. A contract to be specifically enforced by the Court must, as a general rule, be mutual, that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them. When therefore whether from personal incapacity to contract or the nature of the contract, the contract is incapable of being enforced against one party, the other party is, generally, incapable of enforcing it. Here there were two adults who entered into a valid contract for sale of land and I fail to see why the default of the vendor to produce an encumbrance certificate, as undertaken by her in the contract of sale, should deprive the purchaser of his right to specific performance or how the doctrine of mutuality at all comes in.

The next reason given by the learned District Judge is that the first defendant

"Would not be really at least morally, in a position to sell the lands to the plaintiff under Exhibits P-1 and P-2 as her mother was alive."

The argument is that the mother gave funds with which the property was purchased for the daughter in the expectation that she would keep the property. Says the learned Judge,

"There was no necessity at all for Jagadambal to alienate the properties. It has been held that a Court will not decree specific performance of an act which the defendant is not in a position to perform. That ruling will apply in my opinion to the above facts of this case also, and will make the grant of damages and costs the proper remedy in this case."

No ruling has been referred to by the learned Judge and I cannot imagine any ruling of any Court which prevents an absolute owner of property from selling it, even though there was no pressure or necessity for the sale. It is not disputed that the first defendant was the absolute owner of the property and that she was legally entitled to sell it without reference to her mother or anybody else. There is no substance in the reasoning of the learned Judge.

The further reason given by the learned Judge for refusing specific performance is that the plaintiff had asked for an alternative remedy by way of damages and not confined his relief to specific performance. In his opinion the Court has a greater freedom in such a case to award damages than it would have, if only specific performance had been prayed for. This dictum of the learned Judge is opposed to the plain terms of section 19 of the Specific Relief Act and does not call for further comment. The learned Judge further observes that the plaintiff was a broker and therefore might well rest content with damages, though he himself protested that he wanted to buy the property for his own use and there was no evidence contra.

Lastly the learned Judge held that the sum of Rs. 1,750 fixed as the price of the land under Exhibit P-1 was a fair price, and in any case the property would not have fetched more than Rs. 2,250 on the date fixed for the completion of the sale. Nevertheless, he declined to grant specific performance on the ground of "unnecessary hardship" to the defendant. The question of the hardship of a contract or its reasonableness has generally to be judged of at the time it is entered into. If it was then fair and proper and not oppressive, it is immaterial that by force of subsequent circumstances or events, as for instance, by a rise in the price of landed property due to war conditions, the contract has become more beneficial to the purchaser. Here the parties had equal means of knowledge and equal means of ascertaining the value of the property. The vendor, who had purchased the property for Rs. 535 in 1941 and 1942, bargained for a price of Rs. 1,750 in 1943. There was here no intimidation or duress of the defendants, no element of mental deficiency or want of mental alertness, no element of surprise, no pressure caused by want or impecuniousness, and in fact nothing to show that there was not a free, full and intelligent consent to the contract on the part of the defendants. The parties were throughout dealing at arm's length. In *Davis* v. *Maung Shwe Goh*[1], the Judicial Committee held that in the absence of any evidence of fraud or misrepresentation on the part of the plaintiff which induced the defendant to enter into a contract of sale or that the plaintiff under the circumstances took an improper advantage of his position or the difficulties of the defendant, specific performance was rightly decreed, though the contract was onerous but not unconscionable. This decision would have afforded a surer and sounder basis of decision than the legal saws relied upon by the learned Judge.

As the learned District Judge in reversing the decree of the District Munsif misdirected himself in law and erred in substituting damages for specific performance, I reverse the decree of the learned District Judge and restore that of the District Munsif with costs here and before the lower appellate Court. The order as to costs made by the trial Court will stand. Time for execution of the conveyance by the first defendant is extended by two months from this date.

The memorandum of cross-objections fails and is dismissed but without costs.

No leave.

K.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Poongavanam Pillai .. *Petitioner**

v.

V. Subramanya Pillai and another .. *Respondents.*

Sale of land—Vendee if entitled to rents and profits accruing due before the transfer—Transfer of Property Act (IV of 1882), section 36—Applicability to agricultural crops or rents.

Rents and profits accruing due *before* the transfer are not legal incidents of the property transferred. Such arrears of rent are a debt or actionable claim, and, if they are to be transferred, must be assigned separately.

1. (1911) 21 M.L.J. 1127 : L.R. 38 I.A. 153 : I.L.R. 38 Cal. 805 (P.C.).

*C. R. P. No. 1058 of 1949. 8th September, 1950.

If a different intention is expressed, at the time of the transfer, that different intention will be given effect to and section 36 of the Transfer of Property Act will have no application.

Where no different intention is expressed, if the act of the transferor or transferee necessarily implies a different intention that intention, so necessarily implied will be carried out and section 36, Transfer of Property Act, will have no application.

If the two positions above indicated do not exist then, the transferor wil be entitled to the rents and profits thereof accruing *before* the transfer and the transferee to the rents and profits thereof accruing *after* the transfer, and the passing of ownership to him. Such rents and profits should be apportioned under section 36 of the Transfer of Property Act which applies to agricultural rents. Section 36 will apply to apportionment of agricultural rents also in terms. In any event the rule prescribed under section 36 will apply as a rule of justice, equity and good conscience even to agricultural rents.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge, Mathurai, dated 29th October, 1948, in S.C.S. No. 117 of 1948.

K. V. Srinivasa Aiyar for Petitioner.

M. R. M. Abdul Karim and *K. Velayudhan Nair* for Respondents.

The Court delivered the following

JUDGMENT.—This revision petition raises an interesting question of law, namely, whether in a purchase of *agricultural* land by private sale, the land being under a lease at the time of the sale, the rent can be apportioned between the buyer and the seller under section 36 of the Transfer of Property Act. The petitioner, Poongavanam Pillai, purchased 1 acre 56 cents of land from the 1st respondent, Subramania Pillai, for Rs. 3,500 under a sale deed, dated 27th January, 1948. At the time of the sale there was standing on the land paddy crop raised by the lessee, the 2nd respondent, who had to pay, according to the finding of the lower Court, 24¾ *kalams* of paddy as rent to the 1st respondent for the whole year, though only 7 *kalams* out of it remained to be paid at the time of the sale. The contract of sale did not say anything about this paddy or the rent to be paid by the 2nd respondent to the 1st respondent. Nor did the 2nd respondent then agree to pay the petitioner any portion of the rent. So, no "different intention" was expressed under section 8 of the Transfer of Property Act. It was admitted by the vendee (petitioner) in the lower Court, that he fixed the price only with reference to the land (at about Rs. 23 a cent) and without taking into account the crops or the rent, but the lower Court did not infer that a different intention was necessarily implied by this under section 8, and there is no revision petition by the vendor. In this revision petition I accept the findings of fact by the lower Court regarding the *quantum* of rent, namely, that an annual rent of 24¾ *kalams* of paddy was payable, and that the rent was not payable in two fixed instalments, and that a *kalam* of paddy was worth Rs. 12 at the material time. The paddy was harvested a month after the sale. The vendee, Poongavanam Pillai, then asked the vendor and the lessee to pay him the rent. The lessee said that he had paid the rent except 7 *kalams* to the vendor. The vendor also confirmed this, and denied the vendee's right to the rent, but, in order to avoid a suit, offered to make the lessee pay the 7 *kalams* still due to the vendee. The vendee refused this very generous offer of compromise and filed S. C. No. 117 of 1948 for recovering the entire rent of 24¾ *kalams* or its value, Rs. 234-2-0 as estimated by him. The lower Court applied section 36 of the Transfer of Property Act, apportioned the rent between the vendor and the vendee, and gave the vendee (petitioner) a decree for two *kalams*, or Rs. 24, and dismissed the rest of his claim against the 1st defendant (vendor) with costs. The suit was dismissed against the 2nd defendant without costs. Hence the revision petition by the vendee.

The learned counsel for the vendor urged before me that the lower Court had given the vendee even two *kalams* erroneously, and that it should have found a "different intention" necessarily implied at the time of the sale and dismissed the suit *in toto*. I cannot agree. Firstly, the vendor has acquiesced in the lower Court's order and has not filed a civil revision petition himself. Secondly, the vendee, admittedly, did not tell the vendor that he would not claim any part of

the paddy or rent. So there was no *understanding or agreement* about it. In the lower Court, the vendee claimed the entire rent as his, or, in the alternative, at least 7 *kalams* of paddy, as offered by the vendor in his reply notice. The lower Court held that there was no "different intention" expressed, or necessarily *implied*, under section 8, and that, as the property sold was land, the vendee would be entitled, under section 8 to the rents and profits *accruing from the land after the transfer*. To find out what would be the rent or profits from the land *accruing after the sale*, the lower Court applied section 36 of the Transfer of Property Act relying on the ruling in *Nand Kishore* v. *Ram Sarup*[1], and, as there was no contract or local usage to the contrary, it held that the rent accrued between the transferor and the transferee *from day to day* and gave the petitioner two *kalams* of paddy, being one month's rent out of the year's rent payable, and decreed the suit to that extent with proportionate costs and dismissed the remainder of the suit with the costs of the 1st defendant. It rejected the vendor's contention that an intention on the part of the vendee not to claim any portion of the rent must necessarily be implied under section 8 by his calculating the purchase price only on the price of the land (at Rs. 23 or so a cent) and not taking into account the rent or any portion of it. It also rejected the vendee's contention that the vendee's offer of 7 *kalams* in his reply notice showed or implied an intention to pay him at least 7 *kalams* due by the date of the sale. The plaintiff has filed this revision petition. As already stated, the vendor has not filed any revision petition. Nor has the 2nd defendant.

I have perused the entire records, and heard the learned counsel on both sides. Mr. K. V. Srinivasa Aiyar, for the petitioner, frankly admitted that there was no "different intention" regarding the paddy crop standing on the land or the rent due for it at the time of the sale. He also, of course, supported the lower Court's finding that no different intention could also be necessarily implied in the circumstances of the case. But he contended that, even so, under section 8 of the Transfer of Property Act, all the interest which the transferor was then capable of passing in the property would pass to the transferee, and that this would entitle the plaintiff to the whole year's rent, or at least to the 7 *kalams* remaining due at the sale. He also said that section 36 of the Transfer of Property Act would not apply to agricultural crops or rents, as they do not accrue from day to day. Indeed, he went to the extreme length of contending that all interest which the transferor was then capable of passing in the property would automatically pass to the transferee forthwith, and urged that even if three years' rent was in arrears, at the time of the sale, the transferee would be entitled to it. I am unable to agree with this contention. Rents and profits accruing due *before* the transfer are not legal incidents of the property transferred. See *Bhogilal* v. *Jethalal*[2], *Ganeshlal Tewari* v. *Shamnarain*[3], *Muthu Hengsu* v. *Netravathi Naiksavi*[4] and *Chandrasekharalingam* v. *Nagabhushanam*[5]. Such arrears of rents are a debt or actionable claim, and, if they are to be transferred, must be assigned separately. (See *Sheogobind Singh* v. *Gowri Prasad*[6].)

In cases like this, three different positions will arise under the law, namely :—

(1) If a "different intention" is expressed, at the time of the transfer, that different intention will be given effect to. Thus, if at the time of the sale the transferor had stated that the standing paddy crop or accruing rent should go to him wholly, or to the transferee wholly, or to himself and the transferee in certain named shares, that intention will be given effect to, and section 36 of the Transfer of Property Act will have no application whatever.

(2) Where no different intention is expressed, but the act of the transferor or transferee necessarily implies a different intention, that is, leads to an irresistible inference as to what was intended by the parties, that intention, so necessarily implied, will be carried out, and section 36 will have no application whatever. Thus, if in the presence of the transferee and with his consent, or absence of dissent,

1. (1927) I.L.R. 50 All. 18.
2. A.I.R. 1929 Bom. 51.
3. (1880) I.L.R. 6 Cal. 213 : 6 C.L.R. 533 (P.C.).
4. (1920) 58 I.C. 383.
5. (1927) 53 M.L.J. 342.
6. (1924) I.L.R. 4 Pat. 43.

the transferor cut and took away the standing crops or collected the rent, or, in the presence of the transferor, the transferee did the same, then a different intention to that effect will be necessarily implied and the consenting or assenting party will be precluded from questioning the position, as the approval showed the *implied* different intention, even though it was not *expressed* at the time of the sale. Here, the lower Court held that there was no different intention necessarily implied by the vendor's not taking the rent into consideration when fixing the purchase price. That finding is one of fact, and cannot be canvassed now by the vendor, especially as he has not filed a civil revision petition himself. The vendee never told the vendor that he would not claim a share in the crop or rent.

(3) If the positions indicated in Nos. (1) and (2) above do not exist, then the transferor will be entitled, in the case of a transfer of *land*, like this, to the rents and profits thereof accruing *before* the transfer as stated clearly in section 55 (4) (*a*) of the Transfer of Property Act, and the transferee to the rents and profits thereof accruing *after* the transfer, and the passing of ownership to him, as stated clearly in sections 8 and 55 (6) (*a*) of the Transfer of Property Act. Such rents and profits should be apportioned under section 36 of the Transfer of Property Act, which has been held to apply to agricultural rents like this, in *Kunhi Sow* v. *Mollali Chathu*[1] and *Rangiah Chetti* v. *Vajravelu Mudaliar*[2], let alone the ruling in *Nand Kishore* v. *Ramsarup*[3]. The observation in *Ma Hawa Bi* v. *Sein Kho*[4], that agricultural rents are not apportionable under section 36 as they accrue once and for all when the crops are reaped and do not accrue from day to day, must be held to be incorrect as observed by Mulla in his "Transfer of Property Act" (1949 edn., page 176), as it is precisely because rents do not accrue from day to day that the rule of apportionment has been applied to them under section 36 of the Transfer of Property Act. So I hold that section 36 of the Transfer of Property Act will apply to apportionment of agricultural rents also in terms. Even if this is not so, the rule of apportionment prescribed under section 36 will apply, as a rule of justice, equity and good conscience even to agricultural rents. In *Sendattikalai Pandia* v. *Sangili Veerappa*[5] and *David* v. *B. Rangaraju*[6], this Court has applied the rule of apportionment under section 36 to purchases of land in execution proceedings (though the Transfer of Property Act will not apply to sales in execution as per section 2 (*d*) of that Act itself) on the ground that section 36 embodies a rule of justice, equity and good conscience. So I see no reason to discuss the merits of this contention further. It is not the case here of a crop raised after the ownership passed, as in *Hariharan* v. *Narayana*[7], but of a yearly rent payable by a lessee, the year expiring a month after the sale.

The petitioner was rightly refused by the lower Court his claim to at least 7 *kalams*, offered by the vendor in his reply notice, as it was refused, and lapsed, and had been made merely as a term of compromise, and to purchase peace, and without prejudice to the contentions of either side.

In the end, therefore, I hold that the lower Court was quite right in applying section 36 of the Transfer of Property Act to this case and in giving the petitioner only one month's rent, which alone accrued *after* the transfer, and in refusing him the 11 months' rent which had accrued *before* the transfer and belonged to the vendor and to which the vendee was not entitled under sections 8, 55 (4) and 55 (6) (*a*) of the Transfer of Property Act or in justice, equity and good conscience. So, the only modification I want to make in the lower Court's judgment and decree is to direct all the parties to bear their own costs in the suit, which order appears to me to be the most equitable order to pass regarding the suit costs in the circumstances, seeing the many untenable contentions raised on either side. Indeed, at one time the vendor offered to pay the vendee 7 *kalams*, or the whole rent remaining unpaid at the time of the sale, and encouraged the vendee to claim at least those 7 *kalams*

1. (1912) 23 M.L.J. 695 : I.L.R. 38 Mad. 86.
2. (1917) 33 M.L.J. 618 : I.L.R. 41 Mad. 370.
3. (1927) I.L.R. 50 All. 18.
4. (1927) I.L.R. 5 Rang. 803.
5. (1937) 1 M.L.J. 77 : I.L.R. (1937) Mad. 589.
6. (1944) 2 M.L.J. 51.
7. A.I.R. 1933 Mad. 482.

in the suit on the ground that the vendor expressly or by necessary implication intended to give him 7 *kalams*, at any rate, out of the rent, thus expressing or implying a "different intention" under section 8. That too justifies the modification regarding costs. In other respects, the petition is dismissed. All parties to this petition also will bear their own costs in the peculiar circumstances, seeing that they persisted in their untenable contentions before me also.

K. S. *Order modified as to costs and petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE PANCHAPAKESA AYYAR.

Bendapudi Veera Venkatasubba Rao and another .. *Petitioners**

v.

Rao Venkata Rao .. *Respondent.*

Court-Fees Act (VII of 1870), section 12—Applicability—Question of court-fee—Decision as to if can be reopened—Practice of principal ministerial officer deciding question if correct court-fee has been paid and getting formal order of Judge to his endorsement—Propriety—Section 7 (v) (d)—Suit for possession of defined portion of a larger extent as plaintiff's share—If can be treated as one for partition for purposes of court-fee—Anomalies introduced in the application of section 7 (v) (d) and need for legislation to remove them.

Under the Court-Fees Act, the question of court-fee should be decided by the Court at the inception and before the plaint is taken on file. It is incumbent upon the Court to apply its mind to the question before the plaint or the appeal, as the case may be, is admitted, and decide the question finally. It is impossible to hold that a scrutiny by a ministerial officer would be tantamount to a decision by the Court within the meaning of section 12. The Judge must apply his mind and decide for himself whether the court-fee paid is correct or not. If so decided it becomes final and it cannot be reopened except under section 12, clause 2.

Desirability of Subordinate Judges deciding the question of court-fee before the plaint is allowed to be filed instead of continuing the current practice of the principal ministerial officer of the Court scrutinising and only in case of doubt putting up the cases for formal orders by the Judge, pointed out.

[Case-law discussed.]

Where the Subordinate Judge has not applied his mind and come to the conclusion that the court-fee paid was correct, but merely initialled the endorsement by the ministerial officer that the correct court-fee was affixed, it cannot be said that there was a decision by the Subordinate Judge within the meaning of section 12 (1) of the Court-Fees Act. Accordingly, it will be open to the Subordinate Judge to reconsider the question.

A specific property with definite boundaries can never be a fractional share of a property, though at one time it might have formed part of a larger extent. A fractional share predicates that the owner of that share is entitled to every bit of the total extent of his share. Till a partition is held and a specified part is allotted to him, he would be entitled to a fractional share of the whole. When the properties are allotted to his share, he becomes the owner of that specified plot allotted to him. In the latter case, the suit for recovery would only be "for the possession of the property the boundaries of which are indicated". If, as a matter of fact, the property, which is the subject-matter of the suit, is a specific property with boundaries, the plaintiff cannot be allowed, by clever draftsmanship, to evade the payment of court-fees.

Kesanna v. *Boya Bala Gangappa*, (1947) 1 M.L.J. 201 : I.L.R. (1947) Mad. 643 (F.B.), followed.

Anomalies introduced by reason of the Full Bench decision in the application of section 7 (v) (*d*) of the Court-Fees Act and the notification of the Government and need for legislation to remove them pointed out.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order, dated 20th December, 1949, and made in O.S. No. 81 of 1949, on the file of the Court of the Subordinate Judge of Kakinada, etc.

C. Rama Rao for Petitioners.

The Government Pleader (*P. Satyanarayana Raju*) and *Rao Venkata Rao* for Respondent.

The Court delivered the following

JUDGMENT.—This Civil Revision Petition raises a question of court-fee. The facts necessary for appreciating the question raised may be briefly narrated.

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*C. R. P. No. 2098 of 1949 and 6th September, 1950.
C. M. P. No. 10435 of 1949.

The plaintiffs filed O. S. No. 81 of 1949 on the file of the Court of the Subordinate Judge, Kakinada, for recovery of possession of the properties described in *A* and *B* schedules annexed to the plaint. We are not concerned with the A schedule property, as nothing turns upon it in the revision. In regard to B schedule property, it is alleged in the plaint that the plaintiffs' paternal grandfather, late Bendapudy Venkataratnam, purchased the property described in the B schedule for a sum of Rs. 14,000 from the defendants under a registered sale deed, dated 16th January, 1945. In paragraph 17 of the plaint it is stated that:

"The plaint B schedule property is an undivided southern half of a big plot and so the plaintiffs and the defendants are co-sharers of the big plot. The plaintiffs are entitled to have their southern half separated and to be put in separate possession of the same. As regards the said property, the plaintiffs pray for a decree for separation of the same and to put them in separate possession after evicting the defendants therefrom."

The schedules are not before us, and we presume that they are described by boundaries and also by extent. The B schedule property was valued under section 7, clause (v) of the Court-Fees Act for purposes of jurisdiction at a sum of Rs. 20,000, and a court-fee of Rs. 100 is paid under Article 17-B of Schedule II of the Madras Court-Fees Amendment Act. The plaint was presented on 22nd June, 1949. On 24th June, 1949, the plaint was returned signed by the Principal Subordinate Judge with an endorsement that the 'deficit Court-fee should be paid'. The endorsement reads:

"When the purchaser, the plaintiffs' paternal grandfather has not entered into joint possession of the property purchased by him as per B schedule, the relief for partition and possession should be valued under clause (v) of section 7. Returned. Time 7 days."

On 2nd July, 1949, the plaint was re-presented with an explanation that the valuation of the B schedule property and the court-fee paid thereon was correct. On 6th July, 1949, it was again returned with an endorsement, signed by the Subordinate Judge, as follows:—

"The allegations in paragraphs 11 to 16 clearly show that the property as per schedule B was not put in joint possession of the plaintiffs or their grandfather and so the plaintiffs cannot be said to be in constructive possession of their share with their co-sharers. Hence the relief for partition of the B schedule property also has got to be valued under section 7, clause (v) of the Court-Fees Act. Returned. Time 7 days."

It was again re-presented with an explanation further elucidating the circumstances under which the relief was valued and asserting that the valuation put upon it by the plaintiffs was correct. The Sheristadar scrutinised the plaint again and made an endorsement "presented in time and stamped aright. May be filed". This endorsement was signed by him. Below the endorsement of the Sheristadar the following endorsement appears, "Issue summons to defendants for issues 17th August, 1949". This was signed by the Subordinate Judge himself. On 10th November, 1949, the office pointed out that the B schedule property was zamindari zeroyati land of 38 acres and 2½ cents in extent, specified within boundaries, and that, as the same was a specific plot within specified boundaries, *ad valorem* court-fee should be paid on the market value in accordance with the ruling in *Kesanna* v. *Boya Bala Gangappa*[1]. Notice was given to the plaintiffs' advocate to show cause why he should not pay court-fee on the market value. On 20th December, 1949, after hearing the arguments of the pleader for the plaintiffs, the learned Subordinate Judge passed an order in the following terms:

"So far as the B schedule land is concerned, the prayer is for possession of the southern Ac. 38-2½ cents out of a big plot. It is a suit for a specific plot and not for partition. The fixed court-fee of Rs. 100 paid under Schedule II, Article 17-B is insufficient. The plaintiffs should value this relief on the market value of the 38 acres and odd in accordance with the observations in *Kesanna* v. *Boya Bala Gangappa*[1].

2. For correct valuation and payment of deficit court-fee, 3rd January, 1950."

The plaintiffs have preferred the above revision against the said order.

The revision first came up before one of us (Panchapakesa Ayyar, J.), and it was referred to a Bench in view of the important question raised therein. Notice was given to the Government Pleader.

1. (1947) 1 M.L.J. 201 : I.L.R. (1947) Mad. 643 (F.B.).

The learned counsel for the petitioner raised before us two contentions : one, that the order issued by the Subordinate Judge on 17th August, 1949, directing summons to issue to the defendants in the circumstances of the case involved a decision within the meaning of section 11 of the Court-Fees Act and therefore the learned Subordinate Judge had no jurisdiction to reopen the matter and call upon the plaintiffs to pay additional court-fees ; two, that the decision in *Kesanna* v. *Boya Balagangappa*[1], had no application to the facts of this case, as the plaintiffs did not ask for possession of a specific plot of land, but only asked for separating the southern half of a bigger plot and to be put in possession thereof.

The first question turns upon the construction of some provisions of the Court-fees Act. The relevant sections read as follows :—

Section 6 :—

"Except in the Courts hereinbefore mentioned, no document of any of the kinds specified as chargeable in the first or second schedule to this Act annexed shall be filed, exhibited or recorded in any Court of Justice, or shall be received or furnished by any public office unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document."

Section 7 :—

"The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows . . . . . ."

Section 12 (*i*) :—

"Every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be final as between the parties to the suit."

Section 12 (*ii*) :—

"But whenever any such suit comes before a Court of Appeal, reference or revision, if such Court considers that the said question has been wrongly decided to the detriment of the revenue, it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided, and the provisions of section 10, paragraph (ii), shall apply."

The provisions of section 12 have been the subject of judicial scrutiny in the various High Courts. It may be convenient at this stage to notice the decisions cited before us.

The earliest decision in this High Court, which throws some light on the subject is *Kasturi Chetti* v. *Deputy Collector, Bellary*[2]. In that case, an appeal against the award made by the District Judge under the Land Acquisition Act (I of 1894) was filed in the High Court, the appeal memorandum bearing a court-fee stamp of Rs. 10 only and was admitted by the Registrar, no question having been raised as to the sufficiency of the stamps. At the time of the hearing of the appeal, it was objected on the part of the respondent that the stamp paid was insufficient. It was contended that as the appeal was admitted by the Registrar without any objection, it was not open to the Court to reopen the matter. But the learned Judges, rejecting the contention, held that there was no decision by the Taxing Officer within the meaning of section 5 of the Court-Fees Act, and therefore it was open to the Court to reopen the matter and direct the appellant to pay additional court-fee. Though the wording of section 5 of the Court-fees Act and that of section 12 are not identical, the principle underlying the two sections appears to be the same. If there was a decision of the Court, under section 5 or under section 12, as the case may be, the order would be final, and the Court could not reopen and re-agitate the matter at a later stage.

But a direct decision on section 12 itself is found in In re *Lakshmi Ammal*[3]. In that case the relevant facts are these. A plaint, which was insufficiently stamped, was filed in the City Civil Court and was accepted without objection by the Sheristadar

1. (1947) 1 M.L.J. 201 : I.L.R. (1947) Mad. 643 (F.B.).
2. (1898) I.L.R. 21 Mad. 269.
3. (1925) 49 M.L.J. 608.

of that Court, who was entrusted with the duty of checking the pleadings filed and of seeing whether the proper court-fee has been paid thereon. The suit was dismissed by the City Civil Judge, and on appeal, by the plaintiff, the Taxing Officer of the High Court demanded from the plaintiff the difference between the court-fee paid by her in the City Civil Court and the court-fee payable by her according to law. It was contended by the plaintiff that as there was no decision by the City Civil Judge under section 12 of the Court-Fees Act, the appellate Court had no power under section 12 (*ii*) of that Act to require her to pay the additional court-fee. The learned Judges held that the act of the Sheristadar in accepting the plaint amounted to a decision by the City Civil Judge as to the Court-fee payable on the plaint under section 12 (*i*) of the Court-fees Act, and therefore the Taxing Officer had jurisdiction under section 12 (*ii*) to insist upon the payment of the difference. At page 613, Devadoss, J., observes :—

"We hold that when a Court receives a plaint, petition or any other pleading and files it as properly stamped its act amounts to a decision that the proper court-fee has been paid. If according to the practice prevailing in the Courts the chief ministerial officer files a plaint, or a petition, or other pleading, as being properly stamped or that proper court-fee has been paid, his act is an act of the Court within the meaning of section 12, clause (1)."

At page 615, Wallace, J., observes :

"The wording of the section offers no difficulty since, in any case, the trying Court must decide the question of court-fee implicitly or explicitly, before it can proceed to try the suit. If the Court is not satisfied that the plaint is properly stamped it must dismiss the suit unless the proper stamp-fee is paid—*see* Order 7, rule 11 (*c*). If the question is not explicitly raised and the Court proceeds with the trial, the Court has implicitly decided that the stamp is sufficient. If the parties or the Taxing Officer specifically raise the point then the Court gives an explicit decision thereon. In either case, there is a decision of the Court."

The observations of the learned Judges are, in our view, rather wide. We agree with the learned Judges in so far as they held that there should be a decision of the Court under section 12 (*i*). But we cannot agree with them when they said that the act of the ministerial officer could be attributed to the Judge. To have finality under section 12 (*i*), the Judge himself must bring his mind to bear on the question.

The scope of the section was considered by Venkatasubba Rao, J., with his usual clarity, in *Lakshmana Aiyar* v. *Palaniappa Chettiar*[1]. In that case the plaint was filed with a certain court-fee and the officer of the Court entrusted with the duty of checking the stamp raised the objection that a higher court-fee was payable on the amount due to the plaintiff. The plaintiff contended that his valuation was correct and that contention was upheld by the Subordinate Judge. At a later stage, the defendant raised the objection as to court-fee, but the previous decision was confirmed. When the suit was transferred to the file of the District Judge, the same question was raised again by way of an issue and the District Judge held that the original order was final. But a succeeding District Judge again considered the sufficiency of the court-fee on the initiative of the Court-fee Examiner and held that the Court-fee paid was not sufficient. It is manifest from the aforesaid facts that the first order of the Court was a *decision* in the sense that the learned Judge applied his mind to the question and gave his decision thereon. At page 482 the learned Judge observes :

"The Court while making an order under section 12, must apply its mind to the question and give a considered decision. It is said that some Judges rarely bestow at that stage the attention the question deserves and are content to endorse the office note ; such practice if it exists, is opposed to the plain intention of the Act and must be condemned. The question in each case is, whether the order is one intended to be final or merely provisional."

The learned Judge points out that, under the aforesaid provisions, there is no warrant for holding that either the Government or the opposite party should be heard before a decision is made.

In *Sadasiva Pillai* v. *Varadaraja Odayar*[2], Venkataramana Rao, J., also accepts the principles laid down in *Lakshmana Aiyar* v. *Palaniappa Chettiar*[1]. According

1. (1935) 69 M.L.J. 479. 2. (1937) 1 M.L.J. 89.

to the learned Judge, if, on an objection taken by the office or by a defendant, a Court applies its mind and gives a considered decision, it is final and its power to revise the valuation is at an end.

In *Chukka Durgiah*, In re[1], Pandrang Row, J., follows the earlier decisions. In that case, the Court had passed a judicial order fixing the correct-fee payable on a memorandum of appeal. At a later stage an attempt was made to reopen that order, but the learned Judges held that it was not open to the Court to vary the order once passed.

The same point was again raised before King, J., in *Mahalakshmamma* v. *Venkatanarayanamurthi*[2]. The plaintiff in that case appealed against the decree by the District Munsif dismissing her suit. On 3rd March, 1937, the Subordinate Judge called upon her to pay the court-fee for the prayer in the plaint in the lower Court for cancellation of the release deed. That court-fee was paid on 5th April, 1937. The appeal remained pending for another two years and came up for hearing in 1939. The Subordinate Judge's successor reopened the matter and directed further court-fee to be paid. In holding that the successor had no power to reopen the matter, King, J., has stated the law succinctly at page 799 :

"It is argued for the respondents here that section 12 (1) makes final only a decision which has been finally arrived at by the Court after both parties have been heard and that the phrase "shall be final as between the parties to the suit" would be meaningless unless this were the true interpretation of the word 'decision'. I am not able to accept this argument. It seems to me that it would have been very easy for the Legislature to have laid it down that no final decision on a question of court-fee shall be given unless both parties are heard if that had been the intention of the Legislature. The word 'decided' and the word 'decision' are here given without any qualifications at all and they must clearly apply to any adjudication by the Court whether both parties have been heard or only one party has been heard or even if no party at all has been heard. The only essential is that the Court should apply its mind to the questions at issue in arriving at the true calculation of the Court-fee."

We respectfully accept the above passage as the correct statement of the law on the subject.

There are two unreported decisions bearing on the question, one, by Byers, J., and the other by Bell, J. In C.R.P. No. 1310 of 1945, that came up before Byers, J., the facts are as follows : The petitioner brought a suit for possession of certain *lanka* lands. He valued the suit at a total figure of Rs. 25,000. The plaint was returned for details of the valuation. After some delay, when these defects were remedied, the plaint was accepted with a court-fee of Rs. 2,032-7-0. After the defendant appeared, he raised the question of the correctness of the court-fee and the matter was again put in issue and the District Judge held that the court-fee paid was inadequate. It was contended before Byers, J., that by the acceptance of the plaint as properly stamped, the Court had given its decision within the meaning of section 12 (*i*) of the Court-Fees Act, and, therefore, it was no longer open to the trial Court to go into the matter. The learned Judge rejected the plea that the acceptance of the plaint by the head ministerial officer as correctly stamped precludes the presiding officer from later entertaining any objection in the course of the trial and giving a judicial decision on the correctness of the court-fee paid. Bell, J., in C.R.P. Nos. 562 and 563 of 1945, applied the same principles to the facts of that case.

The latest decision on this subject is that of Mack, J., in *Suryanarayanamurthi* v. *Ramakrishnayya*[3]. In that case, in a suit for dissolution of partnership and accounts, a decree was passed against the defendant. The defendant preferred an appeal and in the appellate Court paid court-fee adopting the tentative valuation in the plaint. The District Judge accepted the valuation and directed the appeal to be numbered. But, subsequently on the objection of the Court-fee Examiner, the District Judge upholding his view-point, directed the deficit court-fee to be paid. The learned Judge held that the earlier order of the District Judge, admitting the appeal, was not a considered order and therefore it was not final and

1. (1938) 2 M.L.J. 647.
2. (1941) 1 M.L.J. 796.
3. (1949) 1 M.L.J. 513.

binding between the parties within the meaning of section 12 (*i*) of the Court-Fees Act. That view was sufficient to dispose of the revision petition before him. But we cannot agree with his wide observations that section 12 (*i*) contemplated a decision after hearing the parties.

It is no doubt true that the Allahabad High Court took the view that, for a decision to be final, it must be a Judicial decision based upon a hearing in which the general judicial maxim '*Audi alteram partem*' has been observed. In *Amjid Ali* v. *Muhammad Israil*[1], a Full Bench of that Court held that the decision of the Court on a question of court-fee payable on a plaint or memorandum of appeal which is to be "final as between the parties to the suit" must be a decision made between the parties on the record and after they have had an opportunity of being heard, and not a decision based upon the report of a *Munsarim* before the plaint or memorandum of appeal is filed and therefore before any parties are before the Court. The Nagpur High Court took much the same view in *Gangoo* v. *Saloo*[2]. But, for the reasons mentioned above, we prefer to follow the view expressed in *Mahalakshmamma* v. *Venkatanarayanamurthi*[3], by King, J., as it is in accord with the provisions of the Act.

From the foregoing review of the cases and the consideration of the relevant provisions, the following statement of law may be extracted. Under the Act the question of court-fee should be decided by the Court at the inception before the plaint is taken on file. It accords with law and good sense. Section 6 enjoins that no document—which certainly includes a plaint—should be received unless the full fee is paid. Section 12 (*i*) says that any question relating to valuation shall be decided by the Court in which the suit or the memorandum of appeal, as the case may be, is filed. A combined reading of sections 6 and 12 shows that the object of the section is to have the question decided at the earliest point of time before the plaint is admitted. Section 12 (*ii*) provides a safeguard in the interests of revenue against wrong decisions. The fact that the word 'decision' is not circumscribed by any rule of procedure, such as notice to the Government or to the defendant, is also indicative of the same intention. Indeed, as observed by the Judicial Committee in *Rachappa Subba Rao* v. *Siddappa Venkata Rao*[4], the Act was not intended to arm a litigant with a weapon of technicality. A decision at the inception of the suit is also advantageous from a different aspect, namely, from the standpoint of the litigant. If he is allowed to proceed with the suit and incur expenditure for some years, on the basis that the fee paid by him is correct, it would be unfair to demand from him a heavy court-fee at a very late stage. This would upset the calculation of a plaintiff with limited resources and would give an unfair advantage to the defendant by enabling him to stifle the suit without any trial. Even from the standpoint of judicial time and recovery of revenue, it would be better to decide the question before the plaint is admitted as, if additional court-fee is asked to be paid at a later stage, it may turn out that the plaintiff may not be able to meet the additional demand. It is, therefore, incumbent upon the Court to apply its mind to the question before the plaint or the appeal, as the case may be is admitted, and decide the question finally. It is impossible to hold that a scrutiny by a ministerial officer would tantamount to a decision by the Court within the meaning of section 12. The Judge must apply his mind and decide for himself whether the court-fee paid is correct or not. If so decided, it becomes final and it cannot be reopened except under section 12, clause 2.

The prevailing practice in the City Civil Court has been described by Devadoss, J., in In re *Lakshmi Ammal*[5] in the following manner :—

"The principal ministerial officer attached to this Court, *viz.*, the Sheristadar himself, personally receives all plaints and affixes the date stamp on them as soon as they are received. He then goes through the plaints and scrutinises them carefully to ascertain whether they have been presented in time and whether they have been properly framed or stamped . . . . . It is only in cases

1. (1897) I.L.R. 20 All. 11.
2. I.L.R. (1942) Nag. 432.
3. (1941) 1 M.L.J. 796.
4. (1918) 36 M.L.J. 437 : L.R. 46 I.A. 24 : I.L.R. 43 Bom. 507 (P.C.).
5. (1925) 49 M.L.J. 608.

where the principal ministerial officer feels any doubt and puts up the cases for formal orders by the Judge that the Judge applies himself to the question and gives his personal decision . . . . . ."

The procedure now adopted in the Subordinate Courts in this state is also similar. In our view, this practice is not supported by the provisions of the Act. Nor can it be justified on equitable grounds. If this procedure be followed, it would be like a Damocles sword hanging on the plaintiff threatening to descend on him at any stage. It would be an unfair weapon in the hands of a defendant to be made use of when his case is devoid of merits. This practice may be supported on the assumption, unwarranted in our view, that the Judge could not rightly decide the point without the help of the Court-fee Examiner. Perhaps this practice also developed because at the time when the plaint was filed the Subordinate Judges did not apply their minds, but merely relied on the ministerial officers to scrutinise the plaint with the confidence that when he went wrong, the defendant, after notice was given to him, would raise the question once again. The sooner this practice is given up the better it would be in the interests of judicial administration. We hope and trust that the Subordinate Judges would hereafter decide the question of court-fee before the plaint is allowed to be filed.

Mr. Ramarao, the learned counsel for the petitioner does not seriously question the aforesaid principles. Indeed, he relies upon the Judgment of King, J., and presses on us to hold that in the instant case, the Subordinate Judge applied his mind to the question of court-fee before he directed notice to be issued to the defendants. This argument had some plausibility as the Subordinate Judge signed the first two endorsements dated 24th June, 1949 and 6th July, 1949, pointing out that the court-fee paid by the plaintiffs was not correct. But knowing, as we do the practice obtaining in the mofussil, we cannot hold that the Subordinate Judge applied his mind on those two occasions. The returns were in fact made only by the ministerial officer though the initials of the Subordinate Judge were taken on the returns. That this was so is apparent from the recitals in the third endorsement dated 16th July, 1949. The Sheristadar considered the explanation offered by the plaintiffs' pleader and made an endorsement that the correct-fee was affixed and therefore the plaint may be filed. The next day, under the order "Issue summons to the defendants" the signature of the Subordinate Judge is found. A perusal of the original plaint shows that it was the usual stamp that was used with the initials of the Judge. It may be said on the facts of the case that the ministerial officer scrutinised the correctness of the court-fee paid. But we cannot say that the learned Subordinate Judge applied his mind and came to the conclusion that the court-fee paid was correct. We, therefore, hold that there was no decision by the Subordinate Judge within the meaning of section 12 (*i*), and that, therefore, it was open to the Subordinate Judge to reconsider the question.

It is then argued that the court-fee paid was correct. The learned Subordinate Judge held that the suit was for possession of a specific plot and therefore the court-fee should be paid on the market value of the B schedule properties. He relied in support of his view on the Full Bench decision in *Kesanna* v. *Boya Balagangappa*[1]. In that case section 7 (v) (*d*) of the Court-Fees Act and the notification issued by the Governor-General in Council and that issued by the Provincial Government were considered. Section 7 (v) (*d*) of the Court-Fees Act says that in suits for the possession of land, houses, and gardens, the court-fee shall be according to the value of the subject-matter, and where the land forms part of an estate paying the revenue to Government, but is not a definite share of the estate and is not separately assessed, the value shall be deemed to be the market value of the land. But by the notifications it was provided that, when a part of an estate paying annual revenue to the Government under a settlement which is not permanent is recorded in the Collector's register as separately assessed with such revenue, the value of the subject-matter of a suit for the possession of a fractional share of that part shall, for the purposes of the computation of the court-fee chargeable in the suit, be deemed not to exceed ten times such portion of the

1. (1947) 1 M.L.J. 201 : I.L.R. (1947) Mad. 643 (F.B.).

revenue, separately assessed on that part as may be ratably payable in respect of the share. In that case a suit was filed to recover the properties which had been allotted to the plaintiff at the partition. The learned Judges rejected the contention that a fractional share in the notification covered both a definite fraction and also an indefinite fraction, and laid down a simple test for the application of the section and the notifications. The test laid down by them is found at page 647. They say :—

"What the Court has to look at is the relief which the plaintiff seeks. If he is asking to be put in possession of immoveable property the boundaries of which are indicated, as here, the case falls under section 7 (v) (*d*) of the Court-Fees Act. In such circumstances he is not asking for a 'share'. He is asking the Court to give him possession of what has already fallen to him. It is only when he is seeking possession of property as a fractional share of a portion of an estate that the notification applies."

In the present plaint, the schedule B property is described as Zamindari Zeroyati land of 38 acres and 2 and a half cents in extent specified within boundaries. This is obviously a specific plot, which can be put in possession of the plaintiff without any partition. But Mr. Rama Rao argued that as the plaintiffs alleged in the plaint that the B schedule property was an undivided southern half of a big plot and that they were entitled to have their southern half separated and to be put in separate possession of the same, the suit was really for partition and possession of their half share, and therefore was covered by the notification. The words 'fractional share' are words of well-known connotation. A specific property with definite boundaries can never be a fractional share of a property though at one time it might have formed part of a larger extent. A fractional share predicates that the owner of that share is entitled to every bit of the total extent of his share. Till a partition is held and a specified part is allotted to him, he would be entitled to a fractional share of the whole. When the properties are allotted to his share, he becomes the owner of that specified plot allotted to him. In the latter case, the suit for recovery would only be in the words of the Full Bench "for the possession of the property the boundaries of which are indicated". If, as a matter of fact, the property, which is the subject-matter of the suit, is a specific property with boundaries, the plaintiff cannot be allowed, by clever draftsmanship, to evade the payment of court-fees. We have no doubt, on a reading of the plaint, that what the plaintiffs wanted was possession of a specific plot of land with boundaries, which they had purchased from the defendants.

We may point out that by reason of the Full Bench decision many anomalies are introduced in the application of section 7 (v) (*d*) and the notification issued by the Government. In a suit for possession of a specified plot a larger court-fee may be payable, whereas for partition and possession of a fractional share in regard to a larger extent, a smaller court-fee may suffice. In the case of a fractional share, a suit for its recovery may be filed in a District Munsif's Court whereas for a small extent, if the property is a specified one with boundaries, it will have to be filed in the Subordinate Judge's Court. This situation is not only illogical but sometimes make the members of the litigant public feel its oppressiveness by contrast. Though this decision was made as early as 6th January, 1947, no attempt has yet been made by the Legislatures to remove the anomalies, without at the same time over-burdening the litigant public.

In the result this Civil Revision Petition is dismissed with costs. Two months' time granted for payment of additional court-fee.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

The Fire Stone Tyre and Rubber Co., of India, Ltd. .. *Petitioners**

v.

T. S. Ramanuja Aiyangar .. *Respondent.*

Presidency Small Cause Courts Act (XV of 1882), section 38—Application to set aside an order of dismissal for default by a Full Bench—Competency of the Full Bench to entertain it.

A bench of the Small Cause Court has no power to entertain an application to restore a matter under section 38 of the Presidency Small Cause Courts Act that has been dismissed for default.

A proceeding under section 38 of the Presidency Small Cause Courts Act cannot be treated a a suit or a proceeding in the nature of a suit. The jurisdiction of the Small Cause Court under section 38 is substantially in the nature of revisional jurisdiction.

Case-law reviewed.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order dated 26th July, 1948, of the Small Cause Court, Madras, in M. P. No. 3586 of 1948, in N. T. A. No. 75 of 1948, in suit No. 5530 of 1947, etc.

M. E. Rajagopalachari for *J. V. Srinivasa Rao* and *S. Ramayya Nayak* for Petitioners.

B. V. Viswanatha Aiyar, T. R. Srinivasa Iyengar and *T. Krishnaswami Iyengar* for Respondent.

The Court delivered the following

JUDGMENT :—The principal question of law that I have to determine in these two Civil Revision Petitions is whether when a Full Bench of the Small Cause Court in the Presidency Town, Madras, has dismissed an application for a new trial for default of appearance it is competent to that Court to entertain an application to set aside the order of dismissal for default.

In support of his contention that it is competent to do so the learned advocate for the petitioner advanced three arguments. The first was this. It has been decided in *Lodd Govindoss Krishnadoss* v. *Rukmani Bai*[1], that when two or more Judges of the Small Cause Court are sitting together for the purpose of exercising the jurisdiction conferred by section 38 of the Presidency Small Cause Courts Act, they are sitting " in a suit " within the meaning of those words in section 69, and if a reference is made to the High Court under its provisions, such reference is valid. Order 9, rule 9, empowers a Court to set aside an order dismissing a suit for default when a party satisfies it that he had sufficient cause for his non-appearance when the suit was called for hearing. As the Small Cause Court is sitting " in a suit " when it deals with a matter under section 38 of the Act it has got jurisdiction to set aside the order of dismissal for default. The second argument, in a sense overlaps the first and it was to the effect that even if a proceeding under section 38 of the Act cannot itself be considered to be a suit it might very properly be regarded as a continuation of the suit or at least as in the nature of a suit and when so regarded section 141 of the Civil Procedure Code will apply and therefore the procedure laid down in Order 9, rule 9, can be availed of. To reinforce this argument the learned advocate referred to the decision in *K. Venkatanarasimha Rao* v. *Hemadri Suryanarayana*[2], where the facts were these : A suit having been dismissed for default an application to restore the suit was put in. This application was also dismissed. A second application was then filed to set aside the dismissal of the earlier application. The question having arisen whether it was competent to the Court to entertain that application it was ruled that by virtue of section 141 of the Civil Procedure Code, the Court had jurisdiction to restore the application the reason given being that though an application under Order 9, is not a petition in a suit, it is an original matter in the nature of a suit covered by section 141, Civil Procedure Code. Reference was also made to *Chinta Venkatasundara Venugopalasami* v. *President of the Board*

*C.R.P. Nos. 1176, 1177 of 1948 and 484 of 1949. 25th September, 1950.

1. (1913) I.L.R. 38 Mad. 438.

2. (1925) 50 M.L.J. 75.

of Commissioners, H. R. E., Madras[1], which was a case under the Madras Hindu Religious Endowments Act. There it was decided that Order 9, Civil Procedure Code applies to an application presented to the District Court under section 84 of the Madras Hindu Religious Endowments Act and that when such an application is dismissed for default the Court has power to restore it when it is satisfied that there was sufficient cause for the failure of the applicant to appear. I was asked to extend by way of analogy the scope of these two decisions to a proceeding under section 38 of the Small Cause Courts Act.

Now the principal difficulty in accepting this line of reasoning is that it is not possible to treat a proceeding under section 38 of the Small Cause Courts Act as being either a suit or a proceeding in the nature of a suit. A reference to Order 41, rule 7 of the rules framed under the Small Cause Courts Act makes it very plain that the jurisdiction of the Small Cause Court under section 38 is substantially in the nature of a revisional jurisdiction. That order is as follows :

"7. The application will not ordinarily be granted unless one of the grounds specified in the following clauses is established : (*a*) That the decree or order is contrary to some specified law or usage having the force of law ; (*b*) That there was a substantial error in the procedure as prescribed by these rules or by any other enactment applicable to the Court which has produced error in the decision of the case on merits. (*c*) That the applicant has discovered new and important matter or evidence which would affect the decision of the case on the merits and which, after the exercise of due diligence, was not within his knowledge and could not be produced by him before the Court at the time when the decision was passed."

The decisions of this Court confirm the impression produced by a reading of this order. In *M. Doraiswami Iyengar* v. *Radhakrishna Chetti*[2], it is stated that though section 38 of the Act is couched in general terms a number of cases decided by this Court beginning with *Sadasook Gambirchand* v. *Kannayya*[3] and ending with the case *Sikandar Rowther* v. *Ghose Mohideen Marakayar*[4], have laid down in clear terms that a Full Bench of Small Cause Court when called upon to exercise its powers under section 38 is not a Court of appeal and cannot, therefore, arrogate to itself the powers of an appellate Court. "In other words, its jurisdiction is merely revisional in nature." It is not, therefore, possible to extend the scope of the decisions in *K. Venkatanarasimha Rao* v. *Hemadri Suryanarayana*[5] and in *Chinta Venkata Sundara Venugopalasami* v. *President, Board of Commissioners, H. R. E., Madras*[1] by way of analogy to proceedings under section 38 of the Small Cause Courts Act.

The third argument of the learned advocate for the petitioner was based on an amendment made to section 41 of the Appellate Side Rules of the High Court, which is in these terms :

"41-B. The provisions of rule 11 (2), 17, 18, 19 and 21 of Order XLI, Civil Procedure Code, shall apply *mutatis mutandis* to Civil Revision Petitions."

The argument was that if this Court can restore a Civil Revision Petition dismissed for default it may be assumed that the Small Cause Court may do likewise in respect of a matter under section 38. I am not sure that this inference necessarily follows. When dealing with a matter under section 38 of the Small Cause Courts Act that Court has to conform to the rules made by this Court and it is difficult to see how it can adopt a procedure which is not provided for by those rules. In *A. Ramamurthi Iyer and others* v. *T. A. Meenakshisundarammal and another*[6] and *Subbama* v. *Venkatareddi*[7], it was laid down that

"this Court has no jurisdiction to restore to file a Revision Petition which has been dismissed for default as Order 9, rule 9, Civil Procedure Code is not applicable to the revision petitions. Section 151, Civil Procedure Code does not confer upon the Court the power to exercise a jurisdiction which it does not otherwise possess."

In fact it was apparently to get over the difficulty created by these two decisions that the Appellate Side Rules were amended in the manner indicated above. But no such amendment has been made in the rules binding the Small Cause Court.

1. (1937) 2 M.L.J. 876.
2. A.I.R. 1938 Mad. 669.
3. (1895) I.L.R. 19 Mad. 96.
4. (1916) 32 M.L.J. 213 ; I.L.R. 40 Mad. 355.
5. (1925) 50 M.L.J. 75.
6. (1945) 1 M.L.J. 4.
7. (1942) 2 M.L.J. 356.

Following these decisions, I must hold that a Bench of the Small Cause Court has no power to entertain an application to restore a matter under section 38 that has been dismissed for default.

I, however, think that on occasions considerable hardship might be caused to litigants if the Court is not empowered in a proper case to restore a petition dismissed for default. I would therefore suggest that the rules applicable to the Small Cause Court be amended, as was done in the case of the Appellate Side Rules of this High Court.

These two Revision Petitions are dismissed with costs.

K.C. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VISWANATHA SASTRI.

S. P. Periaswami Pillai .. *Petitioner**

v.

The Executive Officer, Panchayat Board, Tiruvayaru, Tanjore District .. *Respondent.*

Madras Local Boards Act (XIV of 1920), section 56 (1) (h) and (4)—Member ceasing to be a member owing to failure to attend meetings of the Board for three consecutive months—Attendance at urgent meeting during such period—If can avail—Attendance at meetings after ceasing to be a member, if can operate as restoration.

A member of a Panchayat Board of a place ceased to hold office as a member of the Board by reason of section 56 (1) (*h*) of the Madras Local Boards Act for not attending any meeting of the Board for a period of three months consecutively. He contended that he attended urgent meetings during this period though he was absent for the ordinary meetings as alleged and he further contended that as he attended the meetings after he had ceased to hold office he should be deemed to have been restored.

Held : (1) That Explanation to section 56 (1) (*h*) makes it clear that urgent meetings fall within sub-rule (2) of rule (3) of Schedule II, and hence could not at all be deemed meetings within the meaning of clause (*h*) of section 56 (1) and therefore have to be kept out of account in reckoning the absence of the petitioner.

(2) That without a resolution of the Board restoring a member he cannot be deemed to be restored by implication under section 56 (4) of the Act.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* and quash the order of the District Judge, West Tanjore, at Tanjore, dated 20th September, 1950, in O. P. No. 49 of 1950.

B. V. Ramanarasu for Petitioner.

The Order of the Court was made by

The Chief Justice.—This is an application to quash the order of the District Judge of West Tanjore holding that the petitioner has ceased to hold his office as a member of the Panchayat Board of Tiruvadi, under section 56 (1) (*h*) of the Madras Local Boards Act, that is to say, on the ground that he had failed to attend the meetings of the Board for a period of three consecutive months. This petitioner's counsel first and most pressed upon us a ground which does not appear to have been taken in the lower Court, namely, that though he did absent himself from the ordinary meetings of the Local Board for a period of three consecutive months, he was present during these months at some of its urgent meetings and therefore it could not be said that he had absented himself from the meetings of the Board for three consecutive months. This contention cannot prevail in view of the Explanation to section 56 (1) (*h*) which runs as follows :

"*Explanation* : A meeting held under sub-rule (2) of rule 3 of Schedule II or rule 4 of that schedule shall no be deemed to be a meeting within the meaning of this clause."

The urgent meetings which the petitioner is alleged to have attended are meetings which fall under sub-rule (2) of rule 3. They should therefore be deemed not to

*C.M.P. No. 9068 of 1950. 28th September, 1950.

be meetings within the meaning of clause (*h*) and must therefore be completely left out of account in reckoning the absence of the petitioner. The contention of the petitioner is that though these meetings should not be taken into account, if he had absented himself from them, they could be taken into account if he were present at such meetings. There is neither logic nor principle to support this argument. The Explanation completely excludes urgent meetings from a consideration of the question which arises under clause (*h*).

The second contention was that the petitioner attended the meetings of the Board after he had ceased to hold office and therefore he should be deemed to have been restored under section 56 (4) of the Act. There is obviously no substance in this contention, because a person who ceased to be a member of the Board can be restored only by a resolution of the Board at a meeting held after an application by such person for restoration.

The application is therefore dismissed.

K. C. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRA REDDI.

N. Vaithianathan .. *Petitioner**

v.

The Union of India, represented by the General Manager, South Indian Railway .. *Respondent.*

Pleadings—Amendment with regard to description of defendant—Permission refused—Wrongful exercise of discretion by lower Court—Right of High Court to interfere.

In a suit by the petitioner herein for permission to sue *in forma pauperis* the defendant for damages the defendant was described as the 'South Indian Railway, by the Governor-General in Council, represented by the General Manager'. Subsequently, when the new Constitution came into force the name was sought to be changed into 'The Union of India, represented by the General Manager, South Indian Railway'. The application for amendment was disallowed. In revision,

Held, that the Court in refusing to allow the amendment of the name of the defendant failed to exercise a judicial discretion. The amendment ought to be allowed in the interests of justice and for the determination of the real controversy in the suit.

It was entirely within the discretion of a trial Court to allow or not amendments of pleadings and if the discretion was properly exercised the High Court will be always reluctant to interfere with the order. But if the Court on a misunderstanding of the real position refused to set it right, then the High Court ought to set it right.

Petition under section 115 of 1908, praying that the High Court will be pleased to revise the order of the Court of the (Additional) Subordinate Judge, Tiruchirapalli, dated 11th July, 1950, in I. A. No. 159 of 1950, in O. P. No. 33 of 1949.

M. S. Venkatarama Aiyar for Petitioner.

S. S. Ramachandra Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The petitioner herein filed a petition in the Court of the Subordinate Judge, Tiruchirapalli, for permission to sue *in forma pauperis* the defendant, for damages in a sum of Rs. 14,000, for wrongful dismissal. The suit, as originally framed, described the defendant as "The South Indian Railway, by the Governor-General in Council, represented by the General Manager". Subsequently he filed an application to change the cause title by describing the defendant as "The Dominon of India, owning the South Indian Railway represented by its General Manager". Subsequently on the new Constitution coming into force he filed another application to change it into "The Union of India, represented by the General Manager, South Indian Railway".

This application was opposed by the Union of India mainly on the ground that the plaintiff by his amendment was seeking to implead a new party in the place

*C.R.P. No. 1299 of 1950. 7th November, 1950.

of a defendant, who ceased to be a legal entity on 1st April, 1944, after the lapse of the statutory period of limitation. This objection prevailed with the Subordinate Judge, Tiruchirapalli, who thought that originally the suit was sought to be filed against the South Indian Railway Company, represented by the Governor-General in Council, while the present petition is to implead the Dominion of India, which is altogether a different entity. I am afraid this conclusion is the result of a misunderstanding of the description of the defendant as given in the original petition for filing the suit *in forma pauperis*. It was not the South Indian Railway Company that was originally impleaded, but it was the South Indian Railway by the Governor-General in Council, represented by the General Manager, which means the Governor-General in Council, owning the South Indian Railway, represented by the General Manager. Therefore there is no substance in the contention advanced on behalf of the respondent herein that a new party is sought to be impleaded by this amendment. The party, as described in the original petition is the same as the party mentioned in the application for the amendment of the cause title. The plaintiff now only seeks to describe the defendant correctly, having regard to the form in which the suit ought to be filed against the Union of India.

It is only due to a misconception that a wrong person was sued originally and that, by an amendment, substitution of parties was sought, that the lower Court refused to permit the plaintiff to change the description of the defendant. No doubt, it is entirely within the discretion of the trial Court to allow or not the amendments of the pleadings and if the discretion is exercised properly, this Court will be reluctant to interfere with that order. But where the Court refused to exercise that jurisdiction on a misunderstanding of the real position in the case, this Court ought to set it right. The application for amendment would have had a different result, if only the trial Judge had realised that it was only the South Indian Railway Administration that was being sued, however, described, and it was the wrong description thereof that was sought to be corrected. A Court ought to permit a plaintiff in the normal circumstances to amend the cause title by furnishing the correct description of the defendant and there are absolutely no grounds for not according that permission in this case. In refusing to do so, the trial Court failed to exercise a judicial discretion. I think that in the interests of justice and for the determination of the real question in controversy, the amendment sought for should be allowed.

I therefore set aside the order of the trial Court and direct it to permit the plaintiff to amend the cause title as prayed for. In the circumstances of the case I make no order as to costs.

K.C. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

Gomraj Punamchand .. *Appellant**

v.

Sogmal Dhanaji .. *Respondent.*

Arbitration Act (X of 1940)—Disputes referred to arbitration—Pursuant to award documents executed—Suit for recovery of amount based on such documents—Maintainability.

Certain disputes between the parties in relation to a partnership concern were referred to arbitration and a settlement was arrived at the terms of which were set forth in a document known as *parikhat* and which was also carried out by an entry in the *katha* or account of the defendant. A suit was later filed by the plaintiff for recovery of certain amounts alleged to be due to the plaintiff from the defendant on the basis of the settlement. The defence raised by defendant was that as the two documents referred to by themselves constituted the award, the suit was not maintainable because it sought to enforce the award in seeking to enforce the documents executed pursuant to the award.

Held, that the contents of the documents mattered and not the complexion which the defendant seeks to give them. To regard the documents as meaning anything more than that they came into

*C.C.C.A. No. 29 of 1948. 24th August, 1950.

existence pursuant to an earlier award was to put an undue strain upon the natural spirit and significance of the documents themselves. The suit was not unsustainable by reason of the provisions of the Indian Arbitration Act.

Appeal against the decree of the City Civil Court, Madras, dated 26th November, 1947, in O. S. No. 190 of 1946.

Subramanyam and Rajagopal for Appellant.

C. Sriraman for Respondent.

The Court delivered the following

JUDGMENT.—An interesting point of law under the Indian Arbitration Act has been argued by Mr. Subramaniam in this case. The facts lie in a short and narrow compass. There were certain disputes between the parties in relation to a partnership concern of theirs. The disputes were referred to arbitration and there was a settlement of the matter by the arbitrators, the terms of which are to be found set forth in a document known as *parikhat*, Ex. B-2, and happened to have been carried out also by an entry in the *katha* of the defendant, Ex. B-1. The suit, out of which this appeal arises, was instituted for the recovery of Rs. 2,261 alleged to be due to the plaintiff by the defendant on the basis of the settlement evidenced by Exs. B-1 and B-2. The case of the plaintiff is that what took place was merely a mediation and not a strict arbitration proceeding which resulted in an award as such. The defendant in his written statement pleaded that the *parikhat* and the *katha* referred to in the plaint constituted by themselves the award of the arbitrators and that the suit was really one to enforce the award evidenced by those two documents and that the suit was unmaintainable because it sought to enforce the award in seeking to enforce the documents executed pursuant to the award. There were two issues raised in the case :

1. Is the suit unsustainable by reason of the provisions of the Indian Arbitration Act X of 1940 ?

2. Are the *parikhat* and *katha* referred to in the *plaint* unenforceable for the reasons stated in paragraph 6 of the written statement ?

The learned City Civil Judge answered both issues in favour of the plaintiff and decreed the suit. The defendant appeals.

On issue (2) there is no argument advanced before me, and it is unnecessary to consider the correctness of the finding reached by the Court below on that. The real point of the learned advocate for the appellant is that the documents, Exs. B-1 and B-2, read together, themselves constitute the award in the case. In support of his contention he has drawn my attention not merely to the recitals of the documents, but also to the evidence of D. W. 1 in the case, that is to say, the defendant himself, as against which there is no evidence on the side of the plaintiff at all. What exactly Exs. B-1 and B-2 are is stated by D. W. 1 in his evidence as follows :

> " All the four persons took my signature in a book and also in a letter. The letter was not read over to me. The arbitrators decided something for themselves and wrote their decision in a book. This is their decision (Ex. B-1). The four arbitrators covered the page of the account book containing the decision with a paper and then took my signature at the bottom of the decision. They took my signature also in another page of the account book which contains the *parikhat*. This is the page (Ex. B-2)."

The learned counsel for the appellant says that having regard to this uncontradicted evidence of the defendant as D. W. 1, one must reasonably regard Exs. B-1 and B-2 as themselves constituting the sole authentic repository of the award. That being so, says the learned counsel, the suit is one for enforcement of the award itself. I am not prepared to read the deposition in this manner. Even if the deposition runs to the effect contended for by the learned advocate, what matters essentially is the contents of the documents themselves and not the complexion which the defendant, as a witness in the box seeks to give those contents. To regard the documents as meaning anything more than that they came into existence

pursuant to an earlier award, is to put an undue strain upon the natural spirit and significance of the documents themselves. I must accordingly repel this contention of the learned advocate for the appellant.

A point has also been mooted by learned counsel, which is founded upon the ruling of Mr. Justice Somayya in *Rashid Jamshed Sons & Co.* v. *Moolchand Jothajee*[1] which has been confirmed by a Letters Patent Appeal Bench of this Court in *Moolchand Jothajee* v. *Rashid Jamshed Sons & Co.*[2]. The point is that whether the suit is one for enforcement of the award directly or for enforcement of a certain document executed pursuant to the award, it makes no difference to the application of the principle laid down in those two decisions. The reasoning of those decisions is that where a party is relying upon an award for the reliefs he has prayed for, he is seeking in effect a decision upon the existence and effect or validity of the award. It is on this basis that those two decisions held a suit for enforcement of an award to be within the mischief of clause (2) of section 31 of the Arbitration Act. Learned counsel argues that if that is the basis of the unmaintainability of a suit for enforcement of an award that basis may equally apply to the case of a suit for enforcement of a document executed pursuant to the award. The argument does not seem to be without force. But I am relieved of the responsibility of pronouncing upon the merits of the argument for the reason that it seems to have been common ground in the Court below that if the suit was to be regarded as not in enforcement of the award directly, but only in enforcement of a document executed pursuant to the oral award it would fall outside the mischief of the Arbitration Act. That being the basis on which this litigation must be decided, I am clearly of opinion that the view of the Court below is right and that this appeal must fail. It is accordingly dismissed, with costs.

K.C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRA REDDI.

M. A. Jaleel Sahib .. *Petitioner**

v.

Seeniappa Ramaswami Mudaliar & Co., by its Managing Partner N. S. Srinivasan .. *Respondent.*

Provincial Insolvency Act (V of 1920), sections 5 and 16—Creditor's petition—Application by another creditor under Order 1, rule 10, Civil Procedure Code, to be added as a party—Maintainability.

A creditor filed an application for adjudging the petitioner an insolvent. Pending disposal of this petition the respondent herein came by way of an application under Order 1, rule 10, Civil Procedure Code, to be added as an additional party to the petition. On the question whether the petition could be ordered,

Held, that under section 5 of the Provincial Insolvency Act the Court exercising insolvency jurisdiction can follow the procedure prescribed in the Code only when there is no procedure prescribed in the Act with regard to a particular matter but not when it is provided for in the Act. While a definite provision for substitution of a party has been made under section 16 of the Provincial Insolvency Act a creditor aggrieved by the conduct of the petitioning creditor can come only by way of the substitution petition under section 16 of the Act and not under Order 1, rule 10 of the Civil Procedure Code to be added as a party.

Held, further, that in the absence of any allegation or proof that the presence of the party is necessary for any effective and complete adjudication of the matters in dispute, the petition could not be allowed.

Petition under section 75 of Act V of 1920, praying that the High Court will be pleased to revise the order dated 14th March, 1949, of the District Court, Tiruchirapalli, in C. M. A. No. 1 of 1949, preferred against the order dated 22nd October, 1948, of the Court of the Subordinate Judge, Tiruchirapalli, in I. A. No. 311 of 1948, in I. P. No. 6 of 1948.

S. K. Ahmed Meeran for Petitioner.

S. Amudachari for Respondent.

1. (1945) 2 M.L.J. 98.
2. (1946) 1 M.L.J. 185.

*C.R.P. No. 1542 of 1949. 5th September, 1950.

The Court delivered the following

JUDGMENT.—An interesting question of law has been raised in this case, namely, whether a Court exercising insolvency jurisdiction can direct addition of parties under Order 1, rule 10, of the Civil Procedure Code. Both the Courts answered the question in the affirmative and hence this Civil Revision Petition.

A creditor filed an application for adjudging the petitioner an insolvent in the Court of the Subordinate Judge, Tiruchirapalli. Pending the disposal of this petition the respondent herein came by way of an application under Order 1, rule 10, Civil Procedure Code, to be added as an additional party to the petition. This petition was ordered by the Subordinate Judge. On appeal by the debtor the order of the trial Cout was confirmed.

In this petition it is urged by Mr. Ahmed Meeran, learned counsel for the petitioner that a Court while exercising insolvency jurisdiction has no jurisdiction to direct the addition of parties under Order 1, rule 10, Civil Procedure Code, when there is a specific provision made in section 16 of the Provincial Insolvency Act for substitution of a party in certain cases. According to him, section 16, Provincial Insolvency Act, contemplates only substitution and not addition of a party and therefore resort cannot be had to Order 1, rule 10, Civil Procedure Code, for addition of parties. Section 16 of the Provincial Insolvency Act lays down

"that where the petitioner does not proceed with due diligence on his petition, the Court may substitute as petitioner any other creditor to whom the debtor may be indebted in the amount required by this Act in the case of a petitioning creditor."

The intention of the Legislature as expressed in this section appears to be that in cases where the petitioning creditor colludes with the debtor, sought to be adjudicated an insolvent, and does not prosecute the petition diligently, leave should be granted to another creditor, to whom the debtor is indebted, in the statutory amount, to come on record and proceed with the petition for adjudication. There does not seem to be any necessity for the addition of another creditor to the same petition having regard to the fact that sufficient safeguard is provided in section 14, Provincial Insolvency Act, which says that no petition, whether presented by a debtor or creditor shall be withdrawn without the leave of the Court. This affords sufficient protection against the petitioning creditor colluding with the debtor and withdrawing the petition presented by him. When an application for withdrawal is made the Court is put on its guard and will direct notices to be issued to the other creditors who are made parties to the petition. So the interests of the creditors are well protected even without any addition of parties to the application of the petitioning creditor.

In support of his submission that an insolvency Court has no jurisdiction to invoke the provisions of Order 1, rule 10, Mr. Meeran has placed before me a decision of a Bench of our Court in *Venugopalachariar* v. *Chunnilal*[1]. In that case the question for decision was whether an order for annulment passed under section 43 (1), Provincial Insolvency Act, could be set aside by virtue of the provisions of Order 9 of the Civil Procedure Code. What happened there was that an application filed by the insolvent under section 43 of the Provincial Insolvency Act for annulling his adjudication was dismissed for default. Subsequently the insolvent filed an application under Order 9 to set aside that order. The learned Judges, Phillips and Madhavan Nair, JJ., held that the insolvency Court could not set aside the order under the provisions of Order 9 of the Civil Procedure Code, because a definite remedy has been prescribed by section 10 (2) of the Act and therefore the insolvent could not have resort to the provisions of Order 9 of the Civil Procedure Code, by virtue of the provisions of section 5 of the Act. The following observations at page 937 of this report may be usefully extracted :

"Under section 5 of the Act the provisions of the Civil Procedure Code are to be applied subject to the provisions of the Act. Section 10 (2) provides a definite remedy for a debtor in respect of whom

1. (1926) 51 M.L.J. 209 : I.L.R. 49 Mad. 935.

an order of adjudication has been annulled, and it gives him permission to prevent another petition on the same facts, provided that he satisfies the Court that he was prevented from prosecuting his application by any reasonable cause. Such a remedy is certainly distinct from any remedy granted by the Civil Procedure Code and appears to prescribe definitely the procedure to be adopted. If that is so, then, I think, that the words 'subject to the provisions of this Act' in section 5 must have their full force; when the Act prescribes a definite method by which the debtor can obtain his remedy it is not open to him to adopt other methods which would be open under the Civil Procedure Code."

Applying the principle underlying this decision to the present case I must hold that resort cannot be had by the respondent herein to the provisions of Order 1, rule 10. A definite provision for substitution of a party has been made in section 16 of the Provincial Insolvency Act. The remedy under section 16 of the Provincial Insolvency Act is distinct from the one provided in Order 1, rule 10, Civil Procedure Code. Under section 16 of the Act a creditor who is aggrieved by the conduct of the petitioning creditor can come by way of an application for being substituted and not for being added as an additional party.

The learned counsel for the respondent argues that the Court exercising an insolvency jurisdiction is competent to direct the addition of parties under Order 1, rule 10, by virtue of provisions of section 5 of the Provincial Insolvency Act and placed reliance for this submission on a decision in *Ayyasami Chetti* v. *The Official Receiver, Coimbatore*[1]. In that case on an application by the insolvent under section 43 of the Provincial Insolvency Act his adjudication was annulled *ex parte*, the presiding Judge being under the impression that it was not contested. When the Official Receiver came to know of the order passed by the Court he immediately filed an application under section 5, Provincial Insolvency Act, read with Order 9, rule 13 and Order 47, rule 1, Civil Procedure Code. This application was opposed by the insolvent on the ground that the Court had no jurisdiction to entertain the application for review of its order. The trial Court overruling this objection allowed the petition filed by the Official Receiver. In a petition in revision against that order this Court had to consider whether the Insolvency Court had jurisdiction to entertain an application for review. The learned Judge Ananthakrishna Aiyar, J., held that the mofussil Courts in the exercise of the insolvency jurisdiction have got a right to review their own orders and entertain applications under Order 9 of the Civil Procedure Code to set aside for sufficient cause orders passed *ex parte* by virtue of the provisions of section 5 of the Provincial Insolvency Act. The learned Judge distinguished *Venugopalachariar* v. *Chunnilal*[2], on the ground that that was a case of an application by the insolvent himself, who could apply for re-adjudication under section 10 (2), Provincial Insolvency Act and also observed that there was a substantial difference between the case of an insolvent applying under section 10 (2) for adjudication and the case of creditors or Official Receivers applying for adjudicating the debtors-insolvents under the same provisions of law. He further observed :

"That if an application by Official Receiver was not allowed creditors were surely to be prejudiced in several cases if adjudications in insolvency be annulled and having regard to the limit of time prescribed by sections 53 and 54 of the Act, their right would be seriously prejudiced in various cases if they be confined to enforcing them by filing fresh applications in insolvency to adjudicate the same man as insolvent."

The learned Judge was inclined to take the view that a Court exercising insolvency jurisdiction has jurisdiction to review its own order in appropriate cases or to set aside its own order under Order 9, rule 13 of the Civil Procedure Code, for sufficient causes, for the reason that there was not appropriate remedy provided for in the provisions of the Provincial Insolvency Act.

The decision in *Abbi Reddi* v. *Venkata Reddi*[3], referred to in *Ayyasami Chetti* v. *The Official Receiver, Coimbatore*[1], is also to the same effect. That was also a case where the creditors who tendered proof of their debts applied to the insolvency Court to review an order of annulment on the application made by the insolvent. It was there held that under section 5 of the Provincial Insolvency Act, a Court exercising the insolvency jurisdiction had the same powers and had to follow the same procedure as in the exercise of original civil jurisdiction.

1. (1931) 61 M.L.J. 719.
2. (1926) 51 M.L.J. 209 : I.L.R. 49 Mad. 935.
3. (1925) 51 M.L.J. 60.

Under section 5 of the Provincial Insolvency Act, the Court in exercising insolvency jurisdiction can follow the procedure prescribed in the Code only when there is no procedure prescribed in the Act with regard to a particular matter but not when it is provided for in the Act. In other words the provisions of the Civil Procedure Code will apply in the absence of any provisions in the Act. Where the Act prescribed a method by which a party can work out his remedy it is not open to him to call to his aid the provisions of the Civil Procedure Code. It is only on this basis that the rulings in *Venugopalachariar* v. *Chunnilal*[1], *Ayyasami Chetti* v. *The Official Receiver, Coimbatore*[2] and *Abbi Reddi* v. *Venkata Reddi*[3], can be reconciled. I am of opinion that the decisions in *Ayyasami Chetti* v. *The Official Receiver, Coimbatore*[2], *Abbi Reddi* v. *Venkata Reddi*[3], are not authorities for the proposition that the procedure prescribed under the Code is to be followed irrespective of whether in the Act a specific provision is made with regard to a particular matter or not. If I may say so with respect, I agree with the reasoning of the learned Judges in *Venugopalachariar* v. *Chunnilal*[1].

Further the provisions of Order 1, rule 10 cannot be invoked by the respondent herein for being added as an additional party for another reason also. Order 1, rule 10, lays down

> "that a Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just order that the name of any party improperly joined, whether as plaintiff or defendant be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant or whose presence before the Court may be necessary in order to enable the Court, effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

This rule indicates that a Court can direct addition of another party under two circumstances; either the name of any person who ought to have been joined originally, was not added as a party or where the presence of a party is absolutely necessary to enable the Court to come to an effective and complete adjudication upon the question involved in the suit. The position that there is no jurisdiction in a Court to add a party in any other case cannot be seriously disputed. *See* Mullah, 11th Edition, page 517, and also the decision in *Vattam Ramakrishnayya* v. *Vattini Satyanarayana*[4], *Vaithilinga Pandara Sannadhi* v. *Sadasiva Aiyar*[5] and *Devendra Kumar* v. *Mt. Batasi Bai*[6]. Now what I have to consider is whether the petitioner can come within either of the two alternatives mentioned in Order 1, rule 10 (2). Admittedly the respondent in this case cannot come within the first alternative laid down in that sub-rule (2). The only question is whether he is a person whose presence is necessary for an effective and complete adjudication of the matters in dispute. I do not think his presence is necessary for any effective and complete adjudication of the matters in dispute. It cannot be said his presence is necessary for any effective and complete adjudication of the matters in dispute in this case. Even in the application for being added as a party he does not mention that there is something in the matter which cannot be decided without his being a party to the application. All that he alleges in the application is that, if for any reason, the petitioning creditor does not choose to proceed with his petition diligently, he would be willing to go on with that application. On these allegations in the affidavit, it cannot be said that his presence is absolutely necessary for deciding whether the debtor should be adjudicated an insolvent or not.

It follows that the petitioner cannot be added as an additional party under Order 1, rule 10, Civil Procedure Code. This petition is therefore accepted and the order of the Courts below is set aside.

But I make no order as to costs in this Civil Revision Petition hving regard to the circumstances of this case.

K. C. ——— *Petition allowed.*

1. (1926) 51 M.L.J. 209 : I.L.R. 49 Mad. 935.
2. (1931) 61 M.L.J. 719.
3. (1925) 51 M.L.J. 60.
4. A.I.R. 1929 Mad. 291.
5. (1926) 51 M.L.J. 148 : I.L.R. 50 Mad. 34.
6. A.I.R. 1934 Nag. 228.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Sathayee .. *Petitioner* *

v.

Angappa Kone .. *Respondent.*

Criminal Procedure Code (V of 1898), Section 488—Husband who was bound by the custom of the community to live in wife's house after his marriage and to look after her affairs, leaving wife's house—Liability to an order under section 488.

According to the admitted custom of the community to which the parties belonged, a man, after marriage, had to live in the wife's family house, and become a part of it and had to consider himself as a member of that family. Where such a husband went away from his wife's house on account of misunderstandings and exchange of words,

Held : The desertion is by the husband as according to the custom he has to look after the wife by living in her house, and if he does not do so he will be liable to an order of maintenance under section 488, Criminal Procedure Code.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Sub-Divisional Magistrate, Ramanathapuram, dated 13th August, 1949 in M.C. No. 40 of 1949.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Petitioner.

Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

S. Krishnamurthi for Respondent.

The Court made the following

ORDER.—The order of the Sub-Divisional Magistrate dismissing the application is unsustainable. According to the admitted custom of the community to which the parties belong, a man, after marriage, lives in the wife's family house, and becomes a part of it. He manages the properties of his wife and mother-in-law and should consider herself as a member of that family. The respondent's case is that on account of misunderstandings and exchange of words he went away from his wife's house to Kanappamendal and has been living there ever since. It is not his case that the petitioner, or her mother had made it irksome or impossible for him, to live with his wife. Therefore the desertion is by the respondent and it is not a case of the wife driving out the husband from her roof. If the custom of the community which has been recognised as legally enforceable is to be accepted, then the respondent has to look after the wife by living in her house, and if he does not do so, he will be liable to an order of maintenance under section 488, Criminal Procedure Code. Therefore I direct that that if the respondent returns to the petitioner's house before 16th January, 1951 and lives there, as he used to do looking after the properties, tending the goats and sheep, and augmenting the income, then he will not be liable to pay any maintenance. In default of the respondent doing so, he will be bound to pay a sum of Rs. 10 per month to the petitioner as maintenance.

V.S.

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* Cr.R.C. No. 1344 of 1949. (Cr.R.P. No. 1269 of 1949). 8th December, 1950.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

T. K. Rajagopalan .. *Appellant* *

Madras Buildings (Lease and Rent Control) Act (XXV of 1949)—Section 3 (1)—Vacancy—Monthly tenant informing landlord of assignment of the tenancy to another—Payment of rent by the other and acceptance of the same by the landlord—Notice of vacancy not given—If offence under section 3 (1) made out.

A monthly tenant wrote to his landlord on 23rd October, 1948 that he has assigned the tenancy to one *M.* and that as he has paid rent upto 31st October, the said *M.* will pay the rent subsequently and asking the landlord to accept the rent from *M.* Subsequently the landlord was accepting rent from *M.*

Held : In the circumstances there was a vacancy by the termination of the tenancy of which the landlord was bound to give notice to the Controller. Failure to do so is an offence for which the landlord would be liable to be convicted under section 3 (1) of the Madras Buildings (Lease and Rent Control) Act.

Appeal against the judgment of the Chief Presidency Magistrate, Egmore, Madras in C.C. No. 3947 of 1950.

T. M. Kasturi and *A. K. Sriraman* for Appellant.

The State Prosecutor (*S. Govind Swaminadhan*) for the State.

The Court delivered the following

JUDGMENT.—The appellant in this case has been convicted by the Chief Presidency Magistrate for an offence under section 3 (1) of Madras Act XXV of 1949 and sentenced to a fine of Rs. 300. The facts of the case are not in dispute. The house concerned was leased out to P.W. 1 an advocate. He wrote to the petitioner (who for the purposes of this case is treated as landlord) on 23rd October, 1948 that he has assigned the tenancy to one Mani and that as he has paid rent up to 31st October, the said Mani will pay the rent subsequently, and asking the petitioner to accept the rent from the said Mani. Subsequently the petitioner was accepting the rent from Mani.

On these facts, the question is whether there was a vacancy by the termination of a tenancy, so that the landlord, *i.e.*, the petitioner should give notice to the Controller. It is vigorously contended by Mr. Kasturi appearing for the petitioner that the vacancy contemplated in the section is actual vacancy and as Mani has occupied the house even before the 31st October, there was in fact no vacancy and in any event, if one tenant assigns his interest in the leasehold to another who comes into the possession of the leased premises by virtue of the sub-lease, a vacancy cannot be said to have arisen for the landlord to give notice.

There is no evidence in the case, that the lease of the premises was for any fixed period, so that the lessee may assign his unexpired portion to another person. It is the usual monthly lease of a house, and it is terminated by the letter of P.W. 1 who has expressed himself clearly that he will not be a tenant after 31st October. He had therefore no further interest in the property after 31st October which he can assign. As for the actual vacancy, it occurs when the tenant vacates the house after giving notice to quit. In this case, P.W. 1 has given notice to quit and he has vacated it. The occupation of Mani, though it may be lawful till 31st October, is unlawful after 31st October unless a fresh tenancy is created between him and the petitioner and this is what is prevented by the Act, unless it be with the consent of the Controller. On the facts, therefore, a vacancy arose by the termination of the tenancy by P.W. 1 and under the section, notice should have been given. Failure to do so is an offence for which the petitioner is liable. But in this case, I think the petitioner was *bona fide* under the impression that in the circumstances, he need not give notice, obviously under some mistaken advice. In the circumstances, I think a sentence of fine of Rs.100, in default two weeks simple imprisonment will meet the ends of justice. The excess, if paid, will be refunded.

V.S. *Fine reduced.*

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* Cr. Ap. No. 750 of 1950. 7th December, 1950.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRA REDDI.

Sheik Esuf Rowther *alias* A. S. Mohammad Yusuf and others. .. *Petitioners* *

v.

Sheik Davad Rowther and another .. *Respondents.*

Arbitration Act (X of 1940), Section 17—Decree on the award passed without allowing the requisite time to elapse as provided in section 17—Legality.

It is clear from the provisions of section 17 of the Arbitration Act that a Court can pass a decree on an award only after the expiry of time to file objections to the award. Whether the parties applied for time or not, it is the duty cast upon the Court to allow thirty days time to elapse between the filing of the award and the passing of the decree on the basis of the award. Accordingly a decree passed by a District Munsif on an award without allowing the requisite time to elapse as required under the provisions of section 17 of the Arbitration Act read with Article 158 of the Limitation Act is illegal and unsustainable.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsif, Mannargudi. dated 19th November, 1948 in O.S. No. 177 of 1947.

R. Gopalaswami Aiyangar for Petitioners.

M. S. Venkatarama Aiyar and *M. C. Rajagopalan* for Respondents.

The Court delivered the following

JUDGMENT.—This revision petition is filed by the defendants against the order of the District Munsif of Mannargudi accepting the award passed by an arbitrator in O.S. No. 177 of 1947 and giving a decree in terms of it in the following circumstances. A suit was filed by the plaintiffs for recovery of possession of properties alleging that they acquired title to two-thirds shares in the plaint house under two sale deeds, Exhibits A-5 and A-6, dated 5th June, 1912 and a settlement deed Exhibit A-10, dated 10th January, 1947 respectively. The suit was contested by the defendants on the grounds covered by the various issues raised in the suit.

While the trial of the suit was proceeding, the parties agreed to refer the matter to the arbitration of one Mohamed Abu Bucker, and a memorandum of agreement was filed into Court setting out the terms of the reference to arbitration. The arbitrator filed his award on 19th November, 1948. The learned District Munsif without giving any time to the parties concerned passed a decree observing that it was conceded that no question of any time for objections to the award, as in the case of reference through Court, arose and that no time for objections was asked for. Against this order of the trial Court accepting the award on the basis of which a decree was passed the present Civil Revision Petition is filed.

It is contended in this Civil Revision Petition that the order of the District Munsif accepting the award without allowing the necessary time for the filing of objection is illegal and is opposed to the plain wording of section 17 of the Arbitration Act. Section 17 provides that,

"Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award."

It is clear from a perusal of this section that a Court can pass a decree on the award only after the expiry of time to file objections to award. The time provided in Article 158 of the Limitation Act, for objections to the award is 30 days from the notice of the filing of the award, irrespective of the fact whether the parties applied for time or not. It was also urged before me that there was no question of parties applying for time, as the Court took up the matter on the very date on which

* C.R.P. No. 228 of 1949. 3rd November, 1950.

the award was filed and disposed it off immediately and the parties had no time even to apply for time to file objections to the award. Whether the parties applied for time or not, it is the duty cast upon the Court to allow 30 days time to lapse between the filing of the award and the passing of the decree on the basis of the award. On the face of it, the decree passed by the learned District Munsif without allowing the requisite time to elapse as required under the provisions of section 17 of the Arbitration Act read with Article 158 of the Limitation Act, is illegal and unsustainable. I therefore set aside the decree of the trial Court and direct it to issue the necessary notices to the parties concerned and give them sufficient time to file objections to the award and dispose of the suit according to law.

The Civil Revision Petition is therefore allowed, but in the circumstances of the case I make no order as to costs.

V.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

The Public Prosecutor .. *Appellant* *

v.

Chaniappa Pujary .. *Respondent.*

Madras Prohibition Act (X of 1937), Section 4 (2)—Presumption under—When arises—Prosecution for an offence under section 4 (1) (j)—Accused merely found smelling of liquor—If can be convicted on the strength of the presumption under section 4 (2).

There is no doubt that clause (2) of section 4 of the Madras Prohibition Act raises the presumption of guilt in respect of an offence mentioned in section 4 (1) (*a*) to (*j*) of the Act. But it is clear from the wording of the section that it is only where from the possession of any of the things mentioned in the section the offence is sought to be proved that the presumption is raised. Proof of possession of the things mentioned is a pre-requisite for raising the presumption. Where it is neither alleged, nor proved that the accused was in possession of any liquor or intoxicating drug and all that is established is that the accused was smelling something similar to what arises from a drink of alcohol, it will not raise the presumption mentioned in section 4 (2).

Appeal under section 417, Criminal Procedure Code, 1898, against the acquittal of the aforesaid respondent-accused by the Court of the Stationary Sub-Magistrate, Puthur, in C.C. No. 546 of 1950 on his file.

Public Prosecutor (*V. T. Rangaswami Aiyangar*) in Person.

K. V. Ramaseshan (Amicus Curiae).

The Court delivered the following

JUDGMENT.—This is an appeal sought to be filed by the Public Prosecutor against the order of acquittal passed by the Stationary Sub-Magistrate, Puttur in C.C. No. 546 of 1950.

The prosecution was for an offence under section 4 (1) (*j*) of the Madras Prohibition Act. On 12th June, 1950, the Sub-Inspector of Police, Vittal, went to the house of the accused to investigate into a complaint against the accused for offences under sections 448 and 323, Indian Penal Code and arrested the accused and when his person was searched, the Inspector found him smelling liquor. He was immediately sent to a nearby rural medical practitioner who found in him signs and symptoms of having consumed alcohol. The accused was thereupon charge-sheeted for an offence under section 4 (1) (*j*) of the Madras Prohibition Act which runs thus :

" Whoever consumes or buys liquor or any intoxicating drug shall be punished with. : . ".

The lower Court acquitted the accused mainly on the ground that the smell of alcohol is possible for reasons other than drinking liquor such as taking medicine like asava or arishta and the evidence of consuming liquor being based mainly on the smell, it is not conclusive. The other sympton of incoherent talk was found

* Cr. Appeal No. 754 of 1950. 28th November, 1950.

by the Magistrate as likely to be due to the perturbation and fear of the accused by the arrest and search by the police. The redness of the eyes was also explained away by saying that it may be due to weeping and it was admitted that the accused was weeping when he was arrested and taken to the doctor.

It is contended by the Public Prosecutor that this being a prosecution for an offence under section 4 (1) (*j*) it is covered by section 4 (2) under which it shall be presumed until the contrary is shown, that a person accused of any offence under clauses (*a*) to (*j*) of sub-section (i) has committed such offence in respect of the liquor or intoxicating drug etc., for the possession of which he is unable to account satisfactorily and the accused must therefore prove his innocence. There is no doubt that this clause raises the presumption of guilt in respect of an offence mentioned in section 4 (1) (*a*) to (*j*). But it is clear from the wording of the section that it is only where from the possession of any of the things mentioned in the section the offence is sought to be proved that the presumption is raised. Proof of possession of the things mentioned is a pre-requisite for raising the presumption. In this case it is neither proved nor it is contended that the accused was in possession of any liquor or intoxicating drug. What is contained in the stomach is not what is contemplated in the term possession in the section. Even so there is no proof of what was in his stomach. What can be said to have been established beyond all doubt is that the accused was smelling something similar to what arises from a drink of alcohol. This will not raise the presumption mentioned in section 4 (2). Section 4 (2) is more or less similar to section 64 of the Madras Akbari Act I of 1886 which raises the presumption in respect of an offence mentioned in section 55 of that Act. Section 55 of that Act does not contain any clause similar to section 4 (i) (*j*). But the other clauses of section 55 of the Act with slight modifications form section 4 (1) (*a*) to (*i*). The Legislature in enacting the Madras Prohibition Act has bodily taken section 55 (*a*) to (*i*) with suitable modifications and added two more clauses (*j*) and (*k*) and re-enacted section 64 of the Abkari Act as clause (2) of section 4. In so doing a portion of section 4 (1) (*j*) to which possession will not apply has been overlooked. The result is that the presumption will apply to a portion of section 4 (1) (*j*) but not to the whole of it. The presumption will apply to that portion which deals with buying liquor or any intoxicating drug where possession can be proved. In this case as already stated the possession of any liquor or intoxicating drug has not been proved. Only smell of liquor having been found, the presumption cannot apply. In the absence of presumption the question involved in this case is one of fact. I am unable to say that the Magistrate was wrong in drawing the inference which he has drawn on the evidence. I therefore see no reason to interfere with the order of acquittal and the appeal is dismissed.

I am indebted to Mr. K. V. Ramaseshan for his valuable assistance to Court as a *amicus curiae*.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

Vetcha Subba Rao and another .. *Petitioners* *

v.

Vetcha Veeraraju .. *Respondent.*

Court-Fees Act (VII of 1870), Section 7 (5)—Schedule II—Article 17 (B)—Gift to wife by a divided coparcener—Suit for partition of assets and accounts—Wife and husband in possession of the portion of house sued—Proper court-fee.

An alienee from a coparcener may not be a tenant-in-common; he may also be not entitled to possession. Still if as a matter of fact he is in actual possession of property, he need not pay a court-fee as though he was not in possession.

The husband, plaintiff 1 and the wife, plaintiff 2 were in possession of a family house along with plaintiff 1's nephew. Pursuant to an unilateral declaration on the part of the husband, plaintiff

*C.R.P. No. 584 of 1949. 30th October, 1950.

1, the status of the joint family became divided and the husband gave subsequently the portion of the house in possession of himself and his wife, plaintiff 2, to the latter. In a suit for partition of the assets of the family and also for accounts, on the question of proper court-fee,

Held, that so far as the house was concerned of which the plaintiffs were in possession, they were not bound to pay Court-fee under section 7 (5) of the Court-Fees Act. Payment under Article 17-B of Schedule II was sufficient.

Case-law referred to.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Rajahmundry, dated 26th March, 1949 in O.S. No. 42 of 1948.

M. S. Ramachandra Rao and *M. Krishna Rao* for Petitioners.

B. V. Subrahmanyam for Respondent.

The Government Pleader (*P. Satyanarayana Raju*) on behalf of the State.

The Court delivered the following

JUDGMENT.—The two plaintiffs are the petitioners. The first plaintiff is the husband of the second plaintiff. The defendant is a son of a brother of the first plaintiff. Early in January, 1944 the first plaintiff sent a notice to the defendant telling him that he intended to become divided in status. After having thus effected a disruption in status, the first plaintiff executed on 10th January, 1944 a gift deed of his immoveable assets in favour of the second plaintiff. The plaintiffs continued to live as previously in a portion of the family house. Thereafter they brought a suit for partition of the assets of the family and and also for accounts. A sum of Rs. 100 (one hundred) was paid as Court-fee in respect of the claim for partition under Article 17-B of Schedule II of the Court-Fees Act.

The objection was taken that the Court-fee paid was insufficient. The learned Subordinate Judge went into the question and required the plaintiffs to pay *ad valorem* Court-fee. They have therefore come to this Court.

One item in respect of which *ad valorem* Court-fee was insisted on, is the house in a part of which the plaintiffs live. Now, under section 7, clause (5) of the Court Fees Act which is the one which the learned Subordinate Judge held to be applicable, *ad valorem* fees need be paid only if the plaintiffs sue for possession—but their allegation is that they are already in possession. That being so, I find it difficult to see how they can be required to sue for possession or said to be suing for possession of the properties.

The learned Government Pleader referred me to the decisions in *Manjaya* v. *Shanmuga*[1], *Maharaja of Bobbili* v. *Venkataramanjulu Naidu*[2] and *Subba Goundan* v. *Krishnamachari*[3] and also to page 491 of the 11th edition of Mayne's Hindu Law wherein it is stated

"The view taken by the Madras High Court that as the purchaser from a coparcener is not a tenant-in-common with the coparceners in the family, he is not entitled to joint possession or to mesne profits . . . . . appears to be the sound view".

This however is not in dispute. An alienee from a coparcener may not be a tenant-in-common; he may also be not entitled to possession. Still if as a matter of hard fact he is in actual possession of the property, why should it be said that he must pay Court-fee as though he were not in possession? That is a requirement I find it hard to understand. So far as the house is concerned of which the plaintiffs are in possession, they are not bound in my view to pay Court-fee under section 7 (5) of the Court-Fees Act. Payment under Article 17-B of Schedule II is sufficient.

In respect of the matter included in the plaint, the order of the learned Subordinate Judge appears to me to be correct. The Civil Revision Petition is therefore allowed to the extent indicated above. As the petitioners have succeeded in part and failed in part there will be no order as to costs. Time to pay deficit Court-fee one month.

K.C. ——— *Petition allowed.*

1. (1913) 26 M.L.J. 576 : I.L.R. 38 Mad. 684.
2. (1914) 27 M.L.J. 409 : I.L.R. 39 Mad. 265.
3. (1921) 42 M.L.J. 372 : I.L.R. 45 Mad. 449.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VISWANATHA SASTRI.

Mallampati Kondayya and others .. *Appellants* *

v.

The Official Receiver, Nellore and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 24—High Court if can transfer insolvency proceedings in a moffusil Court to the Original Side of the High Court—Letters Patent (Madras) Clause 15—"Judgment"—Order refusing to transfer a case if a "judgment" open to appeal under Clause 15.

The High Court has no power under section 24 (1) (*b*) of the Civil Procedure Code to transfer an insolvency petition pending in a Subordinate Court in the moffusil to the Original Side of the High Court.

Narasareddi v. *Hajee Tar Mohamed Ayub Sait*, (1927) 54 M.L.J. 710: I.L.R. 51 Mad. 330 approved.

An order refusing a transfer is not a "judgment" and not open to appeal under clause 15 of the Letters Patent (Madras).

Appeal under Clause 15 of the Letters Patent against the order of the High Court in C.M.P. No. 4393, etc. of 1950 respectively on the file of the High Court (I.P. No. 3 of 1949, Sub-Court, Nellore).

L.P.A. Nos. 58 and 59 of 1950.

M. S. Ramachandra Rao for Appellant.

K. Krishnamurthi for Respondent.

L.P.A. Nos. 71 to 74 of 1950.

T. Lakshmiah and *K. Srinivasamurthi* for Appellant.

M. S. Ramachandra Rao, M. Krishna Rao and *V. Parthasarathi* for Respondents.

The Judgment of the Court was delivered by

Viswanatha Sastri, J.—These five appeals under Clause 15 of the Letters Patent arise out of orders passed in the course of an insolvency petition I.P. No. 3 of 1949 on the file of the Court of the Subordinate Judge, Nellore. One China Kondiah was adjudicated an insolvent in I.P. No. 3 of 1949 on 12th October, 1949 on a creditors' petition. The Official Receiver of Nellore filed I.A. No 208 of 1950 in I.P. No. 3 of 1949 for a declaration that an assignment of the insolvent's rights under a timber contract made by him in favour of his brothers-in-law was collusive, nominal and devoid of consideration and that the insolvent retained the benefit of the said contract. He also applied for an order setting aside the assignment and for being put in possession of the timber which was the subject-matter of the contract. The Official Receiver also filed another application I.A. No. 209 of 1950 for taking possession of logs of timber alleged to have been cut and transported by the assignees from the insolvent but which really belonged to the insolvent. The learned Subordinate Judge appointed an advocate of Rajahmundry as a Commissioner to take possession of the logs of timber claimed to belong to the insolvent. Thereupon the appellants in L.P.A. No. 58 and 59 of 1950 applied in I.A. No. 276 of 1950 for an order that the timber from Coupes Nos. 46 and 36 belonged to them under contracts entered into by themselves and were therefore not liable to be seized by the Commissioner. The Court by its order directed the commissioner to take charge only of those logs of timber bearing the mark "Coupe No. 19" without interfering with logs bearing mark "Coupe No. 36 and 46". The learned Judge also directed that all other logs not bearing mark "Coupe No. 19" should be released by the Commissioner. This order was passed on 6th April, 1950.

The Official Receiver of Nellore applied to this Court during the midsummer vacation in C.M.P. No. 4393 of 1950 and C.M.P. No. 4394 of 1950 for a transfer of I.P. No. 3 of 1949 from the Court of the Subordinate Judge of Nellore to this

* Letters Patent Appeals Nos. 58 and 59 and 71 to 74 of 1950. 29th September, 1950.

Court, for an order directing the Commissioner who had already been appointed by the Subordinate Judge's Court of Nellore to seize the logs of timber which bore no number but which the Official Receiver alleged belonged to the insolvent, and for a further order for retransmission of the records to the Court of the Subordinate Judge of Nellore immediately this Court made an order giving directions to the Commissioner. The Court of the Subordinate Judge of Nellore happened to be closed for the midsummer holidays and therefore these applications were filed in this Court and were dealt with by Basheer Ahmed Sayeed, J. C.M.P. No. 4393 of 1950 was ordered and the records of I.P. No. 3 of 1949 were called for. C.M.P. No. 4394 was also ordered and the Commissioner was directed to seize all logs which did not bear any coupe number, in addition to the logs which bore Coupe No. 19. The records in I.P. No. 3 of 1949 were also directed to be retransmitted to the Sub-Court, Nellore. These orders were made by the learned vacation Judge *ex parte* on 3rd May, 1950. Against these two orders, L.P.A. Nos. 58 and 59 of 1950 have been filed by the assignees from the insolvent of his rights under the timber contract. A person professing to be a creditor of the insolvent filed C.M.P. Nos. 5333 to 5335 of 1950 on the file of this Court for calling for the records in I.P. No. 3 of 1949 to this Court for a direction that the Commissioner appointed in I.P. No. 3 of 1949 should be directed to seize all logs except those bearing Nos. 36 and 46, for the removal of the Commissioner already appointed by the learned Subordinate Judge of Nellore and for the appointment of a fresh Commissioner in his stead. These petitions also came on for disposal before Basheer Ahmed Sayeed, J., who passed an order *ex parte* in C.M.P. No. 5334 of 1950 on 14th June, 1950 appointing Mr. Yella Reddi, an advocate of Rajahmundry, as an interim Commissioner pending the disposal of the main application (C.M.P. No. 5335 of 1950) for removal of the Commissioner already appointed. C.M.P. Nos. 5333 to 5335 of 1950 came on for final hearing before Panchapagesa Sastri, J., on 27th July, 1950 and the learned Judge dismissed them on the ground that the applicant had not dealt fairly with the Court and had failed to disclose previous applications that had been made by the Official Receiver for the very same reliefs. The learned Judge did not go into the merits of these applications. L.P.A. No. 71 of 1950 is filed against the order of Panchapagesa Sastri, J., dismissing C.M.P. No. 5333 of 1950 an application for calling for the records of I.P. No. 3 of 1949 to this Court. L.P.A. No. 72 of 1950 is against the order in C.M.P. No. 5334 dismissing the application for the appointment of an interim Commissioner. L.P.A. No. 73 of 1950 is directed against the order dismissing C.M.P. No. 5335 of 1950 for removal of the Commissioner appointed by the learned Subordinate Judge of Nellore. When these appeals came on for hearing, Mr. M. S. Ramachandra Rao, the learned advocate for the appellants in L.P.A. Nos. 58 and 59 of 1950 took a preliminary objection that the applications which had been made during vacation time to Basheer Ahmed Sayeed, J., were incompetent and the orders passed by the learned Judge on those applications were without jurisdiction.

The power of this Court to remove to its own file insolvency proceedings pending in mofussil Courts and to pass interlocutory orders in respect of those proceedings is sought to be rested on clause 13 of the Letters Patent or section 24 of the Civil Procedure Code. Clause 13 of the Letters Patent applies to suits and it has been held by the decision of a Full Bench of this Court in *Krishna Mudaliar* v. *Sabapathi Mudaliar*[1], that the clause empowers this Court to remove a case filed in a mofussil Court to its file for trial and determination but not merely to pass an interlocutory order and then to retransfer it to the Court from which it was withdrawn. To this extent the Full Bench dissented from the view of Ramesam, J., in *Jumna Bai* v. *Ramanathan Chettiar*[2]. From the applications presented to this Court and the orders passed by the learned Judge, it is clear that this Court was not called upon to transfer to its own insolvency jurisdiction I.P. No. 3 of 1949 and dispose of it—such a course is not permissible for other reasons as will be shown presently—but merely

1. (1945) 1 M.L.J. 14 : I.L.R. 1945 Mad. 389 (F.B.). 2. (1928) 55 M.L.J. 690 : I.L.R. 52 Mad. 52.

to call for the records in I.P. No. 3 of 1949 for the purpose of passing certain interlocutory orders and then retransfer the case to the file of the Court of the Subordinate Judge of Nellore in which the insolvency petition had been pending previously. In the view of the learned Judges of the Full Bench, clause 13 of the Letters Patent would not apply to such a case.

Under section 24, Civil Procedure Code, the High Court is empowered to withdraw any suit or other original proceeding pending in any Court subordinate to it and try or dispose of the same or transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same. It is open to question whether section 24 empowers this Court to withdraw to its file an interlocutory application in a suit or original proceeding pending in a Subordinate Court keeping the suit or the original proceeding itself on the file of that Court. Section 24, Civil Procedure Code, presupposes that the Court which withdraws a suit, appeal or other proceeding from a Court subordinate to it to its own file would have jurisdiction to try and dispose of the same. The mere fact that a power to withdraw a suit, appeal or other proceedings from a Subordinate Court is conferred by section 24 (1) (*b*), Civil Procedure Code, would not invest the Court so empowered with jurisdiction to try the suit, appeal or other proceeding if the jurisdiction to try the case is excluded by other enactments. So far as insolvency is concerned, the original jurisdiction of this Court is limited by the provisions of the Presidency Towns Insolvency Act and this Court has no "original jurisdiction" over insolvency proceedings which are cognizable by courts in the mofussil. It cannot transfer to its file an insolvency proceeding pending in a mofussil Court and dispose of it in the exercise of its original insolvency jurisdiction. Nor can the application for transfer be entertained on the Appellate Side of this Court, for the original side of the Court cannot be said to be a " court subordinate " to this Court within the meaning of section 24 (1) (*b*) (ii), Civil Procedure Code, so as to attract the operation of that clause. This Court would not be " competent to try or dispose of " the insolvency proceedings sought to be transferred within the meaning of section 24 (1) (*b*) (*i*), Civil Procedure Code, because in the exercise of its original insolvency jurisdiction, it is bound by the provisions of the Presidency Towns Insolvency Act and cannot administer the law as laid down in the Provincial Insolvency Act. For these reasons it was held by Curgenven, J., in the case in *Narasa Reddi* v. *Hajee Tar Mohamad Ayub Sait*[1], that the High Court has no power under section 24 (1) (*b*), Civil Procedure Code, to transfer an insolvency petition pending in a subordinate Court in the mofussil to the original side of this Court to be tried in its original insolvency jurisdiction. The decision rightly interprets the scope and meaning of section 24 (1) (*b*), Civil Procedure Code and we are in respectful agreement with the conclusions of the learned Judge. It follows therefore that the applications for transfer of the proceedings in I. P. No. 3 of 1949 made to this Court as well as the orders made by the learned Judge on those applications were both without jurisdiction.

The result is that L. P. A. Nos. 58 and 59 are allowed with costs and L. P. A. Nos. 71 to 73 of 1950 are dismissed, but without costs.

L. P. A. No. 74 of 1950.—This is an appeal filed against an order of the learned Judge of this Court refusing to transfer I. A. Nos. 208 and 209 of 1950, in I. P. No. 3 of 1949 pending on the file of the Court of the Subordinate Judge of Nellore to the Court of the Subordinate Judge of Rajahmundry for trial in the exercise of the insolvency jurisdiction of the latter Court. The objection to the appeal is that it is directed against an order refusing a transfer and such an order has been held to be not a " judgment " and therefore not open to appeal under clause 15 of the Letters Patent. See *Narasa Reddi* v. *Hajee Tar Mohamad Ayub Sait*[1]. For this reason this appeal has to be dismissed. There will be no order as to costs.

K. S.

L. P. A. Nos. 58 *and* 59 *of* 1950 *allowed.*

——— *L. P. A. Nos.* 71 *to* 74 *of* 1950 *dismissed.*

1. (1927) 54 M.L.J. 710 : I.L.R. 51 Mad. 330.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Valia Peetikayil Chandrankandi Kunhi Pathumma .. *Appellant**

v.

Ariyoth Ayammad and another .. *Respondents.*

Madras Tenants and Ryots Protection Act (XVII of 1946), section 4 (5)—"Each year's rent"—Meaning—Deposit of year's rent where by contract or custom rent was payable half-yearly—If sufficient to entitle him to have a stay.

The words "each year's rent as it accrues" in sub-section (5) of section 4 of the Madras Tenants and Ryots Protection Act mean only the rent accruing at the end of each year, even where the rent is payable by custom or contract in two half-yearly instalments. Hence, when a tenant deposits the year's rent within the time fixed, though he has not paid the instalments according to contract, it is sufficient to entitle him to have a stay under the Act.

Appeal against the appellate order of the District Court, North Malabar, dated 27th July, 1948, in A. S. No. 101 of 1948, preferred against the order of the District Munsiff Court, Tellicherry, in R. M. P. No. 333 of 1947 in O. S. No. 357 of 1945.

A. Achuthan Nambiar for Appellant.

V. P. Gopalan Nambiar for 2nd Respondent.

The Court delivered the following

JUDGMENT.—The simple point arising for decision in this second appeal is whether both the lower Courts were right in allowing the deposit within two months of 15th September, 1946 (the deposit was made actually on 8th November, 1948) construing the deposit required under sub-section (5) of section 4 of Madras Act XVII of 1946 of "each year's rent as it accrues" to mean only the rent accruing at the end of each *year*, even where the rent is payable by custom or contract in two half-yearly instalments, on 15th March and 15th September. In the present case there is no difficulty at all because the matter was covered by a previous decision between the parties, in R. M. P. No. 392 of 1947, which operated as *res judicata*, and the appellant could not, therefore, be allowed to agitate the matter over again. But, even apart from this question of *res judicata* the better opinion appears to be to construe the *year's rent* as accruing at the end of the year. In *Abdulla* v. *Patinhare Kottu Tavazhi*[1], I held that the proper construction of the words "each year's rent" should be to take the year, as a whole, and not *each* instalment thereof separately, and that, when a tenant holding over deposits the year's rent within the time fixed, though he has not paid the instalments according to the original lease dead, it is sufficient to entitle him to have a stay under Act XVII of 1946. Mack, J., in *Mannil* v. *Kesava Taragan*[2], took a similar view. I find it difficult to hold that any other view is possible in view of the phrase "each *year's* rent as it accrues due" in section 4 (5) of the Act. The agricultural year in the locality is admitted to be from 16th September to 15th September. The rent also is fixed *per year*, though payable in two instalments on 15th March and 15th September. So, the *year's* rent can accrue only on 15th September. That is so in insurance also. The premium for a *year* is fixed but it may be payable quarterly or monthly, but for purpose of calculating when the yearly premium accrues, the date at the end of the year is taken, and not the date at the end of the month or quarter. There is nothing contrary to law or custom in taking the *year's rent* as a unit for certain purposes, as for the stay under Act XVII of 1946, even though that rent is payable by custom or contract in instalments, and such a custom or contract can be upheld for certain purposes as for limitation of one instalment of the rent under the Estates Land Act. It also depends on the wording of each Act and section. The wording of Act XVII of 1946 is certainly in consonance with the interpretation

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*A.A.A.O. No. 7 of 1949. 21st September, 1950.

1. (1948) 2 M.L.J. 71 (Short Notes): C. R. P. No. 1469 of 1947.

2. (1948) 2 M.L.J 46 (Short Notes): C. R. P. No. 1372 of 1947.

given to it by the lower appellate Court and, indeed, by this Court in the judgments referred to above. In this view, this civil miscellaneous second appeal deserves to be, and is hereby dismissed with costs.

(Leave to appeal is refused.)

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE BASHEER AHMED SAYEED.

K. T. K. Thangamani .. *Petitioner.**

Madras Security Prisoners' Rules (1947), *rule* 15, *clauses* 6 *and* 9—*Violation of by detenu being on hunger strike—Offence under rule* 17 (2)—*Initiation of prosecution—Sanction or approval of Government—Proper form of.*

For a prosecution of a detenu for an offence under rule 17 (2) of the Madras Security Prisoners Rules by contravention of rule 15, clauses 6 and 9 (by being on hunger strike) specific approval of the Government must be obtained. Each case, as and when it occurs, should be reported to the Government and the Government should consider the necessity, expediency or otherwise of launching prosecution separately and then only after such approval is accorded, can the prosecutions be launched.

A Memorandum (No. 4934, dated 27th June, 1949) sent by the Government of Madras to the Inspector-General of Prisons who in turn forwarded it to the Superintendents of Jails giving general permission to all the Superintendents of Jails for launching such prosecutions against security prisoners who are guilty of such offences and directing them to intimate the fact of such prosecutions alone to the Government is opposed to rule 17 (2) and as such instructions cannot override or overweigh the efficacy of rule 17 (2), the instructions contained in the memorandum are not sufficient to sustain a prosecution.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the District Magistrate, North Arcot and Chingleput at Vellore, dated 8th April, 1950, in Crl. M.P. No. 52 of 1950 in C. C. No. 32 of 1950 on his file.

A. Ramachandran for *Messrs. Row and Reddy* for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

The Judgment of the Court was delivered by

Govinda Menon, J.—The petitioner seeks to revise the order of the learned District Magistrate of North Arcot passed in Crl. M. P. No. 52 of 1950 in C. C. No. 32 of 1950, holding that the Court has jurisdiction to take cognizance of the complaint against him and proceed with the enquiry and trial.

The petitioner is a detenu in the Central Jail at Vellore, having been confined there under the Madras Maintenance of Public Order Act of 1947. The complaint against him is that in violation of clauses 6 and 9 of rule 15 of the Madras Security Prisoners' Rules, 1947, he continued to be on hunger strike from 1st November, 1949 to 26th November, 1949, and thereby committed an offence under rule 17 (2) of the said Rules. Rule 17 (2) contemplates that :

"If any security prisoner is guilty of a jail offence, which, by reason of his having frequently committed such offences or otherwise, is in the opinion of the Superintendent not adequately punishable by him under the provisions of sub-rule 1, he may, with the approval of the Government, forward such prisoner to the Court of a magistrate of the first class or of a Presidency Magistrate, as the case may be, having jurisdiction, and such magistrate shall thereupon inquire into and try the charge so brought against the security prisoner, and upon conviction, shall sentence him to imprisonment for a term not exceeding one year."

It is admitted that in this case before the person was forwarded to the Magistrate or before a complaint was filed against him, specific approval of the Government was not obtained for the prosecution, and therefore it is contended that the initiation of the prosecution, without the Government considering the necessity or otherwise of a prosecution and giving their sanction for such a prosecution, is void and inoperative. On the other hand, on behalf of the State, it is contended by the

* Cr. R.C. No. 683 of 1950. 6th November, 1950.
(Cr. R.P. No. 628 of 1950).

learned Public Prosecutor, that the Memorandum No. 4934, dated 27th June, 1949, has given general permission to all the Superintendents of Jails for launching such prosecutions against security prisoners who are guilty of such offences and intimate the effect of such prosecutions alone to the Government. The memorandum referred to is one sent by the Government of Madras to the Inspector-General of Prisons, who, in his turn, has forwarded it to the Superintendents. The last two sentences of this Memorandum are as follows :

" If in spite of the warning the detenus go on hunger strike, they should take action as follows : if the hunger strike is a token one, lasting for a day, the Superintendent should withdraw the privileges of the detenus for a month or 15 days according to their discretion. In other cases of persistent or continuous hunger strikes, they should launch prosecutions against them and should intimate the Government, without delay, as soon as such prosecutions are launched."

It is contended before us that the instructions issued by the Government to the Inspector-General of Prisons are directly and diametrically opposed to rule 17 (2) and as such such instructions cannot override or outweigh the efficacy of a statutory rule as rule 17 (2). The statutory rule lays down that before the prisoner is forwarded to the Court of the Presidency Magistrate or First Class Magistrate for enquiry and trial, approval of the Government for that action should be taken. But the instructions issued by the Government state that in general a *carte blanche* is given to the Superintendents to launch prosecutions against security prisoners, who are alleged to be guilty of persistent or continuous hunger strikes and after prosecutions are launched, the fact of such launching should be intimated to the Government without delay. We have no doubt that the instructions contained in the memorandum go contra to what is contained in the statutory rule and in our opinion, these directions, issued as they are to the Inspector-General of Prisons, cannot be said to be formal and general approvals of launching of prosecutions against individual detenus as contemplated in rule 17 (2). Rule 17 (2) does not contemplate that there must be such a mass approval. Each case, as and when it occurs, should be reported to the Government and Government should consider the necessity, expediency or otherwise, of launching prosecutions, separately and then after such approval is accorded, can the prosecution be launched. If that be the true and correct interpretation of rule 17 (2), in our opinion, the instructions issued are *ultra vires* and cannot have any legal efficacy. Further the instructions issued by the Government should be in conformity with statutory rules.

We are, therefore, of opinion that the prosecution has not been launched properly and as such the Court has no jurisdiction to take cognizance of the complaint. In such circumstances the proceedings before the District Magistrate are quashed. This order of ours should not be interpreted as preventing a proper application to the Government for approval and any initiation of proceedings after such approval, if the authorities so desire.

K. S. ——— *Proceedings quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE BASHEER AHMED SAYEED.

Chenchu Narayana and others .. *Petitioners**

v.

Karrapati Kesappa .. *Respondent.*

Criminal Procedure Code (V of 1898), section 145 (1) and (4)—Preliminary order more than two months from date of dispossession—Whether person dispossessed entitled to restoration of possession.

Sub-section (1) of section 145 of the Criminal Procedure Code does not contemplate any sustained enquiry before the making of the preliminary order. The condition prescribed is that the Magistrate shall be satisfied from the police report or other information as to the necessity of action and since the whole purpose of the section is to prevent immediately a breach of the peace, it is very necessary that there should be no delay in passing the preliminary order, by the Magistrate

* Cr.R.C. No. 566 of 1950. (Cr.R.P. No. 840 of 1950). 13th September, 1950.

undertaking an enquiry for some time. It necessarily follows that the preliminary order should have been deemed to have been made when the Magistrate takes cognisance of the matter, wi h the result that the two months' period contemplated in the proviso to section 145 (4) should be deemed to be from the date when the petition was presented.

Case-law discussed.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the District Magistrate at Gooty, dated 14th March, 1950, and passed in Miscellaneous Case No. 13 of 1950 on its file.

M. Ramamohana Rao for Petitioners.

M. Krishna Rao for *M. S. Ramachandra Rao* and *I. Balayya* for Respondent.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the State.

The Judgment of the Court was delivered by

Govinda Menon, J.—By his order in M. C. No. 13 of 1950, dated the 14th March, 1950, the District Magistrate of Gooty held that the respondent in this Court, should be allowed to take possession of the land in dispute and retain the same till a competent civil Court decides the dispute between the parties; and aggrieved by that order the petitioners have moved this Court to revise the order of the District Magistrate.

The respondent presented a petition under section 145, Criminal Procedure Code, before the District Magistrate of Gooty on 15th October, 1949, and it was alleged that on 3rd October, 1949, he had been wrongfully dispossessed by the opposite party and wanted the Court to decide the question of possession and put him back in possession. A preliminary order under section 145 (4), Criminal Procedure Code, was passed on 25th January, 1950, that is more than two months not only after the date of dispossession but after the date of presentation of the petition. On the finding that the petitioner in the lower Court was entitled to possession, the learned District Magistrate, following two decisions of this Court held that the two months period contemplated in the proviso to section 145 (4), Criminal Procedure Code, should be deemed to be from the date when the petition was presented and therefore directed restoration of possession to the respondent in this Court. Somasundaram, J., before whom the Criminal Revision Petition first came on for hearing, finding that there is a conflict of decision on this point in this Court referred the matter to be heard by a Bench.

Section 145 (1), Criminal Procedure Code, contemplates that when any of the classes of Magistrates mentioned therein is satisfied from a police report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within the local limits of his jurisdiction, he shall make an order in writing stating, the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, within a time to be fixed by such magistrate and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute. This is the preliminary order contemplated by the section and when such preliminary order has been passed and served in the manner provided by the Code, on the date to which the petition stands posted for hearing, the magistrate shall, without reference to the merits of the claims of any of such parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them, consider the effect of such evidence, take such further evidence as he thinks necessary, and, if possible, decide whether any and which of the parties was in possession at the date of the preliminary order passed by him; and the proviso lays down that if it appears to the magistrate that any party was, within two months next before the date of such order, been forcibly and wrongfully dispossessed, he may treat the party so dispossessed, as if he had been in possession at such date. The words "at the date of the order" in sub-section (4) refers to the order contemplated in sub-section (1), *i.e.*, the preli-

minary order and the meaning to be given to the words " the date of such order " in the proviso, is the question for consideration.

In *Chinchilada Krishna Raju* v. *Chintalaswami Naidu*[1], Wallace, J., was not prepared to subscribe to the proposition that a party taking possession by force must be retained in possession if, owing to delay after the dispossessed party has asked the Court to take action, on the part of the Court taking action, over two months have elapsed before the Court finally makes up its mind to issue a preliminary order. Therefore the learned Judge was inclined to hold that an aggrieved party coming to Court with a complaint of having been dispossessed and invoking the Court to apply the provisions of section 145, Criminal Procedure Code, cannot be made to suffer because the Court, for some reason or other, delayed the passing of the preliminary order referred to in sub-section (1) of section 145. This decision was followed by Devadoss, J., in *Srinivasa Reddy* v. *Dasaratharama Reddy*[2], where the learned Judge held that when an application is made to a Magistrate under section 145 of the Criminal Procedure Code by a person complaining of forcible dispossession if, for no reason or fault of the applicant, the Magistrate is not able to pass a preliminary order within two months of the dispossession, the party complaining should not, on a proper construction of the first proviso to clause (4) of section 145, be made to suffer by reason of such delay on the part of the Magistrate and is entitled to an order under that section. The learned Judge further held that though the words of the proviso are capable of interpretation, that the dispossession must be within two months of the preliminary order, yet the intent and object of the section must be taken into consideration before such an interpretation is put upon it. The learned Judge referred to and quoted with approval the observations of Wallace, J., in the case referred to above.

In *Ammanna* v. *Sitaramayya*[3], Lakshmana Rao, J., following *Srinivasa Reddy* v. *Dasaratharama Reddy*[2], held that in a case where a party was dispossessed on the 14th April, 1938, and an application under section 145, Criminal Procedure Code, was presented on the 12th May, 1938, and the preliminary order was passed only on the 15th June, 1938, despite the fact that the preliminary order was passed on the 15th June there should be an order under section 145 (6), Criminal Procedure Code, declaring the petitioner to be entitled to possession. As against these three cases taking the view that the intent and object of the section should be taken into consideration and that the delay of the Court in satisfying itself and passing the preliminary order should not prejudice the petitioner if in fact the petition was presented within two months of the dispossession, the opposite view was formulated at first by Jackson, J., in *Pitchai Mooppan* v. *Narayanaswami Mooppan*[4] and by Happell, J., in *Arunachalam Goundan* v. *Chinnadorai* alias *Ramalinga Gounder*[5]. In the earlier case, Jackson, J., referred to the decisions of both Wallace, J., and Devadoss, J., and dissented from the conclusions arrived at in these cases. The learned Judge held that where the Legislature has fixed a definite period for interference in these quasi civil disputes, Courts ought to be guided by it, and if the interpretation of limitation periods is to be reasonable and not literal, there can be no certainty or finality. According to the learned Judge the period of two months is quite arbitrary and the Court should, without reference to any other consideration, abide by that rule even if, for no mistake or fault of the party complaining, the preliminary order was not passed immediately after the presentation of the petition. Happell, J., in *Arunachalam Goundan* v. *Chinnadorai* alias *Ramalinga Gounder*[5], rejected the contention that the first proviso to section 145 (4) need not be construed strictly and that the period of two months may, in proper circumstances, be extended in order that substantial justice shall be done between the parties. The learned Judge did not agree with Devadoss, J., but upheld the opinion expressed by Jackson, J., in *Pichai Mooppan* v. *Narayanaswami Mooppan*[4], as giving effect to the plain words of the statute untrammelled by any consideration of equity. In view

1. A.I.R. 1927 Mad. 816 (1).
2. (1928) 56 M.L.J. 33 : I.L.R. 52 Mad. 66.
3. (1939) 49 L.W. 173.
4. (1931) 4 Mad. Cr. C. 168.
5. (1945) 1 M.L.J. 210.

of these divergent opinions expressed in the contradictory line of authority, we have now to decide to which voice we ought to hearken. But before the matter is examined in some detail, it is advantageous to refer to the decisions of other Courts also cited before us.

Stuart, C.J., in *King-Emperor* v. *Baijnath*[1], dissented from the opinion of Devadoss, J., and held that where it is found that a man has been dispossessed more than two months next prior to the date of the preliminary order, he cannot be treated as though he were in possession on the date of the preliminary order. The learned Chief Justice was unable to agree with Devadoss, J., in extending the period of two months. He further goes on to add that the words "two months from the date of the order" should mean two months from the date of the preliminary order and not two months from the date of the complaint. With the view of Stuart, C.J., just now referred to, Rachpal Singh, J., of the Allahabad High Court concurred in *Meharbun Singh* v. *Bhola Singh*[2]. The learned Judge held that a person who has been forcibly dispossessed more than two months before the date of the preliminary order cannot derive any benefit under section 145. Where therefore the Magistrate finds that dispossession took place more than two months before the date of the preliminary order, then the only course open to him is to maintain the possession of the other party. The learned Judge also referred to *Emperor* v. *Parashram*[3], where Macnair, O.J.C., laid down that a person complaining of forcible dispossession under section 145, Criminal Procedure Code, cannot claim the benefit of that section if the dispossession took place more than two months prior to the date of the preliminary order under clause (4) of section 145. Here again reference was made to *Srinivasa Reddy* v. *Dasaratharama Reddy*[4], and a note of dissent was sounded from that Judicial pronouncement.

Our attention was also drawn to the observations of Lobo, J.C., and O'Sullivan, J., in *Muhammad Ali* v. *Shamsul Haq*[5], in the following terms :—

> "The inquiry under sub-section (4) is as to possession on the date of the preliminary order under sub-section (1) and the words of the proviso 'within two months next before the date of such order' are precise and unambiguous. It is difficult to see how these words afford any scope for holding that in those cases where a Magistrate does not make a preliminary order within two months of the dispossession, the party complaining is still entitled to proceed under section 145, Criminal Procedure Code. Undoubtedly, it is unfortunate that a party should be prejudiced by delay in making of a preliminary order under sub-section (1) especially if that delay is in any particular case attributable to the ineptitude or want of integrity of the Magistrate, but we cannot concede that any interpretation at variance with the plain words of the section is justified."

The learned Judicial Commissioners in Sind disapproved of the decision in *Srinivasa Reddi* v. *Dasaratharama Reddy*[4], but approved of the decision of Rachpal Singh, J., in *Meharbun Singh* v. *Bhola Singh*[2]. They also referred to the observations of the Privy Council in *Narayanaswami* v. *Emperor*[6], where Lord Atkin says that when the meaning of the words is plain, it is not the duty of the Courts to busy themselves with supposed intentions.

Mr. N. Rammohan Rao for the petitioner strenuously contends that the line of authority exemplified by *Chincilada Krishnama Raju* v. *Chintalaswami Naidu*[7], *Srinivasa Reddi* v. *Dasaratharama Reddy*[4] and *Ammanna Sastri* v. *Sitaramayya*[8], should not be preferred not only in view of the dissenting note of Jackson, J., and Happell, J., but also because of the concurrence with those dissenting views by single Judges of Lucknow, Nagpur and Allahabad. The learned counsel points out that where the plain words of the statute are clear and explicit, the object and intendment of the Legislature has no place in construction of the section. Moreover, the Court should not be led away by considerations of hardship when the Legislature has laid down an inflexible period for the purpose of limitation. In other words whatever might be the object as might be gatherable from the other provision,

1. (1929) I.L.R. 5 Luck 440.
2. (1934) I.L.R. 57 All. 488.
3. A.I.R. 1931 Nag. 38.
4. (1928) 56 M.L.J. 33 : I.L.R. 52 Mad. 66.
5. A.I.R. 1940 Sind 33 at 36.
6. (1939) 1 M.L.J. 756 : L.R. 66 I.A. 66 : I.L.R. 18 Pat. 234 (P.C.).
7. A.I.R. 1927 Mad. 816 (1).
8. (1939) 49 L.W. 473.

of the statute, the plain language of the section should override any other consideration and should alone guide the Court in coming to a conclusion as a matter like this. For this argument the learned counsel referred us to the dicta contained in paragraph 637, page 499, Halsbury's Laws of England, Hailsham edition, Vol. 31, where we find the following passage :

"It is the duty of judges to give fair and full effect to statutes without regard to the particular consequence in the special case (as, for instance, the escape of a tax-payer from payment of tax for purely technical reasons), and not to speculate on the reasons which led the Legislature to adopt a particular form of enactment, nor indulge in conjecture either that Parliament entertained a purpose which, however natural, was not embodied in the words used or as to what Parliament would have done if a particular case had been presented to its notice, for it may be presumed that the framers of a statute contemplated matters of ordinary occurrence."

Reference was also made to paragraph 556, page 400 of the same book where, in considering the question as to how far a heading or title should be utilised in construing a statute, an opinion is expressed that it may be so considered in determining the scope of the enactment provided that nothing contained in it may be taken to contradict clear and unambiguous language in the enactment itself.

Learned counsel was at pains to refer to a decision of Jackson and Cornish, JJ., in *Sheikh Kalesha* v. *Emperor*[1], where the learned Judges were of the view that the Court's sole function is to interpret the language which the Legislature has employed and very probably where the intention and the language do not coincide, the Courts are only concerned with the language. On the other hand Mr. M. S. Krishna Rao for the respondent contends that sub-section (1) of section 145, Criminal Procedure Code, contemplates the passing of the preliminary order as soon as the Court is satisfied that a disturbance likely to cause a breach of the peace is about to occur and therefore when the Court, after receiving a complaint or police information passes a preliminary order on being satisfied regarding the necessity, such satisfaction should be deemed to relate back to the state of circumtances existing on the date when the complaint was presented or the police report was received and therefore though the actual preliminary order is of a subsequent date, it should be deemed to be as if the same was passed when the complaint or the police report was received, because the Court cannot take into consideration conditions and circumstances that occurred between the presentation of the complaint or the receipt of the police report and the actual passing of a preliminary order. In other words, the contention is that when once a preliminary order contemplated under section 145 (1) is passed it should be deemed to have been passed *eo instanti* the receipt of the complaint or the police report and therefore the period to be reckoned backwards of the dispossession must be the period of two months from the date of the complaint. The leaned Public Prosecutor also supports the contention of the respondent and relies upon the words " he shall make an order in writing" and urges that the making of a preliminary order necessarily follows from the satisfaction of the Magistrate. It is the duty of the Magistrate to pass the order immediately he receives the complaint or the police report because the object of the section itself is to prevent breaches of the peace as a result of a dispute concerning land or water. The primary object of the section is the prevention of a breach of public peace arising in respect of a dispute relating to immoveable property and such being the case, according to the learned Public Prosecutor, a proper interpretation of sub-section (1) of section 145, Criminal Procedure Code, is that the Magistrate should not lose any time in passing a preliminary order after receiving the complaint or the police report. In this connection, it is instructive to look at the history and progress of the legislative provisions which have culminated in the passing of section 145 in the Criminal Procedure Code of 1898. The first proviso to sub-section (4) of section 145, Criminal Procedure Code, that if any party has been forcibly and wrongfully dispossessed within two months next before the date of the preliminary order, then he should be treated as if he had been in possession on such date, was not present in section 318 of the Code of 1861. When the Code was re-enacted in 1872, section 318 came to be section 530. Even there, there was no such proviso. Likewise, there was no such proviso in

1. (1931) 62 M.L.J. 71.

section 145, of the Code of 1882. This proviso was first enacted in 1898. The relevant words of section 318 of the Code of 1861, were as follows :

"The magistrate or other officer shall, without reference to the merits of the claim of any party to a right of possession, proceed to enquire which party is in possession of the subject of dispute, and after satisfying himself upon that point, shall record a proceeding declaring the party whom he may decide to be in such possession to be entitled to retain possession until ousted by due course of law and forbidding all disturbance of possession until such time".

The similar provision in section 530 of the Code of 1872, was as follows :

"Such magistrate, shall without reference to the merits of the claims of any party to a right of possession, proceed to inquire and decide which party is in possession of the subject of dispute. After satisfying himself upon that point he shall issue an order declaring the party or parties to be entitled to retain possession until ousted by due course of law, and forbidding all disturbances of possession until such time".

While the Code was in this state, a decision of the Calcutta High Court in *Khatras-Jherriah Coal Company* v. *Sibkrishta Daw Company*[1], was to the effect that it was impossible to lay down any hard and fast rule which may be applicable to all cases as to the exact point of time to which an enquiry under section 145, must be directed and the time at which possession must be found in one party or the other must be governed by the facts of each particular case. It was further observed that to hold that a Magistrate is precluded from enquiring into anything before the date when he actually commenced his own proceedings might, in some cases, lead to a person who has been acting in an unwarrantable manner misusing the process of the law to enable him to carry out a high-handed and improper scheme, which could never have been the intention of the Legislature. In that case one of the parties to the dispute had been dispossessed fourteen days prior to the commencement of the proceedings and the learned Judges held that such dispossession will not give the wrongful possessor legal possession of the property in order to be held entitled to retain possession. At page 303 of the report the following passage occurs :

"But to hold that under such circumstances the Magistrate is precluded from enquiring into anything before the date when he recorded his own proceedings, which he now tells us he ought to have done thirteen days before, is, we think, to allow a person who has been acting in an unwarrantable manner to misuse the process of the law to enable him to carry out his high-handed and improper scheme, and this we cannot believe to have been the intention of the Legislature".

There is an earlier decision of the Calcutta High Court in *In the matter of the Petition of Mohesh Chunder Khan*[2], to the same effect. It was when the state of the case law was such, that the proviso was introduced and the object of the proviso was to create, as it were, by a legal fiction, a possession with the party who is entitled to be in possession as found by the Court though actually at the time of the presentation of the petition he was not in possession. This shows that the proviso itself is the result of a legal fiction because physically the successful party was not in possession on the date of the presentation of the petition or the preliminary order ; but by the proviso the Court deems that he is in such possession. We have already expressed our opinion that the Legislature did not intend that any time should lapse between the presentation of the petition and the passing of the preliminary order if the Magistrate is satisfied. One should follow immediately the other. The satisfaction of the Magistrate before passing the preliminary order can be based either on the police report or other information. At that time he has no jurisidction to enquire into the matter and find out about the truth or otherwise of the police report or the other information. So the Magistrate is not justified in delaying the passing of a preliminary order if the police report or other information is sufficient to satisfy him that a dispute likely to cause a breach of the peace existed. If the Magistrate is not justified in taking time to pass a preliminary order, then even if the time mentioned in the order is of a subsequent date, it should be deemed to have been passed immediately after the receipt of the police report or the other information. It is in such circumstances that the well known maxim *actus curiae neminem gravabit*, an act of the Court shall prejudice no man, has to be applied. In Broom's Legal Maxims, tenth edition, at page 73, we find the following passage :

1. (1894) I.L.R. 22 Cal. 297.
2. (1878) I.L.R. 4 Cal. 417.

"*Actus Curiae Neminem Gravabit* act of the Court shall prejudice no man. This maxim is founded upon justice and good sense; and affords a safe and certain guide for the administration of the law. In virtue of it, where a case stands over for argument on account of the multiplicity of business in the Court, or for judgment from the intricacy of the question, the party ought not to be prejudiced by that delay, but should be allowed to enter up his judgment retrospectively to meet the justice of the case; and, therefore, if one party to an action dies during a *curia advisari vult* judgment may be entered *nunc pro tunc*, for the delay is the act of the Court, for which neither party should suffer".

In Wharton's Law Lexicon, thirteenth edition, at page 603 the meaning of the expression *nunc pro tunc* is given as follows:

"A proceeding taken *now* for *then*, i.e., the proper time when it should have been taken; for example, special leave granted at the hearing to cross-appeal against an order for a new trial . . . . As to the entering judgment and orders *nunc pro tunc*, see Order LII, rule 15".

We may also refer in this connection to the observations of the Judicial Committee in *Hardeo Bux* v. *Jawhir Singh*[1], to the following effect:

"When the preliminary objection was made their Lordships recommended the appellant to present a petition for special leave to appeal, which was accordingly done, and special leave was granted. In order to avoid delay and expense, the Court suggested that the case should be argued *nunc pro tunc*, and that course was assented to by the learned counsel on both sides and adopted".

In our opinion the maxim *nunc pro tunc* or "now for then" should be applied to the facts of the present case.

In *Evans* against *Rees*[2], Lord Denman, C.J., observes as follows:

"It is a power at common law, and by the ancient practice of the Court, to prevent an unjust prejudice to the suitor by the delay unvoidably arising from the act of Court and has been uniformly exercised, unless the delay is imputable to the laches of the party applying. The effect of the judgment, when entered, may depend on the statute . . . . . but the power to enter it does not".

That this has been laid down as the correct law is evident from a very early case reported in *Butler and Baker's case*[3]. In dealing with fictions of law, this ancient case rules that fictions of law are only of necessity and for avoidance of an inconvenience.

By way of analogy, it is useful to refer to section 22 of the Limitation Act which speaks of the effect of substituting or adding a new plaintiff or a defendant. Sub-section (1) says that where, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted *when he was so made a party*. In construing the words "so made a party" a Bench of this Court in *South Indian Industrials Ltd.* v. *Narasimha Rao*[4], held that where the High Court, after setting aside an order of lower Court refusing to add a party, added a party in revision, the order of the High Court adding a party as a defendant, should for purposes of limitation be deemed to have taken effect not merely on the date when it should have been made by the lower Court if it had taken a correct view of the position *but on the date when the plaintiff's application was presented to the trial Court*. What happened there was that when an application to add a party as defendant was made there was no completed period of limitation in his favour. But by the time the High Court set aside the order of the trial Court refusing to make him a party, the suit against him would have become time-barred. The learned Judges, Kumaraswami Sastri and Reilly, JJ., held that the adding of the party should be deemed to have taken effect from the date when the petition for adding was presented. At page 376 in the judgment of Reilly, J., we find the following passage

"It appears to me to be obviously the right principle to adopt in the matter, as otherwise, though an application might be made in time, as in this case, by the dilatoriness of the Court or by the manoeuvres of the opposite party or by a mistaken decision of the Court, which had to be put right on appeal or revision, the order to which the party applying was entitled might not be made until the suit had become time-barred, and it would be unreasonable to leave the party who had applied in good time at the mercy of such chances. It is contrary to one of the clear principles of the Law of Limitation that a diligent party who has come to Court with his suit or his application within the period prescribed should be defeated because the Court for some reason cannot or does not give him his relief within that period. The heavy penalty for exceeding the arbitrary periods of limitation is to be counter-balanced by the assurance of safety when within them."

1. (1877) L.R. 4 I.A. 178: I.L.R. 3 Cal. 522 (P.C.).
2. (1840) 12 Ad. and E. 166: 113 E.R. 774 at 777.
3. (1591) 3 Co. Rep. 25-A: 76 E.R. 684.
4. (1926) 52 M.L.J. 199: I.L.R. 50 Mad. 372.

It will be noticed that section 22, sub-section (1) of the Limitation Act which has been extracted above states that the order should take effect from the time when he is made a party. Even in such a case in *South Indian Industrials, Ltd.* v. *Narasimha Rao*[1], this Court has held that he should be deemed to have been made a party from the date of the presentation of the petition.

The learned counsel for the petitioner says that the words of sub-section (1) of section 22 are not *ad idem* with the words of the proviso in that in the former, the expression " the date of the order " does not appear. Even where such an expression as " the date of the order " appears in a statute, this Court has taken the view that the construction to be put upon the term should be an equitable one and not a very literal one. In *Krishnamurthi*, In re[2], a Full Bench in interpreting the expression " within two months from the date of such order" in section 23 of the Indian Press (Emergency) Powers Act, XXIII of 1931, held that the expression should be understood not in the literal sense as when the order is made and dated but in the broader sense that the order must be read as being a notified order. What happened there was that the Provincial Government passed an order on a particular date but did not notify the keeper of the press of that order for some time. An application under section 23 of the Act was made within two months of the notification of the order but more than two months from the date when the order was passed. The Full Bench held that if the words " within two months from the date of the order " are construed strictly then, if the Government omitted to notify the order until two months had elapsed, the aggrieved party would have no remedy at all. It is the duty of the Court to interpret a statute according to the ordinary meaning of the words used unless this would lead to a manifest absurdity. Likewise, in the present case, if a person who has been wrongfully and illegally dispossessed files a complaint before the Court and the Court does not pass a preliminary order within two months, then he will be deprived of any remedy at all by resorting to section 145, Criminal Procedure Code. The Sind case mentioned *supra* takes note of the fact that the Code contemplates the passing of the preliminary order without any delay after the receipt of the police report or the information. Sub-section (1) of section 145 does not contemplate any sustained enquiry before the making of the preliminary order. The condition prescribed is that the Magistrate should be satisfied from the police report or other information as to the necessity of action and since the whole purpose of the section is to prevent immediately a breach of the peace, it is very necessary that there should be no delay in passing the preliminary order by the Magistrate undertaking an enquiry for some time. On the other hand, what is contemplated is the passing of an emergent order if the Magistrate is satisfied from a perusal of the police report or from other information which he has got that it is necessary to take action. If that is the proper view to take of the compelling provisions of sub-section (1) of section 145, *viz.*, that no appreciable time should elapse between the presentation of the complaint or the receipt of the police report and the passing of the preliminary order, then it necessarily follows that the preliminary order should be deemed to have been made when the Magistrate takes cognizance of the matter and satisfies himself about the urgency. Therefore, by applying the legal fiction of *nunc pro tunc* it is just that the preliminary order should be deemed to have been on an earlier date. That the passing of a preliminary order should immediately follow the presentation of the complaint or the receipt of the police report does not seem to have been emphasised in the decisions of Wallace, J., Devadoss, J., or Lakshmana Rao, J., referred to *supra* and if that basic principle is clearly understood, then there will be no difficulty in concluding that the time taken for passing the preliminary order should not prejudice the party who has been wrongfully dispossessed. The decision in *Pichai Mooppan* v. *Narayanaswami Mooppan*[3], and *Arunachala Goundan* v. *Chinnadorai* alias *Ramalinga Gounder*[4], are therefore not good law.

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1. (1926) 52 M.L.J. 199 : I.L.R. 50 Mad. 378.
2. (1942) 2 M.L.J. 509 : I.L.R. (1942) Mad. 9 (F.B.).
3. (1931) M.Cr.C. 168.
4. (1945) 1 M.L.J. 210.

In the case under consideration the learned Magistrate has followed (*Chincilada Krishnam Raju* v. *Chintalaswami Naidu*[1] and *Srinivasa Reddi* v. *Dasaratharama Reddy*[2] and came to the conclusion that the dispossession must be deemed to be within two months next preceding the date of the preliminary order and that being so, we cannot say that he has erred in any respect.

The criminal revision case is dismissed.

V.P.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Boya Chinnappa .. *Appellant**.

Penal Code (XLV of 1860), section 375—Evidence of prosecutrix—Corroboration—Necessity.

It cannot be said that the evidence of the prosecutrix in a rape case is on the same footing as that of an accomplice. An accomplice is a person who voluntarily participates in the commission of the crime along with others. In the case of a prosecutrix for rape, she is the victim of the offence and not the offender. The case of an accomplice therefore materially differs from that of a prosecutrix for rape and the evidence of both cannot be placed on the same footing. In law the evidence of the prosecutrix does not require corroboration like that of an accomplice. There is no doubt that in sexual offences utmost caution and scrutiny of the evidence of the prosecutrix are necessary before it is acted upon. But in assessing the value of her evidence her conduct immediately after the offence is committed is of great value and would be relevant under section 8 of the Evidence Act.

Appeal against the order of the Court of Session of the Anantapur Division in Case No. 4 of the Calendar for 1950 on 8th April, 1950.

O. Chinnappa Reddi and *P. Ramakrishna* for Appellant.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the State.

The Court delivered the following

JUDGMENT.—The appellant in this case has been convicted of the offence of rape and sentenced to seven years rigorous imprisonment and a fine of Rs. 500 by the Sessions Judge of Anantapur.

The facts of the case are these. The victim of the rape is P.W. 1 aged about ten years. She was living with her mother P.W. 3 who was abandoned by her husband while P.W. 1 was a baby. P.W. 3 has been earning her livelihood by doing cooly work and sometimes by begging. They were both living in a village called Garlandinne. There was also a brother of P.W. 3 living in the same village almost next to her house. Another brother of P.W. 3 lives at a place called Jambulandinne which is a hamlet of Garlandinne and which is within a distance of about a mile from the latter place. The village Magistrate of the place lives at Jambulandinne and the accused also lives in the same village as P. W. 3.

According to the evidence of P. W. 1, the victim, she left her village on 16th July, 1949, at about 3 P.M., for Jambulandinne to fetch from her uncle's house Junnapalu (milk got from a cow or buffalo within a few days after she calved). The milk was not available and her uncle P.W. 8 promised that he would send it the next morning and she returned. While she was coming back to her village, she was met by the accused who was coming from Garlindinne. He is said to have been in a tipsy condition with red eyes. After making enquiries as to where P. W. 1 was going, he is said to have caught her arm and dragged her into a pit which is by the side of the path, laid her down on her back, himself sat down in front of her and placed her legs on his thighs. P. W. 1 started weeping and shouting The accused then gagged her mouth with her own cloth. She lost consciousness and the only thing she knew when she regained consciousness was that she found the accused tying her petticoat to her after washing it in water in a ditch nearby She found blood on her petticoat and also found her vagina bleeding. The accused is said to have asked her not to tell any one of what happened, threatening to

1. A.I.R. 1927 Mad. 816 (1). 2. (1928) 56 M.L.J. 33 : I.L.R. 52 Mad. 66.

* Crl. App. No. 352 of 1950. 14th November, 1950.

kill her in case of disclosure. She was proceeding to her house weeping. On the way she met P. W. 6 who questioned her as to why she was weeping. She complained to him of what the accused did to her. He advised her to go home and inform her mother. P.W. 1 went home and informed her mother of what the accused did. The mother and daughter thereupon went to the house of the accused who was already known to P. W. 3 but did not find him there. P.W. 3 went to the place where he was alleged to be and questioned him. He is said to have challenged her to do what she liked. The mother and daughter then went to Jambulandinne for the purpose of giving a complaint to the village Magistrate but he was not in the village. Thereupon, on the advice of P. Ws. 7 and 8, they went to Anantapur to obtain a medical certificate. It is alleged that the doctor who examined P.W. 1 refused to give a certificate unless a fee was paid and as they were not in a position to pay, they came back without a certificate. After their return, they again went to the village Magistrate and made a report orally which he reduced to writing and it is Ex. P-2 in the case. On his sending the reports to the police, the investigation started and the accused was arrested. On the requisition of the police, on 18th July, 1949, the lady doctor at Anantapur examined P. W. 1 and gave a certificate. Thereafter the charge sheet was laid against the appellant.

The case against the accused rests mainly on the evidence of P. W. 1 and that of P.Ws. 3 and 6 who speak to the complaint made immediately after the occurrence. The fact that the girl was raped is not seriously disputed and the medical evidence shows that she must have been raped. The doctor found the following injuries (1) contusion on the inner aspect of both thighs, (2) hymen torn and there was slight bloody discharge from the vagina, (3) swelling over the labia majore (4) Vagina admits a finger easily. The doctor was of opinion that the girl was raped and that there was forced penetration but for which, for a girl of her age, the vagina would not admit a finger. Vaginal smears were sent to the Chemical Examiner but no trace of spermetozoa or gonococci was found. The doctor is positive and her evidence admits of no doubt that the girl was raped. The only question is as to who committed it whether it is the appellant or some one else committed it and it is falsely foisted on the appellant.

Mr. Chinnappa Reddi who appears for the petitioner contends that the case has been falsely foisted on the accused at the instance of one Kamma Hanumappa on account of the ill-feeling between the said Hanumappa and his brother on the one side and the accused on the other. Advantage is taken of the statement made by P. Ws. 1, 3 and 7 that they met Hanumappa just at the time when P. Ws. 1 and 3 were proceeding to Anantapur during the night of 16th July, 1949, for obtaining a medical certificate and it is urged that Hanumappa has instigated P. Ws. 1 and 3 to implicate the appellant. The learned Sessions Judge has given good reasons for rejecting the suggestion that this case has been falsely foisted at the instance of Hanumappa and I entirely agree with him.

Certain discrepancies were relied on by the learned advocate to show that the version given by P. W. 1 is not a true one. The learned Sessions Judge has carefully considered everyone of them and has pointed out how they do not affect the fundamental fact in this case that the accused committed rape on P. W. 1. There is no doubt one discrepancy which the learned Judge himself points out as inexplicable. In the committal Court, P. W. 1 stated that by the time she regained consciousness, the accused was not present. But in the Sessions Court she stated that when she regained consciousness, the accused was present and that he washed her langa in water in a side ditch and had asked her not to tell any one on pain of being thrown into a well. The evidence of the Circle Inspector shows that there was no water anywhere near the scene when he examined the scene of occurrence two days after, that is on 18th July, 1949, and P. W. 6 also stated in the Sessions Court that he saw P. W. 1 wearing wet clothes when he saw her weeping which he did not state in the committal Court. As the learned Judge points out there is no doubt that there is this discrepancy but it does not affect the truth of the prosecution version. There seems to be no object in improving the version given in

the committal Court and I agree with him. This does not affect the truth of the story given by P. W. 1.

The next contention of Mr. Chinnappa Reddi is that the evidence of this girl should not be acted upon unless it is corroborated by independent testimony connecting the accused with the crime. As alread stated, the commission of rape not being disputed, the only question is whether the accused committed it. It is urged that the evidence of P. W. 1 should not be acted upon without corroboration by independent testimony connecting the appellant with the crime. It is further contended that the corroboration of P. W. 1's story by P. Ws. 3 and 6 is not such a corroboration as their evidence is only corroboration of her own previous statements under section 157, Evidence Act. Stress is laid that apart from her previous statements made immediately after the occurrence, there should be independent corroboration. No decision of this Court or authority of a binding nature has been cited before me either in support of or contrary to the proposition contended for by the learned advocate for the appellant. But he relies on the decisions of other Courts and they are *Surendra Nath Das* v. *Emperor*[1], *Emperor* v. *Nur Ahmed*[2], *Sikandar Mian* v. *Emperor*[3], *U. Toe Sein* v. *The King*[4], *Emperor* v. *Mahadeo Tatya*[5] and *Nura* v. *Rex*[6]. In *Surendra Nath Das* v. *Emperor*[1], the medical evidence showed that the victim had lost her viriginity at least three months before the occurrence and she had frequent intercourse prior to the occasion complained of. She was intimate with a prostitute who was connected with the accused and the learned Judge has found that there were other improbabilities in the story. In fact, the facts clearly show that the accused could not be convicted on the story of the victim. Being a jury case the learned Judges stated that the story of such a girl should not be accepted unless it is corroborated by independent evidence in material particulars connecting the accused and for corroboration they referred to the well-known case of *Rex* v. *Baskerville*[7], which is a case of an accomplice. In *Emperor* v. *Nur Ahmed*[2], which is also a Jury Case, Lort Williams, J., stated as follows :

> "The accused being Muhammadans and the girl a Hindu it is unfortunate that the jury wa composed as it was" (the Jury consisted of three Hindus and two Muhammadans. The verdict was guilty by a majority of three to two) "It is obvious from the references which I have made to the evidence that this case is unsatisfactory from many points of view apart from the direction given by the Judge to the Jury".

The learned Judge then found that there has been a miscarriage of justice. It is clear in this case therefore that the learned Judge was satisfied that the evidence was not acceptable and they even characterised the composition of the Jury as unfortunate as is clear from the observations referred to above. They followed the principle laid down in *Surendranath Das* v. *Emperor*[1], that the evidence of the prosecutrix must be corroborated by independent evidence and they put the prosecutrix in a rape case on the same footing as an accomplice in other cases. In *Sikander Mian v. Emperor*[3], the learned Judges were dealing with a case where there was independent evidence which was not put to the Jury. It must be mentioned here that they refer to the case in *Surendra Nath Das* v. *Emperor*[1], and Henderson, J., who was a party to the judgment in that case states as follows :

> "I do not think that any useful purpose would be served by taking the individual words of Lort Williams J., and weighing them in a balance in view of the fact that his judgment was delivered extempore as far as I remember. I do not think he intended to lay down any more than what was laid down by my learned brother in *Sarat Chandra Chakraburthy* v. *Emperor*.[8]"

Referring to the previous statement he laid down that the corroboration of a previous statement though admissible under section 157, Evidence Act, is not the kind of

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1. (1933) I.L.R. 62 Cal. 534.
2. A.I.R. 1934 Cal. 7 : 38 C.W.N. 108.
3. A.I.R. 1937 Cal. 321.
4. A.I.R. 1939 Rang. 128.
5. A.I.R. 1942 Bom. 121 ; 44 Bom. L.R. 216 (F.B.).
6. A.I.R. 1949 All. 710.
7. (1916) 2 K.B. 658.
8. A.I.R. 1937 Cal. 463 : 65 C.L.J. 83.

corroboration expected in such a case. He states that the rule is a rule of prudence and lays down the proposition that a previous statement made by the prosecutrix cannot possibly be corroboration within the meaning of this rule. In *U Tos Sein* v. *The King*[1], Sharpe, J., follows the decision in *Emperor* v. *Nur Ahmed*[2], and he seems to think that the corroboration that is sought for is of the same kind as that of an accomplice. In *Emperor* v. *Mahadeo Tatya*[3], the facts were found against the rape. On the medical evidence no injuries were discovered on the private parts of the victim and the judgment seems to indicate that the offence of rape has not been committed. But in dealing with this point of corroboration, Beaumount, C.J., states :

"I do not know that I am prepared to go as far as the Calcutta High Court went in *Surendra Nath Das* v. *Emperor*[4], in saying that the corroboration of the complainant's evidence in a rape case must be dealt with on the same footing as the corroboration of an accomplice's evidence. Subsequent conduct of the complainant in a rape case is the type of corroboration which has no application in the case of an accomplice. It is of course obvious as pointed out by Calcutta High Court in *Harendra Prasad* v. *Emperor*[5], that a prosecutrix in rape cases is not an accomplice".

In *Nura* v. *Rex*[6], the facts showed that there was no rape at all. The learned Judge finds that the girl appears to have had some previous experience of sexual life and the facts that there was no mark of injury in any portion of her body clearly suggested that there had been no tussle between her and the other person alleged. In fact they seem to hold that no rape has been committed on her.

As against these decisions, the Public Prosecutor relies on *Harendra Prasad Bagchi* v. *Emperor*[5], which has been referred to in the judgment of Beaumount, C.J., in *Emperor* v. *Mahdeo Tatya*[3]. In the above Calcutta case which is also a decision of a Bench, Sen, C.J., who delivered the judgment referring to *Surendra Nath Das* v. *Emperor*[4], observes as follows :

"There the girl was older and used to sexual intercourse before the occurrence. No signs of rape were found on medical examination. On the contrary, the doctor said that the indications were that no force had been used. The Court found that the evidence indicates clearly that she had consented and that she told untruths in many matters. In such case a warning to the Jury of the kind referred to by the learned Judge would be necessary and I agree that the omission to give the Jury such a warning on the facts of that case rendered the charge bad. But if the learned Judge was expressing the view that in every case of rape the Judge must direct the Jury that they should not convict the accused on this testimony of the prosecutrix unless it was corroborated in material particulars to the same extent as is required in the case of an accomplice evidence, then I would most respectfully and emphatically dissent from it. The laying down of such a rule would tantamount to saying that every prosecutrix in a rape case should be treated as if she were an accomplice so far as her credibility is concerned. Reference was made to certain observations of Judges in England in regard to this matter. The manners, customs, and mode of life of women in this country are very different from those of women in England. A rule or practice which appropriately may be of general application there would not necessarily have the same utility or application here. If this be the English rule or practice, I do not think that it is desirable in cases of this description to import it without qualification here. The Indian Law of evidence nowhere suggests such an inflexible rule and conditions here do not, in my opinion, warrant the engrafting of such a rule in our system".

In *Soosalal Bania* v. *Emperor*[7], which is not referred to in any of the decisions above nor cited by either side, the learned Judge says that where a tender girl was alleged to have been raped, a statement made by her stating that she was raped and uttered immediately after the rape, crying and weeping, is admissible as explaining her act of crying under section 8 and by way of corroboration under section 157 of the Evidence Act. When the victim of an offence of rape is an innocent girl of tender age, her evidence will carry great weight. A statement made by her by way of disclosure immediately after the occasion will strongly corroborate her credibility and go to prove the consistency of her conduct and also her want of consent.

It is clear from the above decisions that the view of Lort Williams, J., that the evidence of a prosecutrix in a rape case requires corroboration in the same manner as that of an accomplice though it is shared by Ghosh, J., in *Emperor* v.

1. A.I.R. 1939 Rang. 128.
2. A.I.R. 1934 Cal. 7 : 38 C.W.N. 108.
3. A.I.R. 1942 Bom. 121 : 44 Bom.L.R. 216 (F.B.).
4. (1933) I.L.R. 62 Cal. 534.
5. I.L.R. (1940) 2 Cal. 180.
6. A.I.R. 1949 All. 710.
7. A.I.R. 1925 Nag. 74.

Nur Ahmad[1], is not shared by Henderson, J:, who was a party to the Judgment in *Surendranath Das* v. *Emperor*[2], as is clear from his remarks in *Sikandar Mian* v. *Emperor*[3]. At any rate such a view is dissented from in the later decision of the Calcutta High Court in *Harendra Prasad Bagchi* v. *Emperor*[4]. The view of Sen, J., in the above case has been approved by Beaumount, C.J., in *Emperor* v. *Mahadeo Tatya*[5]. The Rangoon and Allahabad decisions specifically do not refer to this aspect.

As stated already no decision of this Court or any authority of a binding nature has been cited before me in support of the view that the evidence of a prosecutrix in a rape case is on the same footing as that of an accomplice. An accomplice is a person who voluntarily participates in the commission of the crime along with others. In fact, he is as much an offender as the accused in the dock except that he is taken as a witness against the others. In the case of a prosecutrix for rape she is a victim of the offence and not an offender. If she is a consenting party it ceases to be an offence except in the case of those who are below a certain age as in such cases, the falsity is not so common as in the other cases. The case of an accomplice therefore materially differs from that of a prosecutrix for rape and the evidence of both cannot be placed on the same footing. I agree with the view expressed in *Harendra Prasad Bagchi* v. *Emperor*[4], which is approved in *Emperor* v. *Mahadeo Tatya*[5]. In law therefore the evidence of a prosecutrix does not require corroboration like that of an accomplice.

The next question is whether the rule of prudence requires that there should be corroboration. Henderson, J., in *Sikandar Mian* v. *Emperor*[3], states that the rule of prudence requires that the evidence of a prosecutrix in a rape case must be in material particulars by independent testimony connecting the accused with the crime and he further states that the previous statement of the prosecutrix though corroboration under section 157 of the Evidence Act is not the kind of corroboration sought in such cases. He even states that it is not a rule of prudence but is a rule of folly to depend upon such former statements as corroborative evidence. There is no doubt that in sexual offences utmost caution and scrutiny of the evidence of the prosecutrix are necessary before it is acted upon. It will be clear from the decisions which lay down the rule as to the necessity for corroboration the facts are such that either no offence of rape can be inferred or the accusation against the accused is based on a background of enmity and ill-feeling and the cases—many of them—were tried with the aid of a jury who returned a verdict of guilty in circumstances in which the Court would not find the accused guilty. It was natural therefore that Judges who had to deal with such cases should express themselves strongly in favour of corroboration. Beaumont, C.J., also has expressed himself strongly in favour of corroboration in *Emperor* v. *Mahadeo Tatya*[5]. There also the facts of the case throw considerable doubt whether rape was committed. The case was tried with the aid of a jury who found the accused guilty. In my opinion, even the rule of prudence is enunciated on account of the peculiar facts of the case which normally would not end in a conviction but the jury however returned a verdict of guilty. I have yet to see a case where as in the present case, a young girl of immature years and tender age has been raped and who has made a disclosure of it at the earliest possible opportunity to her mother and another, the Court still insisted upon corroboration by independent testimony connecting the accused with the crime. Each case depends upon its facts and if after taking all the circumstances into consideration the evidence of the prosecutrix could be believed, then the accused could be convicted on her evidence alone, although there is no corroboration by independent testimony connecting the accused with the crime. Section 114 (*b*) of the Evidence Act says that " an accomplice is unworthy of credit unless he is corroborated in material particulars." There is no such provision for a prosecutrix in a rape case. This shows that neither law nor prudence requires such corroboration. As stated already each case depends on its facts

1. A.I.R. 1934 Cal. 7 : 38 C.W.N. 108.
2. (1933) I.L.R. 62 Cal. 534.
3. I.L.R. (1937) 2 Cal. 345.
4. I.L.R. (1940) 2 Cal. 180.
5. A.I.R. 1942 Bom. 121 : 44 Bom.L.R. 216 (F.B.).

and on the credibility or otherwise of the prosecutrix. If she is proved to be a credible and a satisfactory witness, no corroboration in my opinion is necessary.

In assessing the value of her evidence her conduct immediately after the offence is committed is of great value. Such a conduct is relevant under section 8. The clause itself makes a distinction as to what is relevant under section 8 and what may be relevant under section 157. A complaint relating to the crime in circumstances under which it was made and the terms of it are relevant whereas a mere statement that she was ravished is not relevant under section 8 though it may be under section 157 or section 32 (1). The complaint in the section does not mean complaint to Court as defined in the Criminal Procedure Code. It means merely an allegation against a person who has committed the outrage on the prosecutrix. Such a complaint has been held to be admissible even under English law—*vide* In re *Lilyman*[1]. It has been pointed out by Hawkins, J., in the above case that not only the fact that the complaint was made by the prosecutrix shortly after the alleged occurrence but also the particulars of such a complaint may be given in evidence not as being evidence of the facts complained of but as evidence of the consistency of the conduct of a prosecutrix with the story told by her in the witness box. In this case, there is the evidence of P.W. 6 who saw her weeping immediately after the occurrence and to whom she told what happened and this was followed by what she told her mother P.W. 3 as soon as she reached the village. Their evidence shows that her conduct was consistent with the story given in the witness box. There is therefore no reason to disbelieve her story that it was the appellant who committed the outrage on her. I agree with the learned Sessions Judge in the appreciation of her evidence and find the accused guilty of the offence of rape. The conviction is therefore confirmed. As regards the sentence, a sentence of five years' rigorous imprisonment and the fine imposed by the lower Court will meet the ends of justice. The sentence of imprisonment is therefore reduced to five years' rigorous imprisonment and the fine is confirmed. The order of compensation will stand. With this modification the appeal is dismissed.

V. S. ——— *Sentence reduced.*

[FULL BENCH].

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON, MR. JUSTICE PANCHAPAGESA SASTRI, AND MR. JUSTICE BASHEER AHMED SAYEED.

W. N. Srinivasa Bhat and another .. *Petitioners* *

v.

The State of Madras and another .. *Respondents.*

Press (Emergency Powers) Act (XXIII of 1931), section 4 (1) (a) and (d) and Constitution of India (1950), Articles 19 (1) and (2) and 226—Section 4 (1) (a) and (d) of the Press (Emergency Powers) Act, if invalid as affecting the fundamental rights under Article 19 (1) of the Constitution—Power and jurisdiction of High Court to issue writs specified in Article 226 to persons living outside its original jurisdiction.

On the questions as to the constitutional validity of section 4 (1) (a) and (d) of the Press (Emergency Powers) Act and the power and jurisdiction of the High Court to issue writs specified in Article 222 to persons living outside its original jurisdiction.

Held: In view of the decisions of the Supreme Court in *Romesh Tapper* v. *The State of Madras* (1950) S.C.J. 418 : (1950) 2 M.L.J. 390 and *Brij Bhushan* v. *The State of Delhi*, (1950) S.C.J. 428 : (1950) 2 M.L.J. 431, section 4 (1) (*d*) of the (Press Emergency Powers) Act has to be held *ultra vires* the fundamental rights conferred under Article 19 (1) of the Constitution. Section 4 (1) (*d*) cannot be claimed to be consistent with the Constitution, nor could it be said section 4 (1) (*d*) is saved by the reservations relating to permissive legislation contemplated by Article 19 (2) of the Constitution.

Freedom of speech and expression in Article 19 (1) of the Constitution would include the liberty to propagate not only one's own views but also the right to print matters which are not one's own but have either been borrowed from someone else or are printed under the direction of that person.

1. (1896) 2 Q.B. 167.

* C.M.P. Nos. 5647 and 8581 of 1950. 2nd November, 1950.

Govinda Menon, J. : I do not think that section 4 (1) (*a*) of the Press (Emergency Pawers) Act can be held to be *ultra vires* in a case where the incitement in question is intended to overthrow by force the State and undermine its security.

Panchapagesa Sastri, J. : As section 4 (1) (*a*) stands at present it cannot be regarded as constitutionally valid, as it conflicts with Article 19 (1) (*a*) of the Constitution. It is not open to us to uphold the constitutionality of it even to a limited extent.

Basheer Ahmed Sayeed, J. : Sections 3 (3) and (4) (1) (*a*) of the Act are not repugnant or inconsistent with the Constitution but are saved by reservations contained in Article 19 (2) of the Constitution, assuming at the same time that, by reason of the exercise of the powers vested in the State Government under S. 3 (3) the right of "freedom of speech and expression guaranted by Article 19 (1) (*a*) is sought to be curtailed or abridged."

Held (by the full Court) : The High Court has both the power and jurisdiction to issue the writs specified in Article 226 of the Constitution not only within the limits of its original jurisdiction but throughout the territories of the Madras State.

Petitions praying that in the circumstances stated in the affidavits filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records and order of the Government of Madras, dated 8th June, 1950 and 24th February, 1950 respectively and made under sections 7 (3) and 4 (1) and section 3 (3) of the Press (Emergency Powers) Act and quash the orders therein.

M. K. Nambiar and *A. Ramachandran* for Messrs. *Row* and *Reddy* for Petitioners.

The Advocate-General (*K. Kuttikrishna Menon*) and the Public Prosecutor (*V. T. Rangaswami Aiyangar*) for Respondents.

The Court made the following Order :

Govinda Menon, J.—At the very outset of his arguments the learned Advocate-General raised the objection that this Court has no power to issue a writ of *certiorari* claimed by the petitioners, and he rested his argument on an interpretation of Article 225 and 226 of the Constitution of India. The decision of their Lordships of the Judicial Committee in *Ryots of Garbandho* v. *Zamindar of Parlakimidi*[1], which lays down that the High Court at Madras has no power to issue a writ of *certiorari* on an officer or official body beyond the limits of the Presidency Town of Madras except in a limited manner as regards British subjects and that the Madras Supreme Court Charter (1800), clause 8, did not confer such a power has been relied upon by the learned Advocate-General. This decision must be deemed to have overruled the earlier decisions of this Court, such as In re *Nataraja Iyer*[2], and the cases which followed the same, to the effect that the High Court has jurisdiction to issue a writ of *certiorari* on an officer beyond the limits of its Ordinary original jurisdiction. It has been understood both by the Bench and the Bar in this Court prior to the decision in *Parlakimidi's case*[1], that this Court has inherited all the powers of its predecessor, *viz.*, the Supreme Court of Madras, in the matter of issuing all the prerogative writs which the Court of King's Bench in England had and which were conferred upon the Supreme Court by its Charter of 1800. There had been a number of instances where writs of *certiorari* had been issued to tribunals, authorities and officers functioning outside the City of Madras and even a writ of prohibition had been issued by this Court on a Deputy Registrar of Co-operative Societies functioning outside the city as in *Krishna Iyer* v. *The Secretary, Urban Bank, Ltd., Calicut*[3]. But the authoritative pronouncement of Viscount Simon in the *Parlakimidi's case*[1], referred to above has reversed the current of decisions prior to it and if the Constitution of India did not confer a right on this Court to issue a writ within the limits of its appellate jurisdiction, then we have to hold that our power is limited to issuing writs within the limits of the Presidency town of Madras. The learned Advocate-General invited our attention to Article 32, clauses (2) and (3), especially to clause (3) which says that Parliament may by law empower any Court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2). Clause (2) empowered the Supreme Court to issue the prerogative writs such as *habeas corpus*, mandamus, prohibition, *quo warranto* and *certiorari* and other directions

1. (1943) 2 M.L.J. 254 : L.R. 70 I.A. 129 : L.L.R. (1944) Mad. 457 (P.C.).
2. (1912) 23 M.L.J. 393 : I.L.R. 36 Mad. 72.
3. (1933) 65 M.L.J. 367 : I.L.R. 56 Mad. 970.

or orders for the enforcement of any of the fundamental rights conferred by Part III on the citizen. Article 139 enacts that the Parliament may, by law, confer on the Supreme Court power to issue directions, orders or writs, including writs in the nature of *habeas corpus*, mandamus, prohibition, *quo warranto* and *certiorari*, for purposes other than those mentioned in clause (2) of Article 32. It is therefore clear that the Supreme Court, as a Court of original jurisdiction, has not been empowered to issue writs in the first instance for any purposes other than the enforcement of the fundamental rights conferred by Part III of the Constitution. In other words, it is not open to any party to approach the Supreme Court, and pray for the issue of a writ or order on any tribunal, authority or officer, doing judicial or quasi-judicial functions, if such authority, tribunal, or officer was acting in excess of his jurisdiction or refusing to act in the proper exercise of his jurisdiction except for the enforcement of fundamental rights. The question for consideration is whether Article 226 has conferred that power on the High Court with regard to the enforcement of rights conferred by Part III. But the learned Advocate-General invites our attention to Article 225 of the Constitution whereby the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, are laid down as the same as immediately before the commencement of the Constitution. There is a proviso added to it which has obliterated the invidious distinction that existed prior to the commencement of the Constitution whereby the High Court was negatived the jurisdiction in matters concerning revenue though the subordinate Courts did have that power. Now, the learned Advocate-General emphasises the fact that since Article 225 sustains and maintains the power and authority which this Court had on the 25th January, 1950, and since according to the decision of the Privy Council this Court had no power to issue a prerogative writ outside its ordinary original jurisdiction, unless by express conferment Article 226 gives the power to issue a writ outside the ordinary original jurisdiction, this Court has no authority to act in the manner prayed for by the petitioners. For this contention he places reliance on the decision of the majority of a Full Bench of three Judges of the Madhya Bharat High Court reported in *Anant Bhaskar* v. *State*[1].

According to the learned Advocate-General the appropriate Legislature, by virtue of the powers conferred on it, has not invested this Court with the power to issue writs outside its ordinary original jurisdiction after the commencement of the Constitution and therefore we have no power to entertain the present applications. The distinction between the words "power" and "jurisdiction" in Article 226 is practically the mainstay of the contention on the side of the State. It is urged that Article 226 conferred upon the High Court certain powers which they may use for giving relief in the exercise of their jurisdiction. The extent of the jurisdiction of the High Court and the cases in which it can be exercised and the procedure by which it can be invoked are matters outside the purview of Article 226. Therefore what is urged is that unless this Court is specifically empowered under clause (3) of Article 32, we will not be justified in invoking Article 226 for the issuing of such writs in the exercise of our existing jurisdiction. We prefer to follow the reasoning and the conclusions contained in the dissenting judgment Mehta, J., of the Madhya Bharat High Court as in our opinion Mehta J.'s judgment appears to us to be the correct one. The learned Judge was of opinion that Article 32, clause (3) does not refer to existing High Courts constituted in the State because notwithstanding anything contained in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises its jurisdiction to issue directions, orders or writs as mentioned in Article 226 for the enforcement of the fundamental rights and for any other purpose. What clause (3) contemplates is that the Parliament may, by law, provide for conferring jurisdiction on other Courts than the High Courts. In the judgment of the majority of the Full Bench in the aforesaid case, a distinction is sought to be made between the two

1. A.I.R. 1950 M.B. 60 (F.B.).

alleged concepts of "power" and "jurisdiction". The learned Chief Justice says that "jurisdiction" is an authority conferred upon a tribunal to determine a matter. "Powers" are the means by which effect is given by Courts to their determination. The question as regards the meaning of the phrase "for any other purpose" does not arise in this case for what the petitioners contend is that their fundamental rights are infringed by the demand of security. We do not think it necessary to embark upon discussion about the meaning of the term "for any other purpose" and as to whether it is *ejusdem generis* with the previous expressions. In substance, the learned Advocate-General contends that though under Article 226 this Court may have power to issue the various writs, the exercise of such powers can arise only when the Parliament confers jurisdiction. We do not think that any such interpretation can be put upon the plain meaning of the Statute. In our opinion the strained meaning that is sought to be inferred from the plain words of Article 226 cannot be justified. It seems to us therefore that this Court has both the power and jurisdiction to issue the writs specified in Article 226.

Both my learned brethren, Panchapagesa Sastry and Basheer Ahmed Sayeed, JJ., have discussed the merits of the applications in great detail and I do not wish to say anything more except a few words of my own. Ever since the days of Charles I's reign in England when John Milton wrote his well-known treatise "Areopagetica", where he pleaded for the freedom of the press and for the abolition of precensorship, the question regarding the liberty of the press has been considered to be a foremost right in all freedom loving countries and I agree with my learned brother Panchapagesa Sastri, J., that the term "freedom of speech and expression" would include the liberty to propagate not only one's own views but also the right to print matters which are not one's own but have either been borrowed from someone else or are printed under the direction of that person.

I also agree with my learned brethren that in view of the decision of the Supreme Court in *Romesh Thapper* v. *The State of Madras*[1] and *Brij Bhushan* v. *The State of Delhi*[2], section 4 (1) (*d*) of the Press Emergency Powers Act has to be held *ultra vires* the fundamental rights conferred under Article 19 (1) of the Constitution. I need not recapitulate the reasons given by my learned brethren on that point as I agree in the main with the reasoning on which the conclusion is arrived at by both of them.

With regard to the application to quash the orders of security demanded from the Avanti Press, the question as to how far the impugned passages come within the exception provided in clause (2) of Article 19 has to be considered. We have already held that the offending articles contravene the provisions of section 4 (1) (*a*) and therefore the only question that remains is whether that section is *ultra vires*. My learned brother Panchapagesa Sastri, J., seems to think that even if the newspaper, book, or document, contains words which incite, or encourage, or tend to incite or encourage the commission of an offence of murder, or of any cognizable offence involving violence, and even if such incitement and encouragement might undermine the security of the State or tend to overthrow the same, still section 4 (1) (*a*) would be *ultra vires* because as the section now stands incitements which do not undermine the security of the State or tend to overthrow the same, come within its ambit and since it is impossible to separate the two different categories of the incitement the entire section should be held to be invalid and *ultra vires*. On the merits I have come to the conclusion that the incitements referred to in the offending articles have a tendency to undermine the security of the State or to overthrow it because what is asked of the Andhras is to fight till every man sheds his blood and there can therefore be no doubt that the incitement in question is intended to overthrow by force the State and undermine its security. I do not think that in such a case section 4 (1) (*a*) can be held to be *ultra vires*. Even the incitement or encouragement to a single case of murder, or a single cognizable

1. (1950) 2 M.L.J. 390 : (1950) S.C.J. 418. 2. (1950) 2 M.L.J. 431 : (1950) S.C.J. 425.

offence involving violence, might have a tendency to overthrow, the State ; as for example if the incitement or encouragement is to commit a cognizable offence or to murder a very high functionary of the State whose disappearance itself might tend to or undermine the security of the State, it cannot be held that such an incitement cannot come within clause (2) of Article 19. It is very difficult to postulate with any definiteness that the classes of offences mentioned in section 4 (1) (*a*) will not undermine the security of the State or may not tend to overthrow it. I therefore agree with my learned brother Basheer Ahmed Sayeed, J., that the application by the Avanti Press has to be dismissed.

Panchapagesa Sastri, J.—These two petitions are filed under Article 226 of the Constitution and pray that appropriate writs may be issued for quashing the orders of the State Government passed under the Indian Press (Emergency Powers) Act, XXIII of 1931 (hereinafter called the Press Act or the Act). The first of these is by the keeper of a printing press known as Avanti Press at Rajamahendrawaram, East Godavari district. On 1st March, 1950, he was served with an order under section 3 (3) of the Act, dated 24th February, 1950, calling upon him to deposit Rs. 2,000, with the District Magistrate of East Godavari on or before the 10th April, 1950. A Telugu Book called "*Vajrayutham*" was printed in the Avanti Press aforesaid. It is a book of poems. When it was published, the State Government found that it contained passages which, in its opinion, came under section 4 (1) (*a*) of the Act. The demand for security was made because of this. The second petition is by the publisher of a newspaper entitled "*Aruna*" a Kannada Weekly of Mangalore, published at Mangalore. In the opinion of the State Government the paper contained in its issue of 26th February, 1950, matter which came under section 4 (1) (*d*) of the Press Act. In exercise of the powers conferred by section 7 (3) of the Act, the publisher was called upon to deposit with the District Magistrate of South Kanara, security to the extent of Rs. 1,000. These petitioners had also filed O.P. Nos. 194 and 214 of 1950, under section 23 of the Indian Press Act praying that the orders demanding security might be set aside. The present Bench was constituted as a special Bench under section 24 of the Act to dispose of those petitions. By judgments delivered by us to-day those petitions were dismissed, as we were clearly of opinion that the matter complained of did fall within the scope of sections 4 (1) (*a*) and 4 (1) (*d*) of the Act. In the first petition we found that some poems

"incited commission of offence of murder and encouraged commission of cognizable offence involving violence."

In the second petition we found that the articles brought into hatred and contempt the Government established by law and excited disaffection towards the said Government. As our jurisdiction as a special Bench is limited to a consideration of that question only (see *Mrs. Beasant* v. *Emperor*[1], In re *Mrs. Besant*[2] and *Besant* v. *Advocate-General, Madras*[3]), the present petitions have been filed to have the orders quashed on the ground of the unconstitutionality of the relevant sections of the Press Act.

Mr. M. K. Nambiar appearing for the keeper of the printing press in the first petition, and Mr. Ramachandran appearing for the publisher of the Newspaper in the second, contended (i) that "freedom of the press" is included in the phrase "freedom of speech and expression" in Article 19, clause (1), sub-clause (*a*), and it is a right which is guaranteed to the petitioners ; (ii) that the sections of the Press Act, sections 4 (1) (*a*) and 4 (1) (*d*) were an infringement of the citizen's right to freedom of expression and became void under Article 13 (1) of the Constitution; and (iii) that the demand for security under sections 3 (3) and 7 (3) on the ground that the press was used for printing objectionable matter coming under section 4 (1) (*a*) and that the Newspaper published offending matter coming under section 4 (1) (*d*) of the Act, operated by way of previous restraint upon the citizen's freedom of publication and was analogous to precensorship and was void and uncons-

1. (1916) I.L.R. 39 Mad. 1085.
2. (1916) 32 M.L.J. 151 : I.L.R. 39 Mad. 1164.
3. (1919) 37 M.L.J. 139 : L.R. 46 I.A. 176 : I.L.R. 43 Mad. 146, 154 (P.C.).

titutional. The Public Prosecutor, Mr. V. T. Rangaswami Aiyangar, appearing for the State in the first of the petitions submitted that the liberty of the press was not expressly mentioned in Article 19 (1) of the Constitution and contended firstly that the impugned section 4 (1) (*a*) did not infringe the freedom of expression of the keeper of the press but was only a permissible restraint which the Constitution allowed under Article 19, sub-clauses (5) and (6) in relation to the exercise of the fundamental rights under Article 19, sub-clauses (*f*) and (*g*) of acquiring, holding and disposing of property and of practising any profession, or carrying on any occupation, trade or business, and secondly, that, in any event, as the printing and publication were prior to 26th January, 1950, the order of the Government was not invalid. The learned Advocate-General appearing for the State in the second of these petitions contended firstly that the impugned section 4 (1) (*d*) did not offend against Article 19 (1) (*a*) or Article 19 (2) of the Constitution and secondly that this High Court had no jurisdiction under Article 226 of the Constitution to issue a writ beyond the limits of its original jurisdiction, and that Article 226 while conferring powers on the High Court did not extend its jurisdiction beyond what it had already under Article 225 of the Constitution. These broad contentions were developed during arguments in greater detail. It is desirable to deal with these topics separately.

Is "Freedom of the press" a guaranteed right under Article 19 (1)? The State Prosecutor pointed out that the well-known expression "freedom of the Press" or "the liberty of the press" was not used in this Constitution. Constitutions of several countries make specific mention of the liberty of the press. The State Prosecutor recognised however that the decisions of the Supreme Court in what is known as the Crossroads case, *Romesh Thapper* v. *The State of Madras*[1] and in *Brij Bhushan* v. *The State of Delhi*[2], are against this contention and are binding on this Court. In the latter case it is stated :

> "There can be little doubt that the imposition of precensorship on a journal is a restriction on the liberty of the press which is an essential part of the right to freedom of speech and expression declared by Article 19 (1) (*a*) of the Constitution of India."

Even apart from these decisions it is clear that the freedom of the press is a guaranteed right, under Article 19 (1) (*a*), of a citizen who keeps a printing press, or is an editor, or a publisher. No right of a non-citizen such as a resident alien is involved in these petitions. The non-reference to "the liberty of the press" was merely because it was unnecessary.

The Public Prosecutor contended that the "guaranteed right" covered only matter of which the citizen was the author and did not extend to matters of which others were authors. There is no justification, in my view, for this unwarranted limitation of the meaning of the phrase in Article 19 (1) (*a*). What is guaranteed is much wider than that. There is no question of copyright involved with which we are now concerned. That is a different matter. The question at issue relates merely to the right of speech and expression. A limited construction would rule out the citizen's rights to recite the Vedas or the holy texts from the Quoran or to read out in public the Sermon on the Mount. Coming to secular matters, a recital of the songs of Bharati or the poems of Sarojini Naidu or of Dr. Tagore could all be controlled. Coming even to consideration of political literature, a public reading of the Pledge of Independence (now happily not needed any longer) would be non-guaranteed. I see no justification for placing such a restriction on the wide meaning of the phrase as used in Article 19. Neither the context nor the subject-matter nor the language requires a limitation such as is suggested.

Does the word "expression" include mere printing without publication? The State Prosecutor suggested that it did not. I do not agree. Freedom of expression is wider than freedom of communication. Publication is not a necessary ingredient of the concept. Many authors who have prepared their manuscripts

1. (1950) 2 M.L.J. 390 : (1950) S.C.J. 418.
2. (1950) 2 M.L.J. 431 : (1950) S.C.J. 425.

have directed posthumous publication only. It cannot be said that they have not expressed themselves before publication. The language is wide. As it is a fundamental right which is being guaranteed, I see no reason to limit it in the way contended for. Freedom of thought cannot be controlled. Why should there be a restraint on the same, when it is printed though not published? Indeed the very demand for security in these cases is not because of printing matter neither intended to be published nor never published but because objectionable matter printed had, in fact, been published. The phrases "freedom of speech and expression", "liberty of the press" are great historic phrases to secure which there had been great constitutional agitation and fight. The full meaning and content of these terms cannot and should not be controlled by a narrow interpretation. These are cherished freedoms now guaranteed as fundamental rights. The Dictionary method of approach for defining the scope of these terms, would be unimaginative and somewhat fantastic.

The more important argument of the Public Prosecutor was that the impugned section 4 (1) (*a*) was really a reasonable restriction in public interests by way of regulating a trade or profession and by way of restriction on the use of property. This argument is of course confined to the keeper of the printing press and not to the publisher. The scope of the restriction on the keeper of the printing press is merely to control the use of the press and not to abridge his right of freedom of expression, as he is still left free to express himself by speech or otherwise or by printing or publishing in other presses. Such was the argument. Mr. Nambiar contended that the Press Act legislation was not one in relation to control of a business or trade or use of articles of ownership. The question therefore to be decided is, what is the subject-matter of this legislation and its object? I am of opinion that the Press Act in question is legislation *directly* dealing with printing presses and publication of matter. The history of the press laws in India is well known. It is unnecessary to go to earlier legislation; but it is sufficient to say that the Press Act of 1908 gave rise to an agitation in this country that the press laws were unduly oppressive and the same was ultimately repealed on the recommendation of a committee. Consequent on the starting of the Civil Disobedience Movement in 1931, as part of the struggle for the attainment of Swaraj, the Governor-General passed an ordinance in the first instance which was ultimately replaced by this Indian Press (Emergency Powers) Act of 1931. Its provisions were amplified by furhter legislation by the Criminal Law Amendment Act of 1932. What originally started as a temporary measure to meet an emergency, was in 1935 made permanent, and according to some, continued to disfigure the statute book of this country since then. When the Act was first promulgated in 1931 it was described as an Act to provide against publication of matter inciting to or encouraging murder or violence. The statement of objects and reasons indicated the same. It was stated therein:

> "Experience has shown that propaganda in furtherance of subversive movements and of crimes of violence is carried on by newspapers, leaflets, pamphlets, bulletins and the like."

In 1932 the heading was amended by the Criminal Law Amendment Act to read as follows:

> "An act to provide for the better control of the press."

The preamble was amended as follows:

> "Whereas it is expedient to provide for the better control of the press."

Several new sub-clauses were added in section 4 (1) setting out what was considered to be objectionable matter and considerably enlarging the scope of the same. Section 3 (3) provides for demand of security in certain cases where the press had been used for printing objectionable matter of the type mentioned in section 4 (1); section 4 provides for forfeiting the security where the press is used again for printing or publishing similar matter. Even the press can be forfeited where security had not been deposited. The publication also may be forfeited. Section 5 provides for a deposit of further security where there is a forfeiture of the deposit previously

made. Section 6 provides for the forfeiture of the further security and other publications, if the press is again used for printing and publishing objectionable matter. Section 7 provides for demand of security on a publisher of a newspaper where the Provincial Government considers that the newspaper published objectionable matter as aforesaid. If later issues again contained objectionable matter, section 8 provides for the forfeiture of the security deposited and for the annulment of the declaration made by the publisher under section 5 of the Press and Registration of Books Act, 1867, where security has not been deposited, and copies of the newspapers also may be forfeited. Section 9 provides for the demand of further security, while section 10 provides for the forfeiture of the further security and the newspapers. Section 11 makes it an offence to keep a press without making the deposit demanded by the Government under section 3 or section 5. The keeper is on conviction liable to a penalty of fine not exceeding Rs. 2,000 or simple imprisonment for a term not exceeding six months or both. Section 12 precludes the use of the press where a deposit has not been made for the printing and publishing of any newspaper, book or other document after the expiry of the time allowed to make the deposit, until the deposit has been made. Where a printing press is used in contravention of section 1 the Government may declare the press itself to be forfeited. The Act also contains provisions for the issue of a search warrant. It is fairly clear from the above summary of the main provisions that this Act must be taken to be legislation directly dealing with the control of the press, *i.e.*, printing and the publication of books, newspapers, leaflets, etc. It is impossible to regard this even in so far as the keeper of the printing press is concerned, as legislation having for its subject-matter the regulation of the printing press either as a trade or as a business, or for the use of the Press as an item of property by its owner. The object of the Act is to be gathered from its necessary effect and not from some purpose or motive which the Legislature may be supposed to have had. The whole scope and purpose of the Press Act is not to regulate the trade or business of a printing press as such. It is, as it professes to be, for the *control* of the press. I cannot agree with the contention of the Public Prosecutor that section 3 (3) read along with section 4 (1) (*a*) merely operates to create a restraint on the use of the press as an article of ownership, and that it is in no *sense* a restraint on freedom of expression. It is, in my opinion, no answer to say that it is still open to the keeper of the press to express himself by printing and publishing anything which he wants in other presses either of his own or of strangers. He is, by the very terms of section 12 of the Act, precluded from making use of this press with respect to which a demand for security has been made, for printing or publishing of any newspaper, book or other document until he makes the deposit and if he does so, without making the deposit, the press itself can be forfeited. He is also liable to conviction under section 11 which, be it noted, may come into operation long before the validity of the demand is tested by the filing of the petition in the High Court under section 23 and its disposal. In a prosecution for an offence under section 11, there seems to be no room for a defence that the demand for security was illegal on the ground that the offending article would not come under the relevant clauses of section 4 (1) (*a*). The American Courts have held that exclusion of matter from the main destroys circulation and makes free speech to that extent impossible, and it is no answer to say that the telegraph can be used instead. I am clearly of opinion that even as regards the keeper of the press the combined operation of sections 3 (3) and 4 (1) (*a*) is to abridge his freedom of speech and expression.

It is next argued that even if it is in one sense an abridgement of the right to freedom of expression, still it may be valid as a reasonable restriction on the right to engage in business or commercial activity. It is true that normally the keeping of a printing press is a business and produces an economic return to the owner. At the same time the press is the chief means of publication and the most popular and effective means. The object of printing is generally publication. Printing press is used as the main instrument for the same. Printing gets over the difficulties of time and space, which speech has to encounter. The spoken voice, apart from

modern inventions of very recent times, does not extend far and vanishes after the speech is uttered, whereas printing perpetuates the expressions and printed matter can be sent to very distant places. It is obvious that the running of a printing press is a thing quite different and distinctive from other kinds of trade. It is really a part and parcel and indeed the primary part of publication machinery. A control over the printing press even as regards the owner thereof will, generally, operate to restrict or abridge his freedom of expression. At the same time the business aspect of the organisation cannot be totally ignored. The printing press is a business which cannot claim immunity from regulations affecting its business side such, for instance, the applicability of factory laws or the Shop Assistants Act with reference to its employees. Having regard to the dual aspect of the printing press being a business as well as its functioning as a means of propogating ideas and thoughts, restrictions may partake of the character of both, *i.e.*, legislative regulations may, from one aspect, be regarded as restrictions on the use of the press, and from another aspect, as restrictions on its function. Restrictions of one kind may be justifiable under the Constitution, whereas the same restrictions viewed in the other aspect may be unjustifiable. In this very case, regarded as an infringement of the freedom of expression, Article 19 (2) will apply. If the restriction is regarded as a restriction of fundamental rights under Article 19 (1) (*f*) and (*g*), clauses (5) and (6) will apply. The scope of the exceptions in each case is different. A conflict may well arise in such circumstances, where a particular restriction is constitutionally justified under clauses (5) and (6) and is constitutionally bad as not coming under sub-clause (*b*) of Article 19. The test to be applied in such cases cannot be formulated easily. I shall deal with it presently; but before I consider the matter I think it is better to clear up a subsidiary consideration.

Mr. Nambiar for the petitioner specifically admitted before the Court in answer to my question that he did not contend that the provisions of sections 4 (1) (*a*) and 3 (3) of the Act would amount to an unreasonable restriction within the meaning of clauses (5) and (6) of Article 19; if the fundamental rights affected are those set out in Article 19 (1), sub-clauses (*f*) and (*g*). The State Prosecutor therefore did not argue this matter. Nevertheless, I am not satisfied about this point. The demand for security if not complied with, makes the keeper of the press liable for a prosecution and may subject him to imprisonment and fine. It precludes him before satisfying the demand from making use of the press for printing and publishing even legitimate matter of an unobjectionable kind, as for instance, a wedding invitation. These disabilities are not imposed as punishments for an offence proved in the ordinary way but are consequent upon a determination by the executive Government that the press has been used for printing objectionable matter. The Act does not provide for notice beforehand to the keeper of the press to show cause why an order should not be passed under section 3 (3). It is true that the matter can be taken up by him to the High Court; but these disabilities come into existence even before the determination by the High Court on the merits of the dispute. These are somewhat exceptional provisions of a drastic character contrary to the well-established procedure under the Criminal Procedure Code and other rules. I have therefore some doubts as regards the reasonableness of the restrictions. I quite realise that the restriction must be shown to be unreasonable, *i.e.*, no rational being can say that it is reasonable, and that a Court is not to substitute its own judgment of reasonableness in place of the judgment of the Legislature. Very probably, these restrictions may in the light of the decisions bearing on the point be constitutionally upheld, notwithstanding what is stated above. I mention this merely for the purpose of reserving my opinion on this point when it is fairly and squarely raised. It is as well that I make it clear that I do not understand Mr. Nambiar's concession to govern anything other than a demand for deposit under section 3 (3). Possibly he made this concession, as in this case we are only at the stage of the demand and the making of the deposit. No question of forfeiture has arisen in this case. The question may take a different complexion altogether with relation to the sections which provide for forfeiture. I shall leave the matter there with these observations.

Turning to the question postulated earlier I may state that I do not regard the right to freedom of speech and expression as having any preferred place in relation to the other kinds of freedom guaranteed under Article 19, except in so far as the Constitution itself provides differently in relation to the scope of the exceptions permitted under clause (2) on the one hand and the other clauses following, in relation to the other matters. No doubt it is the first of the series in Article 19, even as it stands first in the first amendment of the United States of America Constitution. Some of the American decisions have no doubt recognised it as having a preferred position. Even apart from its occupying the first place, it is fairly clear that the sanctity of that particular fundamental right cannot be permitted to be taken away by dubious intrusions, and

> "it is the character of that right, not of the limitation, which determines what standard governs the choice between the individual's freedom and the State's power of control."

The difference in the importance of these various fundamental rights is however expressed by the Constitution by the difference in the character of the restrictions permitted by the subsequent clauses of Article 19. It will be noted that clause (2) allows a narrower field for legislative interference than what clauses (3) to (6) allow. It is unnecessary therefore to build any argument upon the superiority of the one kind of freedom over the rest, except to the extent specifically recognised and regulated by the Constitution itself. The rights of free speech and expression and a free press are not of course confined to freedom of thought and conscience or to religious activity of persons or institutions. Nor are they confined to political matters alone. All secular causes, great and small, come under its sway. The safeguards therefore are not inapplicable to business or to economic activity. Even with reference to an organisation engaged in business activities and with reference to individuals who make a profit out of it, the safeguards of freedom of thought and expression are available and are not to be taken away. In reconciling individual freedom with social control, the Court has to perform a peculiarly delicate task. The Constitution lays down the guaranteed rights and the legislative encroachments which are permitted. Any particular restriction which is impugned as unconstitutional will have to be judged by its effects on individual freedom and compared with the effect which its absence will produce on social order and general welfare. Considered as a "business", a reasonable restriction may be necessary and is permissible in public interests. In a pharmacy where poisonous drugs are sold, the owner may be compelled to separate the poisonous and the non-poisonous drugs and to keep the former in a separate place under lock and key. Razors and other instruments kept for use in a hair cutting saloon may be subject to a regulation for keeping them antiseptic. In the interests of hygiene and sanitation, regulations may be made in relation to edible things exposed for sale in restaurants and boarding-houses. These may be justified as reasonable restrictions in public interests. Where however a keeper of the printing press is called upon to make a deposit, because the press has been previously used for printing objectionable matter, it is difficult to see how the deposit of security would merely regulate the carrying on of the business as such. The very object of the demand for security is to act as a deterrent from printing or publishing objectionable matter in future. The object is more to control future printing or publication. Its direct effect is to act by way of control over the press in the matter of its functioning. This is not analogous to a regulation which regulates the press in the matter of securing a minimum wage for its employees or of ensuring a maximum number of working hours. A deposit is not required in every case where a printing press is started. The demand for deposit in this case is not a demand in the nature of a licence fee applicable to all owners of printing presses as such. It is a previous restraint on freedom of expression in spite of the devise of requiring the deposit as a condition for continuing the use of the press for printing or publication. I cannot agree that the true scope of sections 3 (3) and 4 (1) of the Act is merely to provide a reasonable restraint in the exercise of a calling or vocation or business. I must hold that it operates to abridge the right of freedom of expression.

The question would still remain whether it is constitutional by virtue of the saving clause, Article 19 (2), the relevant portion of which is as follows :

"Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law in so far as it relates to . . . . libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State."

I have already set out section 4 (1) (*a*), the relevant words being

"inciting to or encouraging commission of an offence of murder or any cognizable offence involving violence".

It is argued that section 4 (1) (*a*) of the Act relates to a matter which undermines the security of or tends to overthrow the State. The other matters mentioned in Article 19 (2) do not apply. It is apparent that the language of section 4 (1) (*a*) is much wider than what is described in Article 19 (2) as

"matter which undermines the security of or tends to overthrow the State."

Publications which incite murder of some individuals or commission of cognisable offences involving violence are not always such as may be described to undermine the security of or tend to overthrow the State. The word "State" is no doubt defined in Article 12 as including

"the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."

But even with this expanded definition in view the scope of section 4 (1) (*a*) is very much wider than the language used in Article 19, clause (2). It may be that in some cases publication which falls under section 4 (1) (*a*) may amount to publication of matter undermining the security of or tending to overthrow the State ; but the two expressions are not, however, identical. As section 4 (1) (*a*) stands at present, it cannot be regarded as constitutionally valid, as it conflicts with Article 19 (1) (*a*). To the extent of such inconsistency it has become void under Article 13 (1). The question whether it is possible to separate a part of it as still good even though the whole of it cannot be sustained is more difficult to answer. I shall deal with that matter separately in a later portion of this judgment.

The Public Prosecutor further contended that the printing and the publication of the book "Vajrayutham", portions of which contained the offending article, was long prior to 26th January, 1950. According to him an offence had been committed earlier and notwithstanding the coming into existence of the Constitution, the Press Emergency Act section would justify the making of the order by the Government in respect of a prior publication. This argument is, in my opinion, untenable. The Government order in question was made in February, 1950 and was served on the 1st March on the keeper of the press. This is after the coming into force of the Constitution. No proceedings have been initiated prior thereto. There is nothing to indicate that the Government applied its mind and decided upon passing an order calling for security prior to 26th January. There is nothing to show even that the publication had come to the notice of the Government prior to that date. Even if they had applied their mind, the effective order in this case was passed at a time when the Constitution had come into force and if the State had no right then, the fact that the offending article had been published earlier would not validate the order.

The learned Advocate-General while conceding that "liberty of the press" would come under Article 19 (1) (*a*) of the Constitution contended that section 4 (1) (*d*) of the Press Act was not inconsistent with that right. He presented a twofold argument. First he stated the American law on the subject of freedom of the press as laid down by the decisions of the United States Supreme Court and contended that it was not absolute freedom which was guaranteed but it was subject to well-defined exceptions, one of which was that it could not be exercised where

"there was a clear and present danger of the spoken or written word disturbing public tranquillity."

In such cases where it has such effect the police power so far as State legislation is concerned and the inherent limitations on the concept of freedom of speech as regards legislation by the Congress operated to justify an abridgment of the freedom of speech and expression. He submitted that the Courts in this country should declare the law in similar terms. His second argument was that even otherwise Article 19 (2) which permitted legislation on defined matters set out therein would justify the continuing in force of section 4 (1) (*d*).

I shall deal with the second argument first. S. 4 (1) (*d*) is as follows :

" To bring into hatred or contempt the Government established by law in British India, or the administration of justice, or any class or section of the citizens of India, or to excite disaffection towards the said Government ".

He contended that this would be legislation with reference to libel, one of the matters coming under Article 19 (2). Exciting hatred and contempt against the Government established by law or exciting disaffection towards Government are parts of what is known as the offence of sedition in the Penal Code. When the Constitution was being considered, the question of sedition came also for discussion. As pointed out in the judgment of the Supreme Court in the *Crossroads case*[1], aforesaid, the Constitution in its finally amended form omitted the word " sedition " which was found in the draft. Now it merely contains the words " matter which undermines the security of or tends to overthrow the State." The Supreme Court decided in the case aforesaid that legislation relating to maintenance of public order was different from legislation which undermined the security of or tended to overthrow the State. While recognising that the distinction was one of degree rather than of kind, their Lordships though by a majority, held that the Constitution permitted a law restricting freedom of speech and expression only where it is directed solely against undermining the security of the State or the overthrow of it and that a law cannot otherwise fall within the reservation of clause (2), although the restriction which it seeks to impose may have been conceived generally in the interests of public order. Their Lordships further observed that :

" the imposition of restriction for the wider purpose of securing public safety or the maintenance of public order fell outside the scope of the authorised restrictions under clause (2) and was void and unconstitutional ".

The learned Advocate-General recognised that this decision which has got to be followed by us and which is binding on us, as laid down in the Constitution itself, stands in his way. All that he could suggest, when pressed with this difficulty, was that their Lordships did not consider the scope of the term " libel " in Article 19 (2). He took us elaborately into the history of what is known as " seditious libel " in English Criminal law and pointed out that exciting hatred and contempt against the Government established by law was under English law, seditious libel. He suggested that it was open to us to consider the matter afresh and hold if we agree with him that section 4 (1) (*d*) could well be recognised as valid and constitutional, if it could be treated as legislation in relation to libel or what he calls, seditious libel. It is not permissible for us in the first instance to try to get over a direct decision of the Supreme Court in this indirect manner. We cannot assume that their Lordships were unaware of the meaning of the term " libel " also in Article 19, clause (2). Their Lordships make a specific point that the wide concept of the expression " sedition " as reiterated in the latest decision of the Judicial Committee, differing from the view of the Federal Court in India, was specifically under the consideration of the Constituent Assembly and that in its ultimate shape the Constitution used very much narrower words with the deliberate object, as their Lordships infer, of excluding incitements creating hatred and contempt and exciting disaffection against Government from the scope of sedition. Their Lordship say that freedom of speech and expression cannot be curtailed except in the manner recognised under Article 19 (2). The question is therefore not open to us in this Court. This is sufficient to dispose of this contention. I have mentioned it in passing so that the State may have liberty to raise it, if so advised in the highest Court.

1. (1950) S.C.J. 418 : (1950) 2 M.L.J. 390.

Turning to the first argument as to the effect of the American decisions and the suggestion that we should declare the law in the same terms, it is not quite clear to me on what basis the learned Advocate-General wanted to rest his argument. If the right to freedom of expression guaranteed under Article 19 (1) (*a*) is capable of restriction only under the terms of Article 19 (2) and not otherwise, it is difficult, to see how in the face of the judgments of the Supreme Court already referred to, we can add or invent other grounds of exemption. Apparently though he did not state it so categorically the Advocate-General meant to say that on a true and proper interpretation of the phrase "freedom of expression" in Article 19 (1) (*a*) there are inherent limitations on the concept of the freedom so guaranteed. *Freedom is of course different from licence or anarchy.* Freedom of one individual citizen has got necessarily to be circumscribed by the like freedom of other citizens in any organised society. To that extent therefore, in a society under an organised Government the preservations of order is an implied condition for the exercise of the fundamental rights guaranteed to the citizens. At the same time, it is not open to us to read limitations other than what are exclusively mentioned in Article 19 (2) itself. The American Constitution on which reliance was placed and the American decisions interpreting it have not enumerated any exceptions in general terms. The way in which the American law has been developed with regard to this question is noteworthy. The expression "abridging the freedom of speech" or "of the press" occurs in the first amendment. The American Courts proceeded on the basis that the Constitution used these words in the sense in which it was accepted and used by the English Common law at that time and the freedom so recognised as not to be curtailed had its amplitude subject to the exceptions recognised by the Common law itself. At the same time the Courts recognised that the Republican form of Government necessarily carried with it a larger meaning of the term than what the English Common law would allow. Though the heads of exceptions to the existing freedom of right were the same as in English Common law, the precise ambit of those exceptions was not the same in both the countries, particularly with reference to the law of sedition and seditious libel and the law relating to contempt of Court. Moreover, the American decisions gave full scope for the doctrine of "necessary and proper powers" recognised under clause (18) of Article VIII of the U. S. A. Constitution. The power to regulate foreign and inter-State Commerce and the power to establish post offices and post roads also empowered the Congress to curtail freedom of speech and of the press in the exercise of what may be regarded as a power analogous to the police power of the States. Freedom of speech was not therefore an absolute freedom which stood unregulated. Even giving the largest scope for those terms the Courts had recognised the right to curtail the freedom in certin cases and had laid down a test as follows :

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that the Congress has a right to prevent. It is a question of proximity and degree".

No doubt this test was not regarded as a formula but was only a working principle. Nonetheless, the decisions of the Supreme Court reveal a startling divergence of views among eminent Judges of that Court, in applying the principle aforesaid to concrete cases. In many such cases the Court was not unanimous but divided in its opinion, oftentimes by a five to four majority. It is with this knowledge of the uncertain application of the test in various circumstances that the Indian Constitution adopted a different method. Our Constitution is a detailed one and has been framed to suit Indian conditions and the genius of the country and its requirements in the light of its past history and its future growth. The Constituent Assembly had before it various Constitutions of different States and had carefully made detailed provisions with reference to these restrictions on the exercise of fundamental rights. Such restrictions which public interests required in order to reconcile social interest with individual freedom for which the American Courts had to indent on the police power and the inherent restrictions on the concept of freedom of speech and of the press have here been tabulated, categorised and formulated in defined exceptions. It is not permissible therefore, in my opinion, for the Court here to resort to an

undefined police power or a power analogous to it so as to extend the scope of the permitted field of legislation. The guaranteed freedoms can be regulated only by legislation to the extent permitted under Article 19, clauses (2) to (6). The phrase " freedom of speech and expression " is not terms of art. In the face of the decisions of the Supreme Court the contention of the Advocate-General that even apart from the reference to the law of libel under Article 19 (1) (*b*) there can be a restriction on the guaranteed right to freedom of expression is not one which this Court can entertain.

Mr. Nambiar contended that the Press Act itself was wholly unconstitutional as it operated to create a *previous* restraint on publication and was therefore an abridgment of the freedom of the press. His main argument was that the demand for security was not an abridgment for a proved offence or crime but was merely as a preventive action to control the nature of the future publications. He submitted that in truth this was a previous restraint in the nature of a pre-censorship on publication. He relied on the well-known passage in Blackstone's Commentaries :

" The liberty of the press consists in laying no previous restraint upon publication, and not in freedom from censure for criminal matter when published ".

In this connection he referred to the history of the doctrine in Chapter VI of Dicey's well-known book on the Law of Constitution. It is true that the demand for security is really by way of previous restraint on future publications and the sole object of the same is to control future publications. In this sense this is a restraint prior to publication which, like the requirement of a licence for printing or like pre-censorship, is one of the fundamental obstacles standing in the way of the freedom of the press. I cannot however agree with the contention of Mr. Nambiar that the citizen has got a right to absolute freedom prior to publication as contra-distinguished with a regulated right with reference to publications already made. The Constitution does not draw the line between pre-publication and post-publication as such. The exceptions provided for in Article 19 (2) relate to matters with reference to which the Legislature may enact laws applicable to the stage before publication as well as after publication. No doubt any restraint by way of pre-censorship or similar restraints of a like character are not likely to be enacted by Legislatures of modern times in a democratic State. Wartime and emergency legislation stands however on a different footing ; but even in normal and peace time such legislation is not precluded by the Constitution as unconstitutional. The necessity for and the wisdom of the measure, if any, will be one for the concerned Legislature. Such measures are not open to judicial review except in so far as the legislation whether it concerns pre-publication or post-publication is outside the field of legislative activity permitted under Article 19 (2). In *Brij Bhushan* v. *The State of Delhi*[1], the Act which was impugned permitted a pre-censorship order. An order of that kind was called in question. The Supreme Court held that the imposition of pre-censorship on a journal was undoubtedly a restriction on the liberty of the press and then postulated the question as follows :

" The only question therefore is whether section 7 (1) (*c*) of the (East Punjab Public Safety Act V of 1949) which authorises the imposition of such a restriction falls within the reservation of clause (2) of Article 19 ".

It is clear that the latter question would have been unnecessary if the fact of pre-censorship by itself was conclusive of the matter. In the face of this decision it is not possible to accept Mr. Nambiar's contention that the Press Act either wholly or in part is unconstitutional on the mere ground that it operates to create restraints previous to publications.

The result of the foregoing discussion would amount to this that as regards the first petition, unless section 4 (1) (*a*) can be said to be constitutionally valid and operative to a part at least, *i.e.*, in so far as it takes in words which have a tendency to undermine the security of or tend to overthrow the State, the petition

1. (1950) S.C.J. 425 ; (1950) 2 M.L.J. 431.

will have to be allowed. The second petition also will have to be allowed provided we have jurisdiction under Article 226 of the Constitution to act by way of issuing writ beyond the limits of the original jurisdiction of this Court. These two important questions therefore remain to be considered before we can finally dispose of the applications.

I have already held that the language of section 4 (1) (*a*) of the Press Act is very much wider than what is permitted under Article 19 (2). It is argued however that even so any existing law inconsistent with the fundamental right is void only to the extent of the inconsistency and no more and that in so far as the language of section 4 (1) (*a*) of the Press Act will take in cases where the offending matter undermines the security of the States or tends to overthrow the same, the legislation is saved by Article 19 (2). This aspect of the matter was not fully argued at the Bar, though no doubt a brief reference to it was made. Where certain words are found in a legislative enactment which if interpreted in its literal sense, may fall outside the powers of the Legislature but if confined to a narrower meaning will fall within its powers, the Court as a rule of construction will hold the legislation valid by attributing the latter meaning to the words in question. For instance the word "property" in the Hindu Women's Rights to Property Act, 1939, had been interpreted by the Federal Court as meaning only non-agricultural property in view of the fact that the Central Legislature which made the enactment had no power to legislate on the subject of agricultural land. The present case cannot fall under that principle. Here words are used which take in a wider class of acts and events than what is permitted to the Legislature. In effect, we have got to substitute for the words in section 4 (1) (*a*) different words limiting the scope thereof to cases where the offending matter undermines the security of the State or tends to overthrow it. This is rewriting the section, although it is by way of not introducing a new and different subject-matter but by abridging the full scope of the enacted words as they would stand and limiting their operation to a narrower field. It is true that a legislative Act may be entirely valid as to some classes of cases and clearly void as to others. Also a portion of it may be good and a portion bad. A law may be unconstitutional as regards citizens but not unconstitutional as regards aliens. It may be unconstitutional in so far as has been given retroactive operation, though it may be valid as regards its future operation. The American Courts have held that a State enactment, invalid as regards inter-State commerce may be good as regards intra-State commerce. The question of the severability of the good and the bad portions may arise for decision in different ways. Indeed, in some cases an enactment as "*interpreted and applied*" to the particular individual has been declared to be unconstitutional with reference to the particular matter in controversy. These different aspects of this question of severability have to be kept in view before we can come to a conclusion in the present instance.

The precise question that calls for decision now is whether it is open to this Court to hold that the application of sections 4 (1) (*a*) and 3 (3) of the Act as a result of which the keeper of the printing press has been called upon to make a deposit consequent on the printing and publication of the *particular offending matter* complained of can be sustained on the ground that the offending matter aforesaid is such as to undermine the security of the State or tend to overthrow the State; in other words, whether the application of the section in each particular case has got to be scrutinised with a view to see that the offending article can be brought not within the wide language of section 4 (1) (*a*) as such but within that part of it which may satisfy section 4 (1) (*a*), as it stands, and at the same time also amount to undermining the security of or tending to overthrow the State. On this aspect of the matter the judgment of the Supreme Court in the *Crossroads case*[1], has to be borne in mind. Their Lordships say:

"Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it

1. (1950) S.C.J. 418: (1950) 2 M.L.J. 390.

may be applied within the Constitutional limits as it is not severable. So long as the possibility of its being applied to purposes not sanctioned by the Constitution cannot be ruled out it must be held to be wholly unconstitutional and void. In other words clause (2) of Article 19 having allowed the imposition of restrictions on the freedom of speech and expression only in cases where danger to public security is involved an enactment which *is capable of being* applied to cases where no such danger could arise, cannot be held to be *constitutional and valid to any extent*".

This clear pronouncement of the highest Court is, in my opinion, decisive of the question. It is not open to us to uphold the constitutionality of section 4 (1) (*a*) even to a limited extent as contended for. It is true that in the *Crossroads case*[1], the matter in question was a ban on the circulation of the journal. In *Brij Bhushan* v. *The State of Delhi*[2], it was a pre-censorship order which was also quashed by the Supreme Court. The entire order was quashed, and their Lordships do not uphold it even to any limited extent. The test however is the same. It follows in my opinion that both sections 4 (1) (*a*) and 1 (*d*) fall outside the scope of permitted legislation and would be unconstitutional as operating to abridge the freedom of expression guaranteed by Article 19 (1) (*a*). Moreover, there is nothing to show that the State Government, before asking for deposit, had applied its mind to the question whether the offending matter was such as to undermine the State or tend to its overthrow, and not merely whether the matter comes under section 4 (1) (*a*) of the Press Act as it stands now.

The last question relates to the jurisdiction of this Court to issue the writs under Article 226 of the Constitution. I agree with the conclusion of my learned brother, Govinda Menon, J., that this Court has jurisdiction. The question is fully examined by him. I shall content myself with observing that while it is true that there is a distinction between jurisdiction and powers, jurisdiction may also be implied in certain cases from the conferring of powers. Article 226 confers the power on the High Court *throughout the territories in relation to which it exercises jurisdiction*. In my judgment, these words imply that this High Court has power to issue writs not only within the limits of its original jurisdiction but throughout the territories of the Madras State. The scheme of the Constitution is to provide a remedy for the enforcement of the fundamental rights by enabling the subject to move the Supreme Court under Article 32 (2) and to move the High Court under Article 226 (1). The Constitution contemplates the extension of this remedy by parliamentary legislation empowering other Courts also such as Subordinate Courts (*see* clause (3) of Article 32). In this sub-continent of great distances the necessity for speedy resort to a Court of Justice easily accessible was visualised by the Constitution and provided for by Article 226 by giving jurisdiction to the High Courts and leaving it to parliamentary legislation to confer this jurisdiction on subordinate Courts, when necessary.

In the result I would allow both the petitions and direct the issue of necessary writs to quash the orders of the Government demanding security from the petitioners. Sections 4 (1) (*a*) and 4 (1) (*d*) of the Indian Press (Emergency Powers) Act, 1931, are in conflict with Article 19 (1) (*a*) of the Constitution and are therefore void under Article 13.

Basheer Ahmed Sayeed, J.—These are two petitions filed under Article 226 of the Constitution of India praying this Court to quash the orders passed by the Government of Madras under the Indian Press (Emergency Powers) Act, XXIII of 1931 (hereinafter called the Press Act) by issuing appropriate writs or orders, on the ground that these orders of the State Government contravene Article 19 (1) and 19 (2) of the Constitution. The first petition is by the keeper of the "Avanti" press at Rajahmendravaram, East Godavari district, within the State of Madras. The petitioner was served with an order dated the 24th February, 1950, under section 3 (3) of the Press Act, by which he was called upon to deposit a sum of Rs. 2,000 with the District Magistrate of East Godavari on or before the 10th April, 1950, for having *printed* a Telugu book called "Vajrayutham" in his press. The book "Vajrayutham" contains numerous poems under different headings and when it was published by the publisher, with whom we are not concerned in this

1. (1950) S.C.J. 418 : (1950) 2 M.L.J. 390. 2. (1950) S.C.J. 425 : (1950) 2 M.L.J. 431.

petition, it was found by the State Government that the book contained passages which offended against a provision of the Press Act, *viz.*, 4 (1) (*a*). The offending passages are found in Exhibit B filed along with the original petition, O. P. No. 194 of 1950. It appears to be the view of the Government that the passages extracted in the said Exhibit B from out of the book *printed by the keeper of the* "*Avanti*" press come within section 4 (1) (*a*) of the Press Act and therefore they fall within the mischief of section 3 (3) of the said Press Act entitling the Government to call upon the "keeper of the Press" to deposit security with the Magistrate. So action was taken under section 3 (3) of the Act.

The second petition is by the "publisher" of a newspaper called "Aruna" published in Mangalore, South Kanara district, within the State of Madras. It is a *Kannada* weekly of Mangalore and its issue dated the 26th February, 1950, is said to contain matter of the nature described in section 4 (1) (*d*) of the Press Act, justifying the Government to call upon the petitioner, who is the *editor* and *publisher* of the said newspaper to deposit with the District Magistrate of South Kanara, a sum of Rs. 1,000 by way of security. This order is dated the 8th June, 1950, and issued in exercise of the powers vested in the State Government under section 7 (3) of the Press Act. A translation of the offending article entitled "22 persons were inhumanly murdered in Salem jail, etc.," which appeared in the petitioner's newspaper "*Aruna*" dated the 26th February, 1950, has been filed along with the original petition (O. P. No. 214 of 1950).

These two petitioners had originally filed O. P. Nos. 194 of 1950 and 214 of 1950 respectively under section 23 of the Press (Emergency Powers) Act, praying that the orders of the State Government demanding security from the "keeper" of the Press and the editor and publisher, respectively of the "Avanthi" press and the "Aruna" newspaper might be set aside on the grounds set out in their petitions. For the disposal of these two petitions, the present Bench was constituted as required under section 24 of the Press Act. By two judgments delivered by this Bench to-day, both the petitions referred to above have been dismissed, as in our opinion, the matter complained of by the State Government in each of the cases did fall within the scope of sections 4 (1) (*a*) and 4 (1) (*d*) of the Press Act respectively and the State Government was justified in calling upon both the petitioners in the said two petitions to deposit the securities required in the orders issued by the State Government. In the first of the petitions, this Bench was of the opinion that some of the poems extracted in Exhibit B contained words, which incited the commission of the offence of murder and other cognisable offences involving violence. The contention of the learned counsel for the petitioner that the matter complained of did not come within the mischief of section 4 (1) (*a*) of the Press Act was not tenable. Even so, in the second petition, namely, O. P. No. 214 of 1950, this Bench was of the opinion that the article complained of did come within the scope of section 4 (1) (*d*) of the Press Act in that the words used brought into hatred and contempt the Government established by law and excited disaffection towards the said Government and that the petition was devoid of merits. But, since it was realised by the learned counsel for the petitioners, during the course of the hearing of these two petitions, that the jurisdiction of this Bench constituted under section 24 of the Press Act was confined only to a determination as to whether the book, or the newspaper, in respect of which the order was made by the State Government, did or did not contain any words, signs or visible representations of the nature described in section 4 (1) (*a*) of the Press Act, or section 4 (1) (*d*) thereof, it was felt necessary by the learned counsel to file the present Civil Miscellaneous Petitions under Article 226 of the Constitution praying for the issue of appropriate writs or orders to quash the orders of the Government on the ground of unconstitutionality of sections 4 (1) (*a*) and 4 (1) (*d*) of the said Press Act. It is with these petitions that we are now concerned.

The points raised by Mr. M. K. Nambiar appearing for the "*keeper*" *of the printing press* in the first petition are: (1) that sections 3 (3) and 4 (1) (*a*) of the Press Act are *ultra vires* of the Constitution of India, in that they abridge the right

of the petitioner to freedom of speech and expression, a fundamental right guaranteed by the Constitution under Article 19 (1) (*a*) ; (2) that the said sections of the Press Act are not saved by Article 19 (2) of the Constitution, which permits legislation by the State affecting the fundamental right guaranteed under Article 19 (1) (*a*) of the Constitution in certain specified matters ; (3) that the demand for security under section 3 (3) of the Press Act on the ground that the press *was used for printing* objectionable matter coming under section 4 (1) (*a*) of the Press Act, operated by way of previous restraint upon the petitioner's right to freedom of speech and expressions and was in the nature of pre-censorship and therefore it was void and unconstitutional and (4) that the section 3 (3) of the Press Act enabling the Government to demand such security was inconsistent with the provisions of Part III of the Constitution as laid down by Article 13 of the Constitution. Mr. Ramachandran, appearing for the *editor and publisher* in the second petition, also contends on the same lines as Mr. Nambiar in respect of the order served on his client under section 3 (3) of the Press Act and urges that sections 3 (3) and 4 (1) (*d*) of the Press Act are inconsistent with the Constitution and offend against Articles 13 and 19 (1) (*a*) thereof.

The Public Prosecutor, Mr. V. T. Rangaswami Aiyangar, who appears for the State in the first petition, submitted various points in support of his contention that the order issued against the "keeper of the printing press" was sustainable and that sections 3 (3) and 4 (1) (*a*) of the Press Act did not offend against Article 13 or 19 (1) (*a*) or 19 (2) of the Constitution. In the first place, he argues that "freedom of the press" has not been specifically mentioned in Article 19 (1) (*a*) of the Constitution and what is mentioned there is only "freedom of speech and expression," while in the Constitutions of America and other countries having a written Constitution "freedom of the press" or "liberty of the press" has been specifically mentioned among the guaranteed rights and that since Article 19 (1) (*a*) of the Indian Constitution has omitted to include the "freedom of the press" or "the liberty of the press" it would not be proper to give any wider meaning than what is warranted by the express language of Article 19 (1) (*a*) of the Constitution. His point seems to be that what has been guaranteed by the Constitution is only "freedom of speech and expression" and though the term "expression" may relate to utterances in writing or in print, or manifestation or representation of feelings, intentions or thoughts in writing the word "expression" cannot be equated with the words "liberty of the press" in the sense in which the phrase is used in the other Constitutions.

As against this contention, Mr. Nambiar invited our attention to the proceedings of the Constituent Assembly, when the Constitution was on the anvil and especially to the debates relating to the framing of Article 19 of the Constitution of India. A reference to the debates of the Constituent Assembly as published in Vol. 7, No. 17, pages 712 to 716 and No. 18 of the same volume, page 77 and following reveals that, when the question was raised by some of the framers of the Constitution that the phrase "freedom of the press" should also be included in addition to the words "freedom of speech and expression" in Article 19, it was made clear in reply by the members of the drafting committee that "freedom of speech and expression" means "freedom of the press" as well, and that there was no specific necessity to include the words "freedom or liberty of the press" as such. Dr. Ambedkar who piloted the draft in the Constituent Assembly is reported to have said that no special mention of the "liberty of the press" was necessary in view of the fact that in so far as citizens were concerned, "freedom of speech and expression" meant and included "freedom of the press" as well. Though the manner in which the need for the addition of the words "freedom of the press" has been dealt with does not seem to be quite satisfactory and while we feel that it would have been eminently desirable to have included in Article 19 (1) (*a*) the phrase "freedom or liberty of the press" as well, still we feel it difficult to exclude the concept of the "liberty of the press" from the actual terminology used in Article 19 (1) (*a*) of the Constitution. The term "press" according to

A. V. Dicey the author of the Law of the Constitution, means periodical literature in general and particularly the newspapers, and "freedom of the press," according to him, is a person's right to make any statement he likes in books or newspapers. Freedom of expression, as found in Article 19 (1) (*a*) of our Constitution, cannot be said to exclude a person's right to make any statement he likes in books or newspapers, and it will be no violence to the meaning of the word "expression" if we so include within its connotation this right. Besides the debates of the Constituent Assembly at the time of the framing of the Constitution referred to above, the learned counsel for the petitioner in the first petition has also invited our attention to two decisions of the Supreme Court, namely, *Romesh Thappar* v. *The State of Madras*[1] and *Brij Bhushan* v. *The State of Delhi*[2] where the learned Judges of the Supreme Court have taken it for granted that the term "freedom of speech and expression" include "freedom of the press" as well. In the first of the two decisions referred to above, Patanjali Sastri, J., delivering the majority judgment in the Supreme Court has observed that :

"There can be no doubt that freedom of speech and expression includes freedom of propagation of ideas and that freedom is ensured by the freedom of circulation".

The learned Judge further quotes in the course of his judgment the following :

"Liberty of circulation is as essential to that freedom as the liberty of publication. Indeed, without circulation the publication would be of little value."—Ex parte *Jackson*[3].

In the second of the above decisions also, Patanjali Sastri, J., again delivering the judgment of the Supreme Court for the majority has observed :

"there can be little doubt that the imposition of pre-censorship on a journal is a restriction on the liberty of the press which is an essential part of the right to freedom of speech and expression declared by Article 19 (1) (*a*) of the Constitution of India."

He further quotes a passage from Blackstone's Commentaries, Vol. IV, pages 151, 152 which run as follows :

"The liberty of the press consists in laying no previous restraint upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public ; to forbid this, is to destroy the freedom of the press."

These two decisions no doubt are concerned mainly with the right of "publication of matter in journals" which had been interdicted by the State Governments under specical legislation enacted by the States' Legislatures and the person concerned and affected in each of these cases was a printer, publisher and the editor of the journals in English called "Cross roads" in the one case, and "Organiser" in the other case. It should also be noted that in these two cases, the question whether the "keeping of a printing press" could be included within the scope of Article 19 (1) (*a*) did not arise and was not the subject-matter of the decision. However the fact remains that, in the light of the two decisions referred to above and the well-known rule of construction that the terms used in a statute should be given the meaning which they were intended to be given at the time of the adoption of the statute, it could not be inconsistent, nor could it amount to any violation of the true meaning and intent of the language, to hold that the phrase "freedom of speech and expression" occurring in Article 19 (1) (*a*) does include the "freedom or liberty of the press" as well. In this view, the contention of the learned Public Prosecutor that Article 19 (1) (*a*) does not include liberty of the press cannot be accepted.

The next point argued by the learned Public Prosecutor is that though the various sections of Press (Emergency Powers) Act deal not merely with the "keeper of the printing press" but also with the "publisher and editor of any newspaper" or journal or magazine, still in the present case, the person who is sought to be dealt with by section 3 (3) of the Press Act is only the *keeper of the printing press* and that section 3 (3) in so far as it related to the keeper of the printing press seeks only to regulate the use of the printing press by its keeper and not to restrict the

1. (1950) S.C.J. 418 : (1950) 2 M.L.J. 431.
2. (1950) S.C.J. 423 : (1950) 2 M.L.J. 390.
3. 96 U.S. 727.

liberty of the individual to make any statement he likes in books, or newspapers, or magazines. Therefore, he contends that in so far as the "use" of the printing press by its keeper is concerned, there cannot be any violation of the right of freedom of speech and expression, if the "use" of such a printing press is controlled; and the proper Article under which such control can be legitimately exercised by the State is not by virtue of the reservations contained in Article 19 (2), but that the use of a printing press by its keeper is permitted to be regulated by any existing laws, or by such laws as may be enacted by the State under the reservations contained in Articles 19 (5) and 19 (6). In effect, his argument is that, while Article 19 (1) (*a*) would not apply to the "use of the printing press by its keeper," Articles 19 (*f*) and 19 (*g*) would apply, and, according to Articles 19 (5) and 19 (6), any existing law may operate or legislation is permissible, which may impose reasonable restrictions on the exercise of any of the rights in the interests of the general public. According to the learned Public Prosecutor, the petitioner in the first of the petitions before us cannot be said to be exercising any right of "freedom of speech and expression" in having undertaken to merely print matter for another individual, either for remuneration or free of any remuneration. The "keeper of the printing press," by no means, can be said to be making any statement he likes in books or newspapers and thereby exercising his right to "freedom of speech and expression," when he prints matter for another individual who may either publish or not publish the same. The position would not be any different, if he prints well known works either of a secular or religious nature. Of course, the question of his reading or reciting or circulating such matter by publication would be otherwise. In that case, he would certainly be exercising his right of freedom of speech and expression. On the other hand, by printing the book in question "Vajrayutham," he has simply used his press in the exercise of his right to the property, namely, the printing press, which he owns for the purpose of practising a profession or occupation, or trade or business of printing and has not exercised any personal right of the liberty of the press or freedom of speech and expression. Therefore when the keeper of the press, the petitioner before us, has actually used his press for printing matter for another person, which incites to or encourages, or tends to incite or to encourage, the commission of any offences of murder, or any cognizable offence involving violence, the State will be entitled to regulate the use of such a printing press by *its keeper* in the interests of the general public by imposing reasonable restrictions such as are found in section 3 (3) of the Press Act. We think there is considerable force in this contention of the learned Public Prosecutor. A reading of the Press Act and an analysis of the various sections thereof discloses that the Press Act is intended not merely to control "publication" of newspapers, journals, magazines, etc., but also to control and regulate "the use of the press" as a profession or business. The preamble, no doubt, is in very general terms when it says that it is enacted to provide for the better control of the press. It must be remembered that the words "better control" are used in comparison with the provisions of the already existing law in what is known as the Press and Registration of Books Act (Act XXV of 1867). That is why frequent references are also made in the Press Act to this earlier Act which, apparently, was found to be inadequate to meet the requirements of the changed situation. But the scheme of the Press Act seems to be to control the press in both its aspects, namely, "publication" of periodical literature in general such as newspapers, news sheets and magazines, etc., and also the "use" of the press, or the printing press, as both a property and as a profession, occupation, trade or business. A scrutiny of the various sections of the Press Act abundantly supports that the scheme of the said Press Act is twofold as set out above. Section 2 of the Press Act and sub-clauses (1), (5), (6), (9) and (10) thereof define the various items which go to constitute periodical literature, newspapers, magazines, etc., whereas sub-clauses (7) and (8) define what a press and a printing press is. That is to say, sub-clauses (7) and (8) deal with the Press in its narrower aspect, namely, as property used for the purpose of carrying on a trade or business, *viz.*, printing, while the other sub-clauses referred to above deal with the press in the wider aspect in which it is.

understood, *viz.*, as the exercise of a liberty to make any statement or utterances, or express any opinion in books, newspapers or magazines, etc. Section 3 of the Press Act refers to deposit of security by keepers of printing presses as the marginal note indicates. A close reading of the said section itself would show that whereas sub-clauses (1) and (2) deal only with the keeper of a printing press and the deposit of security by him, sub-clause (3) deals with the security that may be required from a "keeper of a press" which has been used for the purpose of printing or publishing any newspaper, book, or other document containing any words, signs, or visible representations of the nature described in section 4 (1) of the Act. This sub-clause clearly envisages two aspects, namely, the business of printing and also the publications of the matter printed. No doubt, sometimes, one and the same person may be the printer as well as the publisher and editor, but in the present case, it must be remembered that it is only the printer, *i.e.*, the keeper of the press who is dealt with for having used his printing press for printing objectionable matter. Section 4 of the Press Act similarly deals with the power of the State Government to declare either security or press forfeited in cases where action has been taken under section 3 (3) of the Press Act and where either printing or publication has taken place in violation thereof. Section 5 deals only with the "keeper of the press" in so far as the deposit of further security is concerned, after action has been taken against the keeper of the press under section 4 or 6. Section 6 similarly deals with the power of the Government to declare further security made by the keeper of the printing press and the publications that were published forfeited to the Government. But when we come to section 7 of the Press Act, the person dealt with under that section is the "publisher" of the newspaper and not the "keeper" of the press. Under sub-section (1) of this section 7, the publisher of a newspaper may be required to deposit security for reasons to be recorded in writing. Sub-section (2) says that, where security has been deposited and where no order is made by the State Government under section 8 in respect of such newspaper—*i.e.*, where there is no order as to forfeiture of the security—the security shall, on application by the publisher, be refunded. Sub-sections (3) and (4) of the same section enable the State Government to take action against the publisher, if the publisher publishes any objectionable matter that may come within the scope of section 4 (1) of the Press Act. It is to be noted that no mention of the keeper of the Press, is made in this section. Section 8 again deals with the newspaper in respect of which a security has been ordered and it enables the State Government to forfeit that security, if objectionable matter which might fall under section 4 (1) of the said Press Act is published. Section 9 deals with the deposit of further security by the publisher of a newspaper. Section 10 deals with the power of the State Government to declare further security deposited by the publisher of the newspaper and the newspaper itself being forfeited, if matter of the nature described in section 4 (1) is published in the newspaper. These three sections also do not even as much as refer to the keeper of the printing press. Section 11 deals with penalty for keeping a press or publishing any newspaper without making deposit. Here again, we see that the two distinct aspects of the press are dealt with, namely, the keeping of a press and the publishing of a newspaper. Section 12 deals with the consequences of failure to deposit security as required, by the keeper of the printing press as also failure on the part of a publisher of a newspaper when either or both of them have been called upon to furnish security under the relevant sections referred to above. Section 13 again refers to the return of security deposited in certain cases by the person who is the keeper of the press, or by the person who is the publisher of the newspaper. That is to say, when the keeper of the press ceases to keep the press, or when the publisher ceases to publish the newspaper, he is given the right to apply to the Magistrate for return of the deposit. It is unnecessary for us to consider the further sections which follow section 13 of the Press Act. However, when we come to section 23, it relates to the application to the High Court to set aside orders of the State Government under sections 3 (3) or 7 (3) in respect of the keeper of a printing press, or the publisher of a newspaper as the case may be.

Here again, the keeper of the press is dealt with distinctly and separately from the publisher of the newspaper. Section 23 (2) refers specifically only to the keeper of the printing press in respect of which an order for forfeiture has been made under sub-section (2) of section 12. Section 25 again deals with both the keeper of the press and the publisher of a newspaper and what orders have to be passed in either case, when the High Court comes to a decision on the applications filed. It would be evident therefore from a perusal of the sections that the Press Act, as already stated, deals both with regulating the trade or profession of printing as such and also controls the publication or disseminations of facts and opinions by means of newspapers, news sheets, books or other documents, etc. That seems to be the comprehensive scheme underlying the Press Act.

If such be the aim and object of the Press Act, the question then arises as to whether, if the keeper of a printing press in the exercise of his profession, occupation, trade or business of printing, uses his press which is his property, for the printing of matter which incites to or encourages, or tends to incite to or to encourage, the commission of any offence of murder or any cognizable offence involving violence, as has been already found by us in the present case, such trade, occupation or business of printing could be regulated or not in the interests of the general public ; or whether the keeper of a printing press has absolute and unfettered rights to use his press in any manner he likes. Another question that arises is as to whether the provisions of the existing law, namely, sections 3 (3) and 4 (1) (*a*) of the Press Act, which seek to regulate the profession of printing by a keeper of the press by preventing or restraining the printing of matter which incites to or encourages or tends to incite to or to encourage, the commission of any offence of murder or any cognizable offence involving violence, are conceived in the interests of the general public or not. The further question which arises is as to whether the provisions of the existing law, namely, sections 3 (3) and 4 (1) (*a*) of the Press Act, are saved by the reservations contained in Articles 19 (5) and 19 (6) of the Constitution. In our opinion, the Press Act also aims at the regulation of the trade, or profession or occupation of printing in addition to the control of the publication of newspapers, news sheets, magazines, etc., as we hold it does, any provision contained therein which imposes a reasonable restriction upon the exercise of such a profession with a view to prevent the printing of matter, which incites to or encourages, or tends to incite to or to encourage, the commission of any offence of murder or any cognizable offence involving violence, must be held to be a legitimate restraint, which is permissible in the interests of the general public, under sub-clauses (5) and (6) of Article 19 of the Constitution. Nothing could be considered to be more necessary and legitimate in the interests of the general public and the well-being of the society, than to see and provide that any citizen, in the exercise of his profession, or in the use of his property, does not use his property, or exercise his profession in a manner that may possibly create public disorder or disturbance to the peace, and thereby prove detrimental to the interests of the general public, or affect the personal liberty, rights and safety of the other members of the society in the State. Therefore, it follows that any provision of law to regulate or control any profession, or the use of any property by any citizen in a manner not to affect the interests and rights of the members of the general public in the State, cannot by any means be said to be a violation of his right to exercise his profession or the trade and much less a violation of his right of " freedom of speech and expression." In this view we have no hesitation in holding that section 3 (3) and section 4 (1) (*a*) of the Press Act are not inconsistent with Article 13 of the Constitution or Article 19 (*f*) and 19 (*g*) of the Constitution, for we hold that the limitations and restrictions imposed by the said sections of the Press Act are in full accord with and are saved by the reservations contained in Articles 19 (5) and 19 (6) of the Constitution, which permit the existing law to operate or a fresh law being enacted to regulate any trade or profession or the use of property in the interests of the general public.

In fact, Mr. Nambiar appearing for the petitioner in the first of the petitions did not choose to argue contrary to the contention that sections 3 (3) and 4 (1) (*a*) of

the Press Act may amount to an abridgment of the right of the petitioner guaranteed to him under Articles 19 (*f*) and 19 (*g*), and that such abridgment is saved by Articles 19 (5) and 19 (6). In fact, he conceded the position that, if the right of the petitioner to carry on the profession or trade or business of printing alone is considered to be affected by the Government order requiring the petitioner to deposit security, then an abridgment of this right, under sections 3 (3) and 4 (1) (*a*) of the Press Act, should be valid and protected by the reservations contained in Articles 19 (5) and 19 (6). But what he strenuously contended was that it was not the mere use of the printing press that had been sought to be affected by sections 3 (3) and 4 (1) (*a*) of the Press Act, but the right of the petitioner to print any matter he likes in his press, and that a restriction imposed upon his right to print any matter he likes would be an abridgment of his right to " freedom of speech and expression " including the " liberty of the press ". His point is that the right to print matter in the printing press is itself a right that has been guaranteed by the Constitution to the petitioner, irrespective of whether such a matter is published or not, either by him or by somebody else, and irrespective also of the fact, whether the matter thus printed is his own, or of somebody else. That is to say, the petitioner, according to him, has an absolute right to print anything he likes, that under Article 19 (1) (*a*), such a right is guaranteed to him, and that it cannot be abridged except when the restrictions partake of the nature provided for in Article 19 (2). At the same time, Mr. Nambiar also emphasises that every matter that is printed is intended only for publication and there is no purpose of printing any matter, if it is not intended for publication. Printing of matter is only for publication and the right of " freedom of speech " comprehends, according to him, everything that is ancillary and subsidiary to such publication. Printing of any matter through a printing press is therefore, according to him, part of the exercise of the " freedom of speech and expression ", that printing is an ancillary process of the means of expression and that the dominant idea underlying the scheme of the Press (Emergency Powers) Act, according to him, is to regulate or control the means of publication and thereby to control the " freedom of speech and expression ". He urges that the Press (Emergency Powers) Act is a law directly dealing with the right of " freedom of speech and expression " and that it is not a law directly dealing with the trade or profession of printing, or the running of a printing press. It is the functioning of the press and not the property in the press that is aimed at by the Press (Emergency Powers) Act. This is what Mr. Nambiar urges in his elaborate argument.

The further point stressed by Mr. Nambiar is that an enactment like the Press (Emergency Powers) Act and particularly sections 3 (3) and 4 (1) (*a*) could be held to be valid only if they could be brought under the saving clause of Article 19, namely sub-clause (2) which lays down that the operation of any existing law in so far as it relates to any matter which undermines the security of, or tends to overthrow, the State, shall not be affected by anything stated in sub-clause (*a*) of Article 19. Elaborating this point, it is the contention of Mr. Nambiar that section 4 (1) (*a*) of the Press Act, which lays down that the printing or publishing after printing in a press, any book, or document containing any words, signs, or visible representations which incite to or encourage, or tend to incite to or to encourage, the commission of any offence of murder or any cognizable offence involving violence, cannot be brought under the scope of the terms used in sub-clause (2) of Article 19 and cannot be held to be a matter which undermines the security of or tends to overthrow the State. That is to say, any matter that is printed and, or published, which is objectionable and comes within the scope of section 4 (1) (*a*) of the Press Act, cannot be construed to undermine the security of the State or to overthrow the State. Consequently unless and until the matter is such as to undermine the security of or tends to overthrow the State, the absolute " liberty of the Press " and the " freedom of speech and expression " guaranteed under Article 19 (1) of the Constitution cannotbe affected. In spite of the able arguments advanced by Mr. Nambiar, we must confess, we cannot agree with him on the several points raised by him.

In this connection, Mr. Nambiar invites our attention to the first, the fifth and the fourteenth amendments of the American Constitution in order to reinforce his argument that, while the American Constitution does not confer any positive right, it only restricts the curtailment or abridgment of the existing rights, *viz.*, "freedom of speech and of the press, life, liberty and property" and these rights cannot be affected or taken away except under due process of law; that in our Constitution, the position is otherwise, namely, that Article 19 (2) confers certain positive rights on the citizens. It is true that the trend of the decisions of the Supreme Court in the United States of America and the various authorities on Constitutional Law have held that the first amendment of the American Constitution and the fourteenth amendment have the same scope, namely, that the Congress or the States shall make no law unreasonably abridging, the "freedom of speech and of the Press." It is also laid down by those decisions, even as has been the case in the United Kingdom, that there shall be no legal censorship against the press, *viz.*, what is understood to be the expression of opinion in periodical literature or in the form of books or newspapers, etc. But nowhere has any decision of the Supreme Court of the United States of America, or any author of books on Constitutional Law in the United States, ever laid down that the Federal or the State Government had no power at all to legislate upon the subject of "freedom of speech and of the press." On the other hand, it has been uniformly held that the rights of freedom of speech and of the press are not absolute rights, but that both the States and the Federal Government in the United States have the power to restrict the freedom of speech and of the press within the limits imposed by the Constitutional guarantee on Governmental power to enact legislation in that regard. The question then arises as to what exactly is the scope of the Constitutional limitation against the control of personal liberty, such as the "freedom of speech and of the press," by the Government of the State or of the Union. That the fundamental right of the "freedom of speech and expression" guaranteed by Article 19 (1) (*a*) of our Constitution can also be legislated upon by the States or the Union Government, cannot be denied, for Article 19 (2) itself specifically lays down the limits or reservations within which such legislation upon the said right guaranteed by Article 19 (1) (*a*) of the Constitution can be enacted. The question then is what exactly is the interpretation that has to be put upon the scope and implications of the reservations contained in Article 19 (2) of the Constitution so far as the fundamental right of "freedom of speech and expression" is concerned. It is a well-known fact that, even in the United States of America, notwithstanding the passage of the first amendment to the Constitution, the Alien and Sedition Acts of 1798 and the Espionage Act of 1917 were enacted by the Congress and the decisions of the Supreme Court of the United States held these Acts to be valid, though these were war time legislations. In times of peace, however, the same Court has held that any legislation which controls the "freedom of speech and of the press" will amount to due process of law, when it was a proper exercise of the Police power of the State; and the proper exercise of the Police power it has been held, would be whenever the Supreme Court of the United States finds a paramount social interest involved. In the case of seditious libel, *i.e.*, libel on Government as distinguished from libel on private individuals, in the early stages the Supreme Court of the United States thought that, when words directly urge or cause unlawful acts, a paramount social interest was involved and any legislation by the State controlling the expression of such words would be legal. However, at a later stage, the same Court thought that when the words might have an indirect or remote tendency to cause unlawful acts, social control of freedom of speech and of the press would be in the proper exercise of the Police power vested in the State by reason of the due process of law clause in the fourteenth amendment. Still later, the same Supreme Court of the United States has held that, when there is a clear and present danger that words will cause unlawful acts, the exercise of police power under the due process of law clause is allowed and the control of freedom of speech and of the press is sustainable as legal and legitimate. Though this seems to be the latest position so far as the Supreme Court of the United States is concerned, still according

to H. E. Willis, the well-known author of the Constitutional Law of the United States, the position of the law, so far as the "clear and present danger" test is concerned, has been left in some obscurity by some of the later decisions. But this much seems to be clear, so far as the American Constitution is concerned, that the test of the remote and indirect tendency to cause unlawful acts cannot be the test of the constitutionality of the social control of the right of "freedom of speech and of the press." But in the ultimate analysis, the sum and substance of the series of decisions of the Unied States of America on the Constitution, the meaning of the guarantee of "freedom of speech and of the press" seems to be that personal liberty is protected against social control, either by previous restraint or by subsequent liability, unless the Supreme Court passing both the utterance and the statute thinks such social control reasonable. (*See* Willis on Constitutional Law, 1936 Ed., p. 499).

If such, in brief, be the State of law of the American Constitution, what we have to ascertain is what would exactly be the meaning of the guarantee of "freedom of speech and expression" in our Constitution in relation to the impugned sections of the Press (Emergency Powers) Act. In this connection, it must be remembered that the Constitutional guarantee of the "freedom of speech and expression" in our Constitution is intended only to secure the unrestricted discussion of public affairs, especially by the minorities which require protection against the majorities, which may be in power and in charge of the administration of the State. As already observed, this right is not absolute and cannot prevent laws which may forbid the abuse of this guarantee by imposing previous restraint upon publication or subsequent punishment for such publication which may be deemed to be contrary to the public welfare. If we examine in this light, the contents of section 4 (1) (*a*) of the Press (Empergency Powers) Act, it will be found that, what is sought to be prevented or restricted is the incitement, or encouragement to commit the offence of murder, or the incitement and encouragement to commit any cognizable offence involving violence, by the "keeper of a printing press." No reasonable person could hold that, to make criminal the counselling of murder or the commission of offences involving violence, would be an unconstitutional restriction of the right of "freedom of speech and expression," nor could any one deny that the privilege of the liberty of the press and of speech, as a right to freely discuss public affairs, can be exercised only as long as the privilege was not used for the purpose of stirring up violence or breach of the law, or so long as it does not amount to a direct incitement to disorder and commission of offences involving violence. By no means could it be claimed that the "freedom of speech and expression" guaranteed by Article 19 (1) of our Constitution intends to give immunity for every possible use of the language, even to use language so as to incite or encourage murders, or any other offences involving violence. Section 4 (1) (*a*) of the Press Act refers plainly to incitement to illegal acts which may amount to breach of the law and also create disorder and disturbance of public tranquillity. The Press Act, therefore, interdicts both the printing of such words as are calculated to cause breaches of the law, create public disorder and disturb public tranquillity, as are found in the book "Vajrayutham" referred to earlier, by imposing a restraint by way of deposit of security and also by way of forfeiture of such a security when deposited, if the "keeper of the press" still persists in the commission of such unlawful acts as are contemplated in section 4 (1) (*a*) of the Press Act.

It is now for us to consider whether the unlawful acts which are sought to be prevented by exercise of the powers vested in the State Government under section 3 (3) of the Press Act could be so prevented and whether it is a proper exercise of the police power that is vested in the State to do so. The further question that arises is whether these sections, namely, sections 3 (3) and 4 (1) (*a*) do not relate to a matter which undermines the security of the State, and whether these provisions are not saved by Article 19 (2) of the Constitution. In our opinion, the incitement to or encouragement to offences of murder and the incitement to and encouragement to the commission of cognizable offences involving violence is certainly of a serious

nature which will undermine the security of the State. The security of the State, in our opinion, constitutes public welfare, public peace and public safety, and the unlawful acts sought to be prevented by the impugned sections of the Press Act would certainly endanger the security of the State, if left unchecked. If the security of the State does not involve these items which are essential for an orderly Government of the State, it is difficult to conceive what else could be meant by the security of the State. It is true the term Security of the State has not been defined in the Constitution but in our view internal peace, internal safety and internal order do make up the security in times of peace as well as in times of war and any acts calculated to upset these essential factors must be considered to undermine the security of the State. Therefore, even applying the clear and present danger test, followed by the Supreme Court of the United States of America, we are inclined to hold that sections 3 (3) and 4 (1) (*a*) of the Press Act are fully saved by the reservations contained in Article 19 (2) of the Constitution and they fall within the ambit of permissible legislation.

It is well known that in the American Constitution, the postal power for regulation of mails and the power to regulate inter-state commerce have also been exercised by the Congress of the United States of America to exclude from the mails, among other things, writings calculated to produce sedition or to incite murder or arson. Congress, it is stated has also enacted a number of laws, the principal purpose of which is to protect the public from fraud, immorality or something else deemed inimical to public welfare. The theory upon which such legislation is based seems to be that the postal power may properly be used to remedy the evil spread or perpetuated by the use of the mails. It is, however, stated that the Congress, in the exercise of its Federal power, namely, to maintain postal services, may determine what is to circulate in the mails and eliminate whatever in its judgment is deceptive, fraudulent, or otherwise detrimental to the public welfare. That is to say, a law can be made by the State which may prescribe what it deems injurious to the public peace and welfare, notwithstanding the fact that such law will infringe the right of "freedom of speech and of the press."

"It is on this basis again that postal authorities have the delegated power from the Congress in the United States to exclude obscene literature, objectionable advertisements, writings calculated to incite to crime and matters advocating or urging treason, insurrection, or forcible resistance to any law of the United States of America :"

If such be the case with regard to the exercise of postal power to regulate mails, there can be little doubt that the State can exercise similar power to inhibit matter being printed, or published by the keeper of a printing press which incites to crime, such as murder or other cognizable offences which amount to not merely a breach of the laws but also injurious to the public peace and welfare which in turn cannot but undermine the security of the State. If incitement to crime such as the commission of murder and other offences involving violence will not undermine the security of the State, it is not possible to say what else will be the effect of such incitements on the State. (One may usefully refer to the book entitled "the American system of Government, Federal, State and Local" by Ferguesson and Mc. Henry), pages 394, ff, 1947 Edn., in this connection).

Mr. Nambiar no doubt argues that, when such matter is printed or published, it can be made the subject of a prosecution and the offender may be punished and that there can be no justification for imposing a restraint in the nature of a precensorship. It may however be noted that the demand for security—in the present case is made only after the objectional matter has been printed by the keeper of the press and published by some other person. But it is well known that in a majority of cases, criminal prosecution may not be the effective remedy. Instead of it, the more effective remedy usually adopted happens to be to impose a ban by an administrative order issued under the law, thereby preventing the keeper of the printing press or the publisher from indulging in such unlawful acts, which involve danger to the security of the State. Therefore, it is that censorship is resorted to in order to suppress facts or opinions that might undermine the existing order, or the

authorities, or the State as such. It is unnecessary to recall to mind in this connection the very wide and comprehensive definition of the term " the State " contained in Article 12 of the Constitution. It may be that the unlawful acts envisaged by the impugned section 4 (1) (*a*) of the Press Act do not constitute an " overthrowing of the State," but certainly they do constitute an undermining of the security of the State. In this view it is not possible for us to accept the contention that the impugned sections are wider in scope than what is permitted under Article 19 (2) of the Constitution. In our opinion there is certainly an undermining of the security of the State by reason of a direct incitement to murders and other cognizable offences though not an overthrowing of the State, as we have already found in the printed matter in question. Consequently, it is unnecessary for us to consider in this connection, the question of separability or not of the impugned provisions of the Press Act as that question does not arise in the present context, and in the view we have taken of the matter. We are therefore of the opinion that sections 3 (3) and 4 (1) (*a*) of the Press (Emergency Powers) Act are not repugnant or inconsistent with the Constitution, but are saved by the reservations contained in Article 19 (2) of the Constitution, assuming at the same time that, by reason of the exercise of the powers vested in the State Government under section 3 (3), the right of " freedom of speech and expression " guaranteed by Article 19 (1) (*a*) is sought to be curtailed or abridged.

The learned Public Prosecutor contended that the notice demanding security in the first of the petitions could not be affected by the Constitution which came into operation after January, 1950, especially in view of the fact that the publication had taken place prior to the Constitution itself coming into force. However, the action taken is after January, 1950, though the publication is long prior thereto. The fact remains that actually, the Government Order was passed in February, 1950, and was served on the party early in the month of March, 1950. This makes it clear that the order demanding security was issued after the Constitution came into effect. It would have made, in our opinion, a difference if proceedings had been initiated against the " keeper of the printing press " for the impugned matter prior to the coming into effect of the Constitution. We agree with our learned brother, Panchapagesa Sastri, J., that there is nothing in the Government Order to indicate that the Government applied its mind and decided upon passing an order calling for the security prior to the 26th January, 1950. In so far as the Order seems to have taken effect in this case after the Constitution came into effect and if the State Government had no right to pass such an order after the Constitution had come into effect, it will make no difference virtually as to whether the publication took place earlier or later. But in view of the fact that we have held that the State Government is justified in imposing the ban on " the keeper of the press " for the reason that the impugned sections of the Press Act are not inconsistent with or repugnant to the Constitution, this question does not seem to be of any material importance. We do not think therefore it is necessary for us to dilate further on this argument of the learned Public Prosecutor.

In regard to the second petition, the main point argued by Mr. Ramachandran appearing for the petitioner is that the matter complained of does not come under section 4 (1) (*d*) of the Press (Emergency Powers) Act. In this connection, he has invited our attention to the two decisions of the Supreme Court, namely, *Romesh Thappar* v. *The State of Madras*[1] and *Brij Bushan* v. *The State of Delhi*[2], where it has been held that unless a law restricting freedom of speech and expression is directed solely against the undermining of the security of the State, or the overthrow of it, such law cannot fall within the reservations contained in Article 19 (2) of the Constitution although the restrictions which it seeks to impose may have been conceived generally in the interests of public order. His further point is that though Article 19 (2) of the Constitution permits legislation on the subject of libel with a view to restrict the freedom of speech and expression guaranteed under Article 19

1. (1950) 2 M.L.J. 390 : 1950 S.C.J. 418. 2. (1950) 2 M.L.J. 431 : 1950 S.C.J. 425.

(1) (*a*) of the Constitution, still the subject of sedition is not one of the subjects on which legislation can be taken to have been permitted under the reservations contained in Article 19 (2) of the Constitution. The matter that is now the subject of the Government Order against the publisher of the "Aruna" is essentially seditious and sedition in so far as it has been excluded from the scope of Article 19 (2), the Government Order under section 4 (1) (*d*) is an infringement of the right of freedom of speech and expression, by reason of the fact that Article 4 (1) (*d*) is itself *ultra vires* of the Constitution and is repugnant to it. Therefore Article 13 of the Constitution makes it unconstitutional. The learned Advocate-General however raised two points against the contentions of the learned counsel for the petitioner in the second petition. The first point that the learned Advocate-General raised was that the petitioner had no right to come before this Court for the issue of a writ in a matter like the present one. The proper remedy open to the petitioner, according to the learned Advocate-General, is that he should have gone before the Supreme Court and applied to that Court under Article 32 of the Constitution. According to him, Article 226 of the Constitution does not confer power on the High Court to issue writs as regards the rights guaranteed under Part III of the Constitution. It can only issue writs in matters arising within its original jurisdiction. On this point, our learned brother, Govinda Menon, J., has delivered judgment and since we fully concur with him, there seems to be no need for us to further elaborate this objection of the learned Advocate-General. The second point raised by the learned Advocate-General for the petitioner in the second petition is that the order of the Government under sections 3 (3) and 4 (1) (*d*) of the Press Act does not offend Article 19 (1) (*a*) of the Constitution and that the two sections are saved by the first part of Article 19 (2). He therefore contends that the impugned sections of the Press Act should not be considered to be void, because of the fact that Article 19 (2) of the Constitution gives ample scope to any State to legislate on libel and libel must be construed in a general and comprehensive sense so as to include what is known as "seditious libel" or "libel on Government". He of course concedes that the term "freedom of speech and expression" may include the "liberty of the press" as well. But a reference to the history of the Constitution so far as it related to the framing of Article 19 (2) would show that the makers of the Constitution deliberately omitted the word "sedition" from the scope of Article 19 (2) of the Constitution and the cases cited by the learned counsel for the petitioner, namely, *Romesh Thappar* v. *The State of Madras*[1] and *Brij Bushan* v. *The State of Delhi*[2], seem to warrant the position taken up by the learned counsel for the petitioner to the effect that the matter complained of against the petitioner in this petition does not fall within the scope of permissive legislation contemplated by Article 19 (2) of the Constitution. In view of what we have already stated in the foregoing parts of this judgment and also in view of what our learned brother, Panchapagesa Sastri, J., has observed in his elaborate judgment on this point, we do not think it is necessary for us to traverse the same ground. Suffice it for us to say that an examination of the scope of section 4 (1) (*d*) leaves us with no other impression than that it will be straining too much to bring it within the scope of Article 19 (2) of the Constitution. The omission to include "sedition" in clause (2) of Article 19 may perhaps be due to the fact that the Constitution has envisaged a republican form of Government and also has provided for an amendability of the Constitution itself. Numerous cases of the Supreme Court of the United States of America have also been cited to us which have dealt with this point under the American Constitution. We have already examined in general terms the trend of the decisions on seditious libel in so far as they related to the American Constitution and it is not necessary for us to recapitulate the effect of those decisions over again. In our opinion, section 4 (1) (*d*) of the Press Act cannot be claimed to be consistent with the Constitution, nor could we say that section 4 (1) (*d*) of the Press Act is saved by the reservations relating to permissive legislation contained in Article 19 (2) of the Constitution. In our view, even applying the clear and

1. (1950) 2 M.L.J. 390 : 1950 S.C.J. 418. 2. (1950) 2 M.L.J. 431 : 1950 S.C.J. 425.

present danger test of the Supreme Court of America, section 4 (1) (*d*) as it stands amounts to a restriction on the "freedom of speech and expression" guaranteed to the citizen under Article 19 (1) (*a*) and must be held to be an unconstitutional limitation not warranted by Article 19 (2) of the Constitution. Therefore, while we have to dismiss the first petition for the reasons above stated, we think the second petition has to be allowed, and we do so accordingly.

By Consent: C. M. P. No. 8581 of 1950 is dismissed. Leave to appeal to the Supreme Court under Article 132 is granted. C. M. P. No. 5647 of 1950 is allowed and the Order of the State Government is quashed. Leave to appeal under Article 132 is granted.

C. M. P. No. 8581 *of* 1950 *dismissed.*
C. M. P. No. 5647 *of* 1950 *allowed.*
Leave to appeal to Supreme Court granted in both.

V. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

Nidamanuri Subbayya and others .. *Appellants**

v.

Nidamanuri Ramalakshmi .. *Respondent.*

Transfer of Property Act (IV of 1882), *section* 52—*Applicability—Suit by a Hindu wife for maintenance claiming charge*—Lis pendens.

Whether the suit for maintenance is by a Hindu widow or by a Hindu wife, if a charge is asked for in respect of a specified property and a decree is made creating a charge, section 52 of the Transfer of Property Act would apply so as to protect the plaintiff against transfers effected *pendente lite.*

Case-law discussed.

Appeal against the Order of the District Court, Nellore, dated 19th November, 1948, in A. S. No. 121 of 1948, preferred against the Order of the Court of the District Munsiff, Kanigiri, dated 15th March, 1948, in E. P. No. 153 of 1948, in O. S. No. 47 of 1928.

A. Raghavayya for Appellants.

V. Subramaniam for Respondent.

The Court delivered the following

JUDGMENT.—The material facts are few. In O. S. No. 301 of 1905 on the file of the District Munsiff of Kanigiri a Hindu wife obtained a decree for maintenance against her husband. On 12th January, 1928, she filed a second suit, O. S. No. 47 of 1928, for enhancement of the maintenance that had been decreed to her. She also prayed for a charge over the properties set out in the schedule to the plaint. The husband remained *ex parte* and the suit was decreed. On 16th January, 1928, that is to say, four days after the wife had filed her second suit asking for increased maintenance the husband sold certain properties to the first appellant. The maintenance payable to the wife under the decree during the years 1944 to 1947 fell into arrears and to recover the amount due to her she proceeded against the properties that had been sold to the first appellant. The latter objected on the ground that the charge created by the decree could not be enforced against the properties he had purchased. Both the Courts below held that the purchase was affected by section 52 of the Transfer of Property Act and that the purchaser took only subject to the charge that was created in favour of the widow. In that view the objections of the purchaser was overruled and execution ordered to proceed. The purchaser and his sons have, therefore, come to this Court.

Mr. Raghavayya, the learned advocate for the appellants, argued that there is a distinction between a suit for maintenance filed by a wife against her husband and a suit filed by a widow against the coparceners of her husband. In the former case

* A.A.A.O. No. 66 of 1949. 24th October, 1950.

the foundation of the liability is the personal relationship of husband and wife and in the latter case the foundation of the liability is the possession of property in which the deceased husband had an interest. Therefore, he argued, even though in a suit filed by a wife against her husband a charge is created in favour of the wife over the properties of the husband such a charge could not bind a purchaser *pendente lite* of any property from the husband. In support of this contention he referred to the cases in *Rattamma* v. *Seshachalam Sarma*[1], *Official Receiver, Cuddappah* v. *Kalawa Subbamma*[2] and *Gangubai* v. *Pagubai*[3] and the following passage in Mullah's Transfer of Property Act, 3rd Edition at page 247 :

"(ii) *Suit for maintenance.*—A suit by a Hindu wife for maintenance against her husband is a personal suit, and a purchaser from the husband during the pendency of the suit is not affected by the rule of *lis pendens*. But the doctrine of *lis pendens* applies to a suit for maintenance by a Hindu *widow* in which she claims to have her maintenance made a charge on specific immoveable property mentioned in the plaint and a decree is passed creating a charge on such property."

In respect of the decision in *Official Receiver, Cuddappah* v. *Kalawa Subbamma*[2], it is sufficient to say that there is really no discussion of the principle involved and the observation there is merely *obiter*. Similar remarks apply to the decision in *Gangubai's case*[3]. So far as the case in *Rattamma* v. *Seshachalam Sarma*[1], is concerned, practically every ground on which that decision is rested has been subsequently dissented from. For instance, Devadoss, J., held in that case that a charge takes effect only from the date of the decree. Dealing with that a Bench of this Court stated in *Seetaramanuja-charyulu* v. *Venkatasubbamma*[4], as follows :

"Our attention was drawn to the decision of a learned Judge of this Court in the case reported in *Rattamma* v. *Seshachalam Sarma*[1], where he held that a charge takes effect only from the date of the decree. If the learned Judge intended to lay down that even in cases where a plaint prays for specific charge on specific immoveable property mentioned in it, a charge could take effect only from the date of decree, and not from the date of suit, then with all respect, we are unable to agree with him."

There are observations in *Rattamma* v. *Seshachalam Sarma*[1], which suggest that where a charge is claimed over all the properties of the family the doctrine of *lis pendens* would not apply. On those observations the following comment was made in *Ramaswami Pillai* v. *Krishnaswami Pillai*[5] :

"True, if the properties are not specified or if they are enumerated merely for enabling the Court to fix the quantum of maintenance—in either case the doctrine will have no application, but if the property is sufficiently designated so as to make it directly and specifically the subject-matter of the litigation, the fact that the charge is claimed over all the properties of the family, can make no difference. If in *Rattamma* v. *Seshachalam Sarma*[1], decided by Devadoss, J., on which Mr. Rajah Aiyar relies, is implied a different rule, we must with all respect dissent from it."

Finally, there is the decision in *Rajya Lakshmidevamma* v. *Subba Rao*[6], where Varada-chariar, J., delivering the judgment of the Bench stated :

"An extreme contention has been put forward before us on behalf of the respondent that a claim for maintenance even when coupled with a prayer for a declaration of charge on specific immoveable properties, will not fall within the terms of section 52 so as to attract the doctrine of *lis pendens* because such a claim cannot be described as a claim of 'right to immoveable property directly and specifically in question.' Reliance was placed in support of this argument on a decision of Devadoss, J., in *Rattamma* v. *Seshachalam Sarma*[1] and certain observations of Jackson, J., in *Official Receiver, Cuddappah* v. *Subbamma*[2]. The judgment of Devadoss, J., is opposed to the course of decisions both in this presidency and elsewhere and it has been definitely dissented from in *Seetharamanujacharyulu* v. *Venkatasubbamma*[4] and *Ramaswami Pillai* v. *Krishnaswami Pillai*[5]. As regards the observations of Jackson, J., we think it sufficient to say that it was *obiter* because the actual decision in the case did not turn upon that remark. We therefore overrule the contention that section 52 has no application to a claim for a maintenance charge."

The observations in Mulla's Transfer of Property Act do not appear to represent the independent views of the learned author, being only a summary of the proposi-

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1. (1926) 52 M.L.J. 520.
2. (1925) 99 I.C. 364.
3. (1939) 41 Bom.L.R. 815 : A.I.R. 1939 Bom. 403.
4. (1930) 59 M.L.J. 485.
5. (1935) 69 M.L.J. 447.
6. A.I.R. 1936 Mad. 84.

tions laid down in the three cases cited by the learned advocate for the appellants and which have been examined.

Looking at the matter independently of all authority, I find it difficult to see why so far as section 52 of the Transfer of Property Act is concerned, the circumstance whether the plaintiff is a wife or a widow should make any difference. If the suit is by the wife it will be open to her to proceed both personally against the husband and also against any property that he may own. If the suit is by the widow, the personal liability of the husband having become extinguished by reason of his death, she will be compelled to limit her reliefs to the property in which he had an interest and which subsequently passed into the hands of his coparceners. Why the circumstance of the husband being alive should take away the right of the wife to proceed against the property in his hands is difficult to see. Section 52 of the Transfer of Property Act is concerned only with the claims made against the property, and the provisions made therein are independent of and unaffected by any other claim which the plaintiff might be in a position to make against the defendant personally. The observation of Devadoss, J., in *Rattamma* v. *Seshachalam Sarma*[1], that

> "When a wife brings a suit against her husband for maintenance and asks for a charge on the property belonging to him, she does not ask for any other right directly and specifically in respect of the property"

is one which I find difficult to understand. Whether the suit is by a widow or by a wife, if a charge is asked for in respect of specified property and a decree is made creating a charge, section 52 would, it seems to me, apply so as to protect the plaintiff against transfers effected *pendente lite*.

I consider that the view of the matter taken by the Courts below is right and dismiss this second appeal with costs.

Leave refused.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

Tripuramallu Venkatanarasu .. *Petitioner**

v.

Jamili Venkatarangayya and others .. *Respondents.*

Provincial Insolvency Act (V of 1920), sections 28 (2) and 28-A—Scope—Insolvency of Hindu father—Vesting of power over sons' shares—Effect and nature of.

When the insolvent is a Hindu father the property that would vest in the receiver would consist of two categories : (i) The share of the father in the joint family property and (ii) the right, capacity or power of the father to sell the shares of the sons to pay antecedent debts which are not illegal or immoral in character. Since the Insolvency Act makes no distinction between these two categories the extent of the control which the Official Receiver would have over the moneys realized from both the categories would be the same and those funds would be at his disposal for payment of creditors of the insolvent. If any surplus is left, it will revert to the joint family unless there has been in the meantime a disruption of the status of the family.

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Guntur, dated 18th February, 1949, in E. P. No. 214 of 1945 in S. C. S. No. 60 of 1945, etc.

B. V. Ramanarasu for Petitioner.

C. A. Vaidyalingam, T. Venkatadri and *K. Ramachandra Rao* for Respondents.

The Court delivered the following

JUDGMENT.—The material facts are few. One Venkataratnam was adjudged an insolvent in I. P. No. 13 of 1923, on the file of the Subordinate Judge of Guntur. He died on 10th December, 1933, leaving behind him three sons. Between 1937

1. (1926) 52 M.L.J. 520.

*C.R.P. Nos. 1023 and 1024 of 1949. 26th October, 1950.

and 1939 the Official Receiver, Guntur, sold some of the properties of the joint family and realised certain moneys. In 1945, a certain Venkatanarasu obtained a decree in S. C. No. 60 of 1945, on the file of the Subordinate Judge, Guntur, against the sons of Venkataratnam. After obtaining his decree Venkatanarasu applied in E. A. No. 214 of 1945 for the attachment of that part of the money in the hands of the Official Receiver which would represent the share of the sons of Venkataratnam. The Official Receiver then filed his objections in E. A. No. 37 of 1946 and prayed for the attachment being raised. The Subordinate Judge allowed the objections of the Official Receiver and raised the attachment. Against that order, Venkatanarasu came to this Court in C. R. P. No. 1156 of 1946 which was disposed of on 20th July, 1948. In the order made on that date this Court directed that an enquiry should be made into the character and source of the funds now sought to be attached and claimed to be the property of the judgment-debtor. The matter was remanded for disposal afresh in the light of the observations made in that order.

After the case thus went back to the trial Court this question was gone into and accepting a memo. filed by the Official Receiver, the learned Subordinate Judge found that the property sold was the joint family property of Venkataratnam and his sons. He however held that the fund in the hands of the Official Receiver should be utilised in the first instance to pay the debts of Venkataratnam and that the creditors of the sons would be entitled to proceed only against the surplus if any. In that view the E. P. filed by Venkatanarasu was dismissed and the claim petition filed by the Official Receiver allowed. Against that order these two revision petitions have been filed.

The principal argument of Mr. Ramanarasu the learned advocate for the petitioner may be put this way. The insolvency of a father does not by itself disrupt the joint family or bring about a severance in status. If the Official Receiver had not sold the properties of Venkataratnam and his sons those properties would have been joint family properties available for division among Venkataratnam and his sons. The fund into which the properties were converted by the Official Receiver retain the character of the properties from which it arose and must be treated as joint family property and liable to be divided among the sons. Just in the same way as a creditor who has obtained a decree against a son can attach his share in the immoveable properties of the joint family so too he can attach the fund into which those properties have been converted. Mr. Ramanarasu recognised that it is open to a Hindu father to sell the share of his sons in order that he might pay antecedent debts not tainted with illegality or immorality. But he contended that till the money is actually paid over to the creditor it should be treated as an asset of the joint family liable to and available for division. Consequently till the Official Receiver had actually paid out the moneys the fund in his hands continued to retain the character of joint family property and is, therefore, liable to satisfy a decree that has been obtained against the sons.

There is no doubt a considerable amount of logic behind this argument. But it seems to me that if accepted, it would nullify the provisions of sections 28 and 28-A of the Provincial Insolvency Act. On the adjudication of a person as an insolvent, the whole of his property vests in the Court or the receiver under section 28 (2) of the Insolvency Act. When the insolvent is a Hindu father the property that would thus vest in the receiver would consist of two heads or categories. One would be the share of the father in the joint family property. The other would be the right, capacity or power of the father to sell the shares of the sons to pay antecedent debts which are not illegal or immoral in character. Since the Insolvency Act makes no distinction between these two heads of categories, the nature of the vesting in the Official Receiver will be the same in respect of both the categories and the extent of the control which the Official Receiver would have over the moneys realised from both the categories would be the same. It cannot be disputed that any money which the Official Receiver realises by the sale of the share of the insolvent-father would be at his absolute disposal for payment to the creditors of the insolvent.

there is unanimity of opinion, namely, that the language in the notification is by no means clear, and that it is possible to take more than one view of that notification. If the object of the notification is to prevent speculation in forward contracts relating to those commodities specified in the order, it is achieved by prohibiting forward contracts under the provisions of the Order and granting an exemption only in case of contracts under which parties stipulated delivery of specific goods at a specified price, in other words, if they contemplated spot delivery. When the contract contemplated spot delivery, it is rather difficult to infer that it might have been intended also for speculation and to transfer the right to take delivery of the goods under the contract. The exclusion is expressly restricted in the second part which relates to contracts under which parties contemplated delivery orders or railway receipts or bills of lading as substitutes for delivery and where the contracts provide that they should not be transferable to third parties. In such cases, the exclusion would operate only if the delivery orders, railway receipts or bills of lading contemplated by the contracts are made expressly not transferable. In other words, in both the class of contracts, whether they related to delivery on the spot or where they contemplated delivery orders, railway receipts or bills of lading as substitutes for delivery, the speculation is prevented in the former case by providing for specific delivery of goods at specified prices and in the latter case by making the delivery orders or railway receipts not transferable to third parties. This is one possible construction. If this is the correct view, the contract in the present case being one which provides for specific delivery of goods at a specified price and not a contract contemplating either delivery orders or railway receipts as substitutes for such delivery, the exclusion would seem to apply.

The two Bench decisions of this Court and a decision of the Bombay High Court have put upon the exclusion a restricted construction. The latest of the decisions on the point is that of the learned Chief Justice and Krishnaswami Nayudu, J., in *Satyanarayanamurthy* v. *Sitaramayya & Co.*[1]. The learned Chief Justice after referring to the decision of Horwill and Raghava Rao, JJ., in A. S. No. 97 of 1948 refers to the opinion of Desai, J., in *Firm Hansraj* v. *Vasanji*[2] and lays down at page 559 of the Report in the following words what he considered to be the correct interpretation of the exclusion:

"With respect to the learned Judge we agree with this construction of the notification. The intention underlying the notification appears to be to grant the exemption only to cases of forward contracts in respect of which there could be some guarantee that they would not be subject to speculation. In our opinion, before any forward contract could fall within the notification, it must also be established that one of the terms of the contract is that a delivery order or railway receipt or bill of lading relating to it is not transferable. In this case, it may be that none of these documents was contemplated, but it cannot be said that they were prohibited. There was nothing to prevent the buyers sending the delivery order in respect of the goods covered by the contract and in that case there is no provision in the contract to make such a delivery order non-transferable. The result would be that the very mischief sought to be prevented by the Order and the notification would occur."

It follows from this that unless there is a prohibition in the contract preventing the parties from transferring a delivery order or a railway receipt or a bill of lading, even though the contract on its face does not contemplate such delivery order, the benefit of the exclusion does not apply. As two Benches of this Court have taken this as the proper construction of the exclusion, we do not think we will be justified in differing from the view so taken. Applying the test laid down by the learned Chief Justice in the judgment already referred to, we find no prohibition in the contract now in suit, Exhibit P.-1 though it is a contract only for specific delivery of goods at a specified price. It follows therefore that the view of the learned Judge that the plaintiff is entitled to the benefit of the exclusion is wrong. The contract therefore in suit is unenforceable, and the plaintiff would not be entitled to a decree in his favour for damages for breach of contract.

The appeal has therefore to be allowed, and the decree of the lower Court has to be vacated but in the circumstances of this case we think this a fit case in which both the parties should bear their respective costs throughout.

K.C. *Appeal allowed.*

1. (1950) 1 M.L.J. 557.
2. (1948) 4 D.L.R. Bom. 7.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Kajjam Lakshminarasamma .. *Petitioner**

v.

Tanniru Seshayya and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 7 (a) (iii), Order 21, rule 82 and Order 38, rule 13—Small Cause Court decree—Execution after 12 years—No application for transfer of decree to original side—Attachment without formal transfer, null and void

A decree-holder of the Small Cause Court failed to apply to the Judge of the Small Cause Court to transfer the decree for purpose of execution to the original side of the very same Court where the very same Judge presided within twelve years of the passing of the decree. But the Judge himself had ordered attachment of immoveable properties which it was alleged had led the decree-holder to believe that no formal application for transfer was necessary.

Held, that Order 38, rule 13, Civil Procedure Code and Order 21, rule 82 prohibit the attachment and sale of immoveable properties by a Small Cause Court. Section 7 (*a*) (iii), Civil Procedure Code also shows this. Hence the entertainment of execution petition without jurisdiction by the Court on the original side and attachment of immoveables and issue of sale notices are null and void.

Case-law reviewed.

Petitions under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the orders of the Court of the Subordinate Judge, Guntur, in E. P. No. 62 of 1944 in S. C. S. No. 200 of 1932, in E. A. No. 517 of 1946 in S. C. S. No. 200 of 1932 and in E. A. No. 483 of 1946 in S. C. S. No. 200 of 1932, respectively.

G. Venkatarama Sastri for Petitioner.

N. Rammohan Rao for Respondents.

The Court delivered the following

JUDGMENT.—These are three connected petitions. C. R. P. No. 318 of 1947 is a petition against the order of the Additional Subordinate Judge, Guntur, dismissing E. P. No. 62 of 1944 in S. C. No. 200 of 1932, on the ground that the petition to amend the E. P. by adding a prayer to transfer the decree to the original side was barred by limitation, the decree itself having been passed on 16th January, 1933, and the application for transferring the decree to the original side, E. A. No. 483 of 1946, having been made only on 16th September, 1946, long after the 12 years' period under section 48, Civil Procedure Code had expired, and the application for amendment of the E. P., E. A. No. 517 of 1946, having been filed only on 8th October, 1946, long after the expiry of the 12 years' period under section 48, Civil Procedure Code. C. R. P. Nos. 319 and 320 of 1947 are filed against the orders of the Subordinate Judge rejecting the prayers in those two execution applications.

I have perused the entire records, and heard the learned counsel on both sides. Mr. Venkatarama Sastri, for the petitioner, urged that the decree in the small cause suit should not go to waste like this, and that the decree-holder, a poor ignorant country woman, should not be deprived of the fruits of her decree (more than Rs. 300) simply because a mere formality, like the transfer of the decree from the small cause side to the original side in *the very same Court*, where *the very same Judge* presided, had been omitted to be applied for within 12 years of the passing of the decree. He added that the Subordinate Judge himself, by ordering attachment of immoveable properties in E. P. No. 16 of 1944 and E. P. No. 62 of 1944, and calling for sale papers (which were actually filed in E. P. No. 62 of 1944, and even a sale notice was issued), had led the decree-holder to believe that the decree had been really transferred to the original side as per the application made by her in E. A. No. 376 of 1937, and, so this was a case where limitation ought to be overlooked, the E. P. allowed to be amended, and the transfer to the original

*C.R.P. Nos. 318 to 320 of 1947. 4th August, 1950.

side made, the attached immoveable properties sold, and the decree amount realised and paid to the decree-holder. I cannot agree. It is obvious that the period of limitation cannot be extended and the absence of jurisdiction to sell the immoveable properties (either in the small cause side or in the original side) overlooked, as it operates against the vested interests of the judgment-debtors (respondents 2 to 7). Though the *Judge* on the original side and the small cause side was the same, the *Courts* were different, under section 33 of the Provincial Small Cause Courts Act, and a transfer was essential to confer jurisdiction on the Court on the original side to attach and sell immoveable properties for satisfying this small cause decree. Order 38, rule 13, Civil Procedure Code and Order 21, rule 82, Civil Procedure Code prohibit the attachment and sale of immoveable properties by a small cause Court. Section 7 (*a*) (iii), Civil Procedure Code also shows this. The Bench ruling in *Vengu Chetty* v. *Messrs. Valjee Kanjee and Co.*[1], relied on by Mr. Sastri, will not avail his client. In that ruling it was merely held that an order of transmission of a decree *by the High Court to a mofussil Court* for execution is only a *ministerial* act, and that such an order can be passed *ex parte* even after the death of the judgment-debtor. Nothing was said there about the transfer of a decree *from the small cause side of a mofussil Court to the original side of a mofussil Court* on an application made *after limitation had expired* under section 48, Civil Procedure Code. *In the High Court*, the order of transfer to a mofussil Court may be a ministerial act; but, *in the mofussil* it may be a *quasi judicial* act, and not a mere ministerial act, as the mofussil Courts have not got the elaborate staff and gazetted officers of the High Court, and the Judge himself deals with all such applications for transfer of decrees and passes orders on them. Anyway, the Bench in *Vengu Chetty* v. *Messrs. Valjee Kanjee & Co.*[1] never said that an application made *after limitation had operated* should be granted. It is against all law and equity to overlook limitation, and rob the vested rights of parties, in the absence of fraud, or at least fraud in equity, though it is a technical right and may grate against the ordinary layman's sense of fair-play. Limitation is as valid and binding as any other plea in law, when it is fully proved, as here. Of course, the original side would get jurisdiction to entertain an application for execution and to attach and sell immoveable properties to satisfy a small cause decree *the moment the transfer was made* (*Perumal Chettiar* v. *Kotayya*[2]), *but certainly not a moment earlier Error of Court*, ordering the attachment of immoveable properties, without a transfer order will not cure *want of jurisdiction*. The ruling of Mockett and Clark, JJ., in *Divakaran* v. *Brahmadathan*[3], was relied on by Mr. Sastri for urging that the amendment ought to have been allowed overlooking limitation. I have looked into that ruling. It will not help the decree-holder in this case. There, it was the duty of the Court to return an execution petition for the sale of immoveable property for rectifying certain *formal* defects. It failed to do so. When those formal defects were sought to be set right in a petition filed by the decree-holder for amendment of the E. P., which had been filed before limitation operated, the petition itself having been filed after the period of limitation, the Bench held that the Court had powers to order the amendment. But no question of *jurisdiction* of the Court was involved there, as here. The E. P. was filed in the Court having jurisdiction *before limitation*, and no amendment was required to give the Court *jurisdiction*, as here. There, the original side had jurisdiction to attach the immoveable properties and bring them to sale *only after the small cause decree had been transferred to the original side*. Before that, any order for attachment of immoveable properties passed by it in ignorance would be of no avail. A Court is not expected to instruct ignorant country rustics, or women, or paupers, or minors, under our law, to put in all necessary applications before limitation operates, as Mr. Shastri contends. That is the duty of their lawyers and advocates, not of Courts. The mere fact that the petitioner, a woman, loses more than Rs. 300, the entire fruits of her decree, cannot be a ground for overlooking the law. It is proverbial that hard cases make bad law.

1. (1935) 69 M.L.J. 862.
2. (1945) 2 M.L.J. 555.
3. (1945) 1 M.L.J. 447 : I.L.R. 1946 Mad. 117.

It has been held by Addison, J., in *Sriram* v. *Tulsiram*[1], that a small cause Court cannot attach immoveable property in execution of a decree even though it is also an ordinary Court, and the same Judge presides over both the Courts, unless the decree has been transferred to the ordinary side. No ruling to the contrary, of any of our High Courts, has been shown to me ; nor is it possible for such a ruling to exist in view of section 7 (*a*) (iii), Civil Procedure Code and Order 21, rule 82, Civil Procedure Code and Order 38, rule 13, Civil Procedure Code. It is, of course, true, as Mr. Sastri urged, relying on some rulings, that a written application for transfer to the original side is not essential, and that it is enough if the Judge acts on *an oral request*, (as in the case of adjournments) and transfers the decree to the original side, by an order passed by him. He can then proceed to attach immoveable properties after such transfer. But it is one thing to say that *no formal application or order* is necessary for transfer to the original side, and quite a different thing to say that *no application or order* is necessary for transfer to the original side. In this case there was no application for transfer, or order of transfer to the original side, formal or informal, after contest or *ex parte* . The decree-holder brought on limitation on her head by her own laches. She filed E. P. No. 39 of 1936 on 8th January, 1936 itself but allowed it to be dismissed on 27th February, 1936 by paying no batta. She filed E. A. No. 376 of 1937, on 21st June, 1937, for transfer of the decree to the original side, but allowed that application to be dismissed on 22nd June, 1937, by failure to pay batta. After this phenomenal piece of laches, she cannot be heard to say that she thought that the transfer was made, and that the Court's orders attaching the immoveable properties in E. P. Nos. 16 and 62 of 1944, misled her into thinking that the transfer was made in that E. A. She filed E. P. No. 171 of 1940, on 24th June, 1940, but allowed that E. P. to be dismissed on 6th September, 1940, by failure to pay batta. She filed E. P. No. 185 of 1943, on 25th June, 1943, for attachment of moveables, and attachment of moveables was ordered, but the E. P. was dismissed on 13th October, 1943, as no moveables could be found for attachment. She could, and should, have applied at once for transfer of the decree to the original side and got the immoveables attached. She failed to do so. There is no question of constructive *res judicata* preventing the judgment-debtors from opposing this E. P. because of their refusing the sale notices issued in E. P. No. 62 of 1944, as urged by Mr. Sastri. When the Court has no *jurisdiction* to entertain an execution petition on the original side and attach immoveables and issue sale notices, its acts in attaching immoveables and issuing sale notices are *null and void*, and as if they are not, and will never operate as *res judicata*.

All the three civil revision petitions deserve to be and are hereby dismissed, but, in the very peculiar circumstances, and seeing that the petitioner was perhaps misled by the Court's attachment of immoveables and the respondents not objecting to the sale notices into believing that no transfer application or order was necessary in cases where both original and small cause jurisdiction rest in the same judge, and that she has realised not a pie despite numerous execution petitions, without costs.

K.C. *Petition dismissed.*

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1. A.I.R. 1929 Lah. 398.

[FULL BENCH].

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO, MR. JUSTICE PANCHAPAKESA AYYAR AND MR. JUSTICE BALAKRISHNA AYYAR.

N. M. Rayalu Iyer Nagaswami Iyer and Co., through one of its partners, N. M. R. Venkatakrishna Aiyar and another .. *Appellants**

v.

Ambalam Shanmugham Chettiar .. *Respondent.*

Madras Agriculturists Relief Act (IV of 1938), section 14—Applicability—Personal decree against non-agriculturist on a mortgage executed by him as manager of joint family—Section 14 is applicable.

Per Full Bench.—Whether a debt is a family debt or not does not depend upon the personal liability cast on the executant. The test to ascertain whether a debt is a family debt or not depends upon the character of the debt, but not on the person who executed it. When there is a personal decree on a mortgage against the executant thereof, who is a non-agriculturist member of the family, section 14 of Madras Act IV of 1938 is applicable. The section is applicable in regard to such personal decree obtained against him in respect of the balance of the family debt.

Nalanuai v. *Dakshayani Amma*, (1942) 1 M.L.J. 418, disapproved.

Madras Agriculturists Relief Act (IV of 1938), sections 8 and 14—Prior order on application under section 8—If operates as res judicata in application under section 14—Usurious Loans Act (X of 1918)—Relief under—If can be claimed in application under section 14 of Madras Act (IV of 1938).

Per Division Bench after expression of opinion by the Full Bench.—The cause of action for filing an application under section 8 of Madras Act, IV of 1938, and the relief claimed therein are different from that claimable in an application under section 14 of the Act and an order on an application under section 8 will not operate as *res judicata* in application under section 14.

Relief under the Usurious Loans Act should be claimed and obtained before the decree is passed and the debtor is not entitled to such relief in an application under section 14 of Madras Act (IV of 1938).

Appeal against the orders of the Court of the Subordinate Judge, Mathurai, dated 2nd September, 1948, in I. A. Nos. 11 and 161 of 1945, in O. S. No. 114 of 1925, respectively.

C. S. Rama Rao Sahib for Appellants.

K. S. Ramabhadra Aiyar for Respondent.

(This Appeal coming on for hearing before Subba Rao and Chandra Reddi, JJ., on 2nd September, 1949, the Court made the following Order of Reference to a Full Bench :)

Chandra Reddi, J.—This is an appeal from the judgment of the Principal Subordinate Judge of Madura in I. A. No. 11 of 1945. This appeal involves the interpretation of section 14 of Act IX of 1938.

The facts of the case are not in dispute. For an appreciation of the question that arises for decision in this appeal a few material facts may be stated. A mortgage was executed by the 1st defendant for himself and as the guardian of his son, the 2nd defendant, in September 1921, for a sum of Rs. 50,000. As the debt was not discharged, the mortgagee filed a suit O. S. No. 114 of 1925, on the file of the Sub-Court, Madura, on foot of the mortgage against defendants 1 and 2 on the basis that the properties mortgaged were the self-acquired properties of the 1st defendant, though the father of the 1st defendant, Thothan Chetti, and his paternal uncle were alive. During the pendency of that suit Thothan Chetti, the father, and Muthuvedugan Chetti, the uncle, filed two applications, I. A. Nos. 159 and 160 of 1926 to get themselves impleaded as parties to that suit alleging that the properties mortgaged were joint family properties, and that Thothan Chetti was the manager of the family. These applications were dismissed on the ground that the properties were mortgaged as the self-acquired properties of the 1st defendant, and that the applicants were claiming a title paramount to the mortgagor.

In January, 1930, the Court passed a decree for sale as against the first defendant but dismissed the suit so far as the 2nd defendant was concerned on the ground

* A.A.O. No. 644 of 1946. 16th August, 1950.

that the mortgage was not binding on him. The matter was carried in appeal to the High Court which confirmed the decree against the 1st defendant and passed a simple money decree against the 2nd defendant to the extent of his share in the family property holding that the mortgage as such was not binding on him.

In execution of the mortgage decree passed by the Sub-Court against the 1st defendant a sum of Rs. 42,513 was realised by bringing to sale his share of the property in E. P. No. 48 of 1931 on 5th October, 1931. Another sum of Rs. 24,300 was realised in execution of the money decree passed against the 2nd defendant by bringing his interest in the mortgaged properties to sale in E. P. No. 55 of 1935, on 13th July, 1936. In further execution various sums amounting to Rs. 6,070-7-9 were realised between 11th July, 1941 and 13th September, 1943. After the 1st defendant's share of the mortgaged property was sold in E. P. No. 48 of 1931, the plaintiff obtained a personal decree in November, 1932 under Ex. D-2 for a sum of Rs. 1,14,398-7-9 against the 1st defendant.

The plaintiff who purchased these properties in Court auction filed O. S. No. 75 of 1934 on the same mortgage against Thothan Chetti, Muthuvedugan Chetti and others for a decree for sale of their interest in the mortgage properties on the basis that the properties mortgaged were the joint family properties of the entire family. The Court holding that the mortgage was binding on Thothan Chetti as it was executed by the 1st defendant as the *de facto* manager of the family and for binding purposes, passed a mortgage decree against Thothan Chetti for the full amount deducting the amounts already realised in execution of the decree in O. S. No. 114 of 1925. It also held that Muthuvedugan Chetti had become divided and had therefore no interest in the mortgaged properties. Thothan Chetti sought relief under Madras Act, IV of 1938, as by the time the judgment was pronounced the Act had come into force ; but he was refused relief under the Act as it was found that the 1st defendant who was the *de facto* manager was assessed to house tax on an annual rental of more than Rs. 600. Against the judgment of the Subordinate Judge, there was an appeal to the High Court which while confirming the decree of the trial Court held that Thothan Chetti was entitled to the benefit of the provisions of the Madras Agriculturists Relief Act, as the 1st defendant must be deemed to have been assessed to property tax only as an individual and that the joint family was not disqualified from claiming relief under the Act. In the result relief was granted to Thothan Chetti under sections 8 and 14 of the Act, and he was thereby made liable only for a moiety of the principal amount.

It may be mentioned that the 1st defendant also applied to the Court which passed the decree against them for scaling down the debt under sections 18 and 19 of the Act as soon as Madras Act, IV of 1938 came into force ; but that petition was dismissed as the 1st defendant was not an agriculturist as defined in the Act, since he was assessed to house tax on an annual rental value of more than Rs. 600.

I. A. No. 11 of 1935, which has given rise to the present appeal was filed by the 1st defendant under sections 8 and 14 of the Act for scaling down the debt after the judgment of the High Court in O. S. No. 75 of 1934 granting relief to Thothan Chetti under the same provisions of the Act. This application was opposed by the plaintiff on various grounds, the main ground being that the decree now subsisting was a personal decree against the 1st defendant and not a family debt so as to attract the application of section 14 of the Act. The trial Court overruling the objections raised on behalf of the plaintiff granted relief to the 1st defendant under section 14 of the Act declaring that he would be liable only for a moiety of the decree amount, after giving credit for the various amounts realised in execution of the decree. The plaintiff has preferred the present appeal against this order of the learned Subordinate Judge.

It was urged before us on behalf of the appellant by his learned counsel, Mr. Rama Rao Saheb, that the decree remaining to be satisfied being only a personal decree against the 1st defendant, it does not attract the provisions of section 14 of

Act, IV of 1938. According to the learned counsel, sub-section (a) of section 14 applies only to a case where the share of a non-agriculturist member in the family property is sought to be proceeded against in respect of his share of the family property and not to a case like the present where there is only a personal liability against the non-agriculturist member.

In support of his contention that the personal liability of the mortgagor is not affected by the provisions of section 14 of the Act, the learned counsel for the appellant cited to us two decisions, one reported in *Jagannatha Aiyangar* v. *Subbiah Chettiar*[1] and the other in *Nalanunni* v. *Dakshayani Amma*[2]. Before I proceed to examine the cases cited before us I propose to set out the provisions of section 14 of the Act. Section 14 provides :

" Notwithstanding anything contained in section 3 (ii) and subject to the provisions of sections 5 and 6, where in a Hindu family, whether divided or undivided, some of the members liable in respect of a family debt are not agriculturists while others are agriculturists, the creditor shall, notwithstanding any law to the contrary, be entitled to proceed—

(a) against the non-agriculturist member or members and his or their share of the family property, to the extent only of his or their proportionate share of the debt ; and

(b) against the agriculturist member or members and his or their share of the family property, to the extent only of his or their proportionate share of the debt which shall be scaled down in accordance with the provisions of this Act."

Of the two decisions relied on by the learned counsel for the appellant the first is no authority for his proposition. The facts of that case are the following : A personal decree was obtained against defendants 1 to 5 on a promissory note executed by them for a debt binding on the family. Defendants 6 and 7 who did not join the execution of the promissory note were also made liable as the debt was binding on the family. Defendants 3 to 7 applied for scaling down the debt and it was accordingly scaled down under section 8 of the Act. Having regard to the fact that the first defendant was adjudged an insolvent and the second defendant ceased to have any interest in the family the question arose whether the creditor could proceed individually against each of the judgment-debtors for his share of the debt, and whether section 14 of the Act was applicable or not. The lower Court held that section 14 had no application to the case as it was a contractual debt and not a family debt. While revising that judgment Horwill, J., held that if a debt is a family debt, it must be a family debt with regard to every member of the family and that where there are agriculturists as well as non-agriculturists members in a joint Hindu family, the agriculturist members thereof were liable for their share of the scaled down debt as a group, while the latter were liable for their share of the unscaled down debt as another group. So there is nothing in that decision on which reliance could be placed by the learned counsel for the appellant. But the case reported in *Nalanunni* v. *Dhakshayani Amma*[1], lends support to the argument advanced by him. In that case, one of the questions that arose for decision was whether the personal liability of the executants of a promissory note who were sued on the note along with the other members of the family was covered by section 14 of the Act. The argument that section 14 applies only to the liability of a member in respect of his share of the family property and does not affect his personal liability found favour with the learned Judges and they held that the operation of section 14 did not in any way affect the personal liability of the executants of the promissory note.

In coming to that conclusion the reasoning adopted by the learned Judges was that the acceptance of the other interpretation would necessarily involve reading into the section some qualifying words to the effect that the creditor shall be entitled to proceed personally only if he can claim a personal remedy against the debtor and that it also involved

" the creation of a liability which does not exist in the contract, in order to limit a contractual liability in favour of a class of persons whom the Act was not specifically designed to benefit."

They further observed that the word " and " in the phrase " member or members and his or their share " must be read as equivalent to " in respect of " and that

1. (1940) 2 M.L.J. 187. 2. (1942) 1 M.L.J. 418.

section 14 must be read as relating only to the liability of such a member in respect of his share of the family property. It was the opinion of the learned Judges that the interpretation adopted by them would involve the least deviation from the language and the apparent scope of the section. With this view, I express my respectful disagreement. In my opinion by construing section 14 in that manner we have to import words and meaning into that section which it does not contain.

It appears to me that the apparent scope of the section is that the agriculturist or non-agriculturist member who is liable in respect of a family debt can be made liable only to the extent of his share of the debt, irrespective of the nature of the liability. The section does not seem to postulate the existence of a share in the family property as a condition precedent to his claiming relief under the section. The debtor whether agriculturist or non-agriculturist can seek the benefit of the provisions of section 14, whether the liability is a personal one or that of the property, so long as the liability is annexed to the family debt. I think the intendment of the section is that a creditor can proceed against a non-agriculturist member or members of a family for a family debt, both against him or them and his or their share in the family property only to the extent of his or their proportionate share of the debt. It only means that whether the creditor seeks to proceed personally against the agriculturist or non-agriculturist member of the family or against his share in the family property, he could do it only to the extent of his share of the debt. I believe that this section deals with the apportionment of liability of a family debt between agriculturist and non-agriculturist members of the family, the agriculturist members being made liable in respect of their share of the scaled down debt, while the non-agriculturist members are answerable to their share of the debt as not scaled down. I am therefore unable to accept the principle laid down in *Nalanunni* v. *Dhakshayani Amma.*[1]

As I am inclined to take a view different from that taken by the learned Judges in that case with regard to the construction of section 14 of Act IV of 1938, and having regard to the frequency with which the matter arises for decision I consider that the matter should be placed before my Lord the Chief Justice for referring the following for decision by a Full Bench :

"When there is a personal decree obtained on a mortgage against the executant thereof, who is a non-agriculturist member of the family, does it attract the application of section 14 of Madras Act IV of 1938?"

Subba Rao, J.—I agree with my learned brother that the question may be referred to a Full Bench. The facts have been fully stated by the Subordinate Judge and also by my learned brother in his judgment and it is not, therefore, necessary to restate them. As we are differing from the judgment of a Bench of this Court in *Ekkanathtavazhi Karnavan and Manager Dakshayani Kunchi Amma's children Nalanunni* alias *Ponnunni* v. *Manikkath Kunhi Ammu Amma's children Dakshayani Amma*[1], I think it is as well that I give some of my reasons for doing so.

The relevant section of the Madras Agriculturists Relief Act reads as follows :

"Notwithstanding anything contained in section 3 (ii) and subject to the provisions of sections 5 and 6, where in a Hindu family, whether divided or undivided, some of the members liable in respect of a family debt are not agriculturists while others are agriculturists, the creditor shall, notwithstanding any law to the contrary, be entitled to proceed—

(*a*) against the non-agriculturist member or members and his or their share of the family property, to the extent only of his or their proportionate share of the debt; and

(*b*) against the agriculturist member or members and his or their share of the family property, to the extent only of his or their proportionate share of the debt which shall be scaled down in accordance with the provisions of this Act."

The section applies if two conditions are complied with (1) the debt is a family debt, (2) some of the debtors are agriculturists and others are non-agriculturists.

1. (1942) 1 M.L.J. 418.

The learned advocate relied upon the aforesaid decision and contended that as there was a personal decree against the respondent, section 14 ceased to have any application. No doubt, that judgment goes a long way in supporting this contention. But an essential distinction between that case and the case before us may be pointed out. The suit in that case was brought on a promissory note executed by some of the members of a family in regard to a family debt binding on the tavazhi of which the defendants were members. There was a decree against the executants personally and against others to be realised from and out of the family assets. So far as the executants were concerned, they were liable to pay the debt apart from the family debt. In the present case, the respondent was one of the executants of the mortgage deed. Further, at its origin, at the time the final decree for sale was passed, and even after the personal decree was obtained, the debt continued to be a family debt. The personal decree under Order 34, Civil Procedure Code is only a mode of realising the family debt after the mortgaged properties are exhausted. Under that decree, not only the debtor's separate properties but also his share in the other family properties not covered by the mortgage can be proceeded against. That decision may therefore be distinguished on the ground that in that case there was a personal liability, apart from the family liability, whereas in the present case the personal liability is only the working out of the family liability merged in the decree.

Apart from this distinction on facts, with great respect, I cannot agree with the reasons given by the learned Judges in support of their conclusion. The learned Judges noticed that in the most literal interpretation the section would seem to mean that whatever the nature of the liability, so long as it was annexed to the family debt, both the personal property of the non-agriculturist and his share of the family property would be liable only to the extent of his proportionate share of the debt. If so, I fail to see why the literal interpretation should not be accepted, especially as in my opinion, the intention of the Legislature would be given full effect to. The learned Judges gave the following two reasons for not accepting the literal interpretation. (1) The section cannot be read as imposing a personal liability regardless of the nature of the contract in which the debt is embodied. (2) The apportionment of joint liability between agriculturists and non-agriculturists is really not a matter arising with reference to the personal liability of the actual executants. Therefore, to effectuate the supposed intention of the Legis-

alising the debt. It may be argued that even if the appli-
as filed prior to the sale of the properties, the relief under
ined only to the decree on the mortgage. The decision
nption that the character of the debt is changed after the
sed. If on the other hand the interpretation suggested
only the literal interpretation would be given but the
l out smoothly and equitably. The debt would be
e shares of non-agriculturist and agriculturist members
ed is not satisfied by the sale of the share of the members,
ıay be, will be personally liable if that relief is otherwise

asons, I agree for referring the question of law for the

aforesaid Order of Reference, this appeal coming for
sed the following

J.—The question referred to the Full Bench is :

decree obtained on a mortgage against the executant thereof, who is a
family, does it attract the application of section 14 of Madras Act IV

in the Order of Reference and they need not be re-stated
ıough if relevant facts necessary to appreciate the question
h are noticed. Thothan Chetti is the father of Vyravan
Chetti is the son of Vyravan Chetti. Muthuvadugan
her of Thothan Chetti. Vyravan Chetti was the *de facto*
d in that capacity he executed a mortgage deed in favour
nber, 1921. The mortgagee instituted O.S. No. 114 of
ırt of the Subordinate Judge of Mathurai against Vyravan
were the first and second defendants in that suit. He
ee against the first defendant and a money decree against
ıother suit was filed by the plaintiff, being O.S. No. 75
ıe Sub-Court, Mathurai, on the same mortgage against
huvadugan Chetti. In that suit it was held that Muthu-
ɔme divided from the family and therefore he was not
given against Thothan Chetti on the ground that his son
e facto manager of the family when he executed the mort-
ɔbtained against Thothan Chetti was scaled down under
as Agriculturists Relief Act and a decree was given against
half of the principal amount with interest at 6¼ per cent.

Meanwhile, the decree against Vyravan Chetti was
unts were realised by selling the mortgage properties.
mounts due, namely, Rs. 1,14,000 and odd, the plaintiff
against Vyravan Chettiar in November, 1932. Vyravan
of 1945 for relief under section 14 of the Madras Agri-
son filed I.A. No. 161 of 1945 for similar relief. Vyravan
turist, but the son is an agriculturist. But under section
ndivided Hindu family is not an agriculturist, none of his
he male line shall be deemed to be an agriculturist. So,

it is not disputed that defendants 1 and 2 should be treated as one u
cation of section 14 of the Madras Agriculturists Relief Act. It
that for the purpose of this reference, both the suits may be tre
arguments were addressed on the assumption that there was on
decree for a family debt against the first defendant, his son and
personal decree alone against the first defendant. The position,
the judgment-debtor Thothan Chetti is an agriculturist, but th
Chetti and his son Shanmugha are non-agriculturists. There is
only against Vyravan Chetti, the first defendant. Section 14 of t
culturists Relief Act reads :

"Notwithstanding anything contained in section 3 (11) and subject to the
5 and 6 where in a Hindu family, whether divided or undivided, some of the mem
of a family debt are not agriculturists while others are agriculturists, the cre
standing any law to the contrary, be entitled to proceed—

(*a*) against the non-agriculturist member or members and his or their
property, to the extent only of his or their proportionate share of the debt ; and

(*b*) against the agriculturist member or members and his or their share of
to the extent only of his or their proportionate share of the debt which shall be sc
ance with the provisions of this Act."

Mr. Rama Rao Sahib's argument may be put thus : The
for the application of the section is that there must be a family
realised from and out of the family assets. In such a case, if there
and non-agriculturist members of a family who are judgment-debt
of the family will be divided into two groups—agriculturist and no
and the family debt will be divided proportionate to the share of e
creditor will be entitled to recover the share of the debt of each
share of the properties of that group. The section has no appli
creditor seeks to execute the personal decree obtained by him agai
culturist member, as it does not purport to deal or provide for o
out of contracts personally entered into by the members of the fan
he bases upon the words : "in respect of a family debt" within
on the words "against the non-agriculturist member or members
share of the family property" in clause (*a*) of section 14. Emp
upon the words "their share" in clauses (*a*) and (*b*). He conten
truction suggested by him will accord with the dominant intenti
lature to give relief only to agriculturists. I shall now proceed
soundness of the contention on the plain meaning of the clear w
section. The basic fact for the application of section 14 is that the
be liable "in respect of a family debt". The words, be it noted
for a family debt", but "liable in respect of a family debt".
certainly wider in connotation and take in every liability, which i
substance a family debt. In the present case, the debt was in its in
continued to be a family debt. It was contracted by the manag
for family purposes. The Court found it was a family debt. Th
was passed against the *de facto* manager, who could, in the circumst
as representing the family. Even otherwise, the personal decree
the first defendant is only a mode of working out the family de
for the recovery of the balance of the family debt, which could not
by the sale of the family properties and its character is also not lost, a
analysis, the entire family is bound by the debt. If it is a famil
find any difficulty in applying clauses (*a*) and (*b*) of section 14.
Sahib's contention is the words "against the non-agriculturist mer
and his or their share of the family property" in clause (*a*) and th
the agriculturist member or members and his or their share of the f
in clause (*b*) mean against the non-agriculturist member or the agri
as the case may be in respect of the share of the family property.
is not only contrary to the plain meaning of the express words used,
to the language itself. I cannot read into the clauses words whi

especially when without adding such words the section is intelligible and each part thereof is reconcilable. Clauses (*a*) and (*b*) only mean that in the contingency contemplated by the section, the creditor shall be entitled to proceed both against the member or members personally if there is a personal obligation and against his or their property in the case of property obligation of the family. To my mind, the use of the singular "share" also does not create any difficulty. The contention is by reason of the use of the singular "share" in clauses (*a*) and (*b*) of section 14, the personal liability of the executant cannot be separately worked out apart from the group of non-agriculturists of which he would be a component part, for it would lead to complications if in one group some of the judgment-debtors are under personal liability and others under property liability. This complication, if I may say so, is not created by the section, but by the ingenuity of the arguments advanced before us. Under section 3 (35) of the Madras General Clauses Act words in the singular shall include the plural and words in the plural shall include the singular. Therefore, there is no difficulty in construing the word "share" as to mean "shares" when circumstances demand. If so construed, this objection disappears. In support of his contention the learned counsel relied upon the decision of Wadsworth and Patanjali Sastri, JJ., in *Nalanunni* v. *Dakshayani Amma*[1]. It certainly lends support to his argument. In that case a promissory note was executed by 13 defendants, who were all members of a *tavazhi* for a family debt. The *tavazhi* consisted of 25 members. There was a personal decree against the executant of the promissory note and a property liability against the non-executant members of the family. It was argued that section 14 had no application in regard to the personal liability of the executants. The learned Judges observe :

> "In the most literal interpretation, it would seem to mean that whatever the nature of the liability, so long as it is annexed to the family debt, both the personal property of the non-agriculturist and his share of the family property would be liable only to the extent of his proportionate share of the debt. But surely the section cannot be read as imposing a personal liability, regardless of the nature of the contract in which the debt is embodied. If the section is intended at all to govern the personal liability of the agriculturist members of a family, we must necessarily read into it some qualifying words to the effect that the creditor shall be entitled to proceed personally only if he can claim a personal remedy against the debtor."

For construing the section in the manner stated above, they have read the word "and" in the phrase "member or members and his or their share" as equivalent to "in respect of". They have so read the words, as in the learned Judge's view the literal interpretation of the section would involve the creation of a liability, which does not exist in the contract, in order to limit a contractual liability in favour of a class of persons whom the Act was not specially designed to benefit. They assumed that the section was only intended for the benefit of the agriculturists and was concerned only with the liability of the family property. I do not think that the section is conceived entirely in the interests of the agriculturists. No doubt, the Agriculturists Relief Act was enacted to provide for the relief of indebted agriculturists in the Province of Madras. But, at the same time, the Legislature took care to see that in applying the provisions of the Act for the benefit of the agriculturists, the non-agriculturist debtors are not prejudiced. In enacting section 14, it appears to me that the Legislature gave relief to the agriculturists and also lightened the burden cast on the non-agriculturist debtors as a consequence of the relief afforded to agriculturist members. If the debt is scaled down in respect of the agriculturist member of the family, but for the section the entire burden of the debt would fall on the non-agriculturist members and their property. Though the intention of the Legislature is to protect the agriculturist, certainly it is not its intention to increase the burden of the non-agriculturist debtors. To avoid this, section 14 is enacted. Under that section, if there is a family debt and some of the members are agriculturists and others are non-agriculturists, the creditor is entitled to proceed for the proportionate share against the agriculturists and non-agriculturists, as the case may be. Though the literal interpretation of the section may, in one sense, involve the creation of a liability, which does not exist

1. (1942) 1 M.L.J. 418.

in the contract, it does not really impose any fresh liability on the non-executant members of the family. If the debt was a family debt, the executants would be acting only on behalf of the members of the family. Though, in the first instance, the personal decree may be executed only against the executant and his properties, the ultimate liability of the family to the executant remains. The Legislature in enacting the section and in providing relief to the agriculturist might well have taken the ultimate liability of the entire family for apportionment between agriculturist and non-agriculturist members of the family. I cannot also accept the view of the learned Judges that the section is concerned only with the liability of the family property. The section is concerned with the liability "in respect of a family debt" and the fact that in the working out of the provisions of the section, even assuming some unexpected results may flow, is not a ground for ignoring the plain provisions of the section. I cannot, therefore, accept the view of the learned Judges on the interpretation of section 14 of the Act.

Whether a debt is a family debt or not, does not depend upon the personal liability cast on the executant. Documents on behalf of the family for a family debt are ordinarily executed by the manager *de jure* or *de facto*. Some time all the members of the family who have attained majority join in the document. The test to ascertain whether a debt is a family debt or not, depends upon the character of the debt, but not on the person who executes it, though in law the person executing the document makes himself personally liable, though ultimately the family would be bound to recoup him. The same Bench had considered the question, what is a family debt in connection with section 8 of the Madras Agriculturists Relief Act. In the chain of renewals, though the documents were executed by different members of the family, the learned Judges held that if the debt is a family debt, the later document would be a renewal of the earlier one, though in law the executants are liable personally.

In *Doraikannu Odayar* v. *Veerasami Padayachi*[1], the facts are a purchaser of a hypotheca executed a promissory note to the mortgagee for the balance due under the mortgage. The mortgagee obtained a decree under the promissory note against the maker and his sons as members of a joint family. In an application by the son for scaling down the decree, the learned Judges held that when a *member of a joint family executes a fresh document* for a pre-existing liability binding on the family, but incurred on its behalf by another member, such previous debt can be regarded as renewed or included in a fresh document within the meaning of the Explanation to section 8 of the Act.

In *Vasudevan* v. *Unnimaya Anterjanam*[2], it was contended that when an individual coparcener makes himself personally liable for a joint family debt, it must be deemed that there are two liabilities due from two persons, one the liability due from the joint family "person" and the other the liability due from the individual coparcener becoming liable under a subsequent note, and hence he cannot claim that his liability was in renewal of the earlier joint family liability. After negativing the said contention and holding that even in regard to his liability it was a renewal of the earlier family liability, the learned Judges observed at page 89 :

> "When we have a debt due from a joint family acknowledged by the execution of promissory notes by different coparceners, each is in fact on behalf of the family renewing a liability by which the family was bound under the previous documents executed by other coparceners. Although when it comes to the execution of the decree, the coparcener's personal properties may only be liable if he has personally signed the bond, he is in fact signing as a coparcener and as a coparcener he has been liable through the whole series of bonds."

The same view was expressed by Wadsworth, J., in *Kesava Menon* v. *Achuthan Nair*[3], a case relating to Malabar tarwad. At page 42 the learned Judge states :

> "In two cases *Doraikannu Odayar* v. *Veeraswami Padayachi*[1], and *Periakaruppan Chettiar* v. *Appaji Naidu*[4], a Bench of which I was a member, has indicated that when there is a family debt renewed in various documents by different coparceners, any member of the family

1. (1940) 2 M.L.J. 651.
2. (1942) 1 M.L.J. 88.
3. (1942) 2 M.L.J. 41.
4. (1940) 2 M.L.J. 786.

liable for that debt may get the debt scaled down on
he was bound as a member of the family throughout
different coparceners."

When the decision in *Nalanunni* v. *Dakshayani* distinguished it on the ground that that decisic of section 14 as applied to Malabar tarwad in executant members of the tarwad.

From these decisions it follows that tho liable, the debt which he undertakes to disch liability to discharge the same rests on the fa

Another aspect also may be considered. gage decree was for the recovery of the fan incurred, at the time the mortgage decree v personal decree was obtained, the debt did n Order 34, rule 6, Civil Procedure Code, which decree, is a rule relating to procedure of wo in the suit for the sale of the mortgaged prop are sold, if the proceeds realised do not wipe of the family debt will be realised in the m Civil Procedure Code. The executant is ma of the family debt. It cannot, therefore, b defendant is not in respect of the family debt

For the foregoing reasons I hold that se Relief Act is applicable to a non-agriculturist personal decree obtained against him in respec

Panchapakesa Ayyar, *J.*—I agree.

Balakrishna Aiyar, *J.*—I too agree.

(After the expression of the Opinion of on for hearing before Subba Rao and Chand the Court delivered the following

JUDGMENT: *Subba Rao*, *J.*—These ap the Full Bench answered the question Saheb, the learned counsel for the appel He contended that the order of the C in I.A. No. 405 of 1938 in O.S. No. 114 of 1 Madura, operated as a bar to the maintai To appreciate the point raised some materia mortgagee filed O.S. No. 114 of 1925 against obtained a preliminary decree against Vyra The appeal against that decree was disposed 1934. The decree against Vyravan Chetti was given against his son. The mortgagee Chetti's father, Thothan Chetti and obtained ber, 1939. In June, 1938, soon after the Ma the 1st defendant Vyravan Chetti filed ap of the Act for scaling down the decree obta 1925. That application was dismissed on that Vyravan Chetti was not an agriculturist a of the appellant was that as no relief under that application he is now precluded from ra *judicata*.

The learned Subordinate Judge held tha of the principle of *res judicata* on the facts of him. The cause of action for filing an appl

1. (1942) 1 M.L.

Agriculturists Relief Act and the relief claimed therein are different from that claimable in an application under section 14 of the Madras Agriculturists Relief Act. The first defendant Vyravan Chetti filed an application for scaling down the debt on the ground that he was an agriculturist. As he was not an agriculturist the relief for scaling down was negatived. The present application is based on the allegation that though he is not an agriculturist, he will be entitled to the relief under section 14 of the Act. As the scope of the applications and the reliefs obtainable thereunder are different, the order, Exhibit D-1, dated 25th October, 1938, cannot operate as *res judicata*. Further, the first defendant could not have claimed the relief under section 14 of the Act in I.A. No. 405 of 1938. Section 14 presupposes the existence of agriculturist and non-agriculturist debtors and provides for apportionment of the debt between them. When he filed the application for scaling down, the suit against Thothan Chetti was not even decreed. The suit against him was decreed only in November, 1939, and he obtained the relief under the Madras Agriculturists Relief Act only on 6th September, 1943. As the matters then stood the provisions of section 14 were not applicable and he could not have asked for any relief thereunder. He became entitled to a relief only after the decree was obtained against Thothan Chetti and after Thothan Chetti was held to be an agriculturist entitled to relief under the Act. For the above reasons we hold that the present application is clearly maintainable. C. M. A. No. 644 of 1946 is dismissed with costs.

C. M. A. No. 645 of 1946 is an appeal against the order of the Subordinate Judge in I. A. No. 161 of 1945. This appeal also raises the same question that arise in C. M. A. No. 644 of 1946. For the same reasons we dismiss this appeal, but in the circumstances, without costs.

The respondent in C. M. A. No. 645 of 1946 filed memorandum of cross-objections. In that he claimed that relief should be given to him under the Usurious Loans Act. At the outset we may point out that this relief was not asked for in the Court below. Apart from that, we are definitely of opinion that he is not entitled to such a relief under the Act at this stage. He should have raised this plea in O. S. No. 114 of 1925. The Subordinate Judge, who gave a preliminary decree, did not give any finding on the Usurious Loans Act and that decree had become final. Under section 3 (1) of the Usurious Loans Act the Court can give the relief provided by that Act in any suit to which the Act applies. This indicates that the relief under that Act should be claimed and obtained before the decree was passed. As in this case the suit ended in a decree which did not provide for any such relief, it is not now open to the defendant to raise that plea. It is not open to the defendant to go behind the decrees of Court except in so far as otherwise provided for under section 14 of the Act. Section 14 of the Act does not entitle him to get relief under the Usurious Loans Act. We cannot, therefore, agree with the arguments of the respondent that we should now give him the relief under the Usurious Loans Act.

In the result, the memorandum of cross-objections is dismissed without costs.

Appeals and memorandum of objections dismissed.

K. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

The State of Madras, represented by the Collector of East Godavari .. *Petitioner* *

v.

Chitturi Ramanna and others .. *Respondents.*

Provincial Small Cause Courts Act (IX of 1887), Schedule II, Article 7—Suit for damages for violation of lease conditions—Jurisdiction.

Where in a suit by the Government in the Court of Small Causes the plaint in effect only contained a claim for damages for what the Government alleged was a violation of conditions by the defendants as lessee of cattle pasture farms, though there was a mention in the plaint of the rent for the purpose of fixing the quantum of damages, on the question as to the jurisdiction of the Small Cause Court to entertain the suit,

Held, that the suit was properly filed in the Small Causes Court and that Article 7 of Schedule II to the Act did not prohibit jurisdiction.

Petitions under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge, Amalapuram, in S. C. Nos. 92 and 93 of 1948, respectively.

The Government Pleader (*P. Satyanarayana Raju*) for Petitioner.

P. M. Srinivasa Aiyangar for Respondents.

The Court delivered the following

JUDGMENT.—The point for determination in both the civil revision petitions is the same and I therefore deal with them together.

Government sold in auction the right to pasture cattle on certain lanka lands and the respondents became the successful auction purchasers. The terms of the engagement prohibited the lessee from cultivating the land. Apparently the prohibition was imposed as a measure of river conservancy. The terms of the engagement also authorised the Collector of East Godavari to impose a penalty for violation of the condition. After having got possession of the lanka lands for purposes of pasture the respondents cultivated tobacco therein and the Collector imposed a penalty on them. They failed to pay the amount and so two suits were filed against them to recover these amounts on the small cause side of the Subordinate Judge's Court, Amalapuram. The respondents then took the objection that the Small Cause Court had no jurisdiction by reason of Article 7 of Schedule II to the Provincial Small Cause Courts Act. This objection was upheld and the plaints returned for presentation to the proper Court. Government have now come up in revision.

It appears to me that in making the order he did the learned Judge in the Court below overlooked the substance of the plaintiff's claim. That claim was this:

"The defendant took on lease certain lands subject to certain conditions. He has violated one of those conditions. I claim damages for the same. I have the right to determine the question of damages and I have fixed that at a certain figure."

In other words the suit is for damages for breach of contract pure and simple.

Now in fixing the quantum of damages the Collector had regard to the income or profits which the defendants might be expected to have received from the property. But the learned Judge in the Court below was wrong in supposing that this circumstance made the claim a claim for rent or that the suit was for enhancement or ascertainment of rent. That was not asked for at all. The subject of rent was mentioned in the plaint only to show that the amount claimed as damages was reasonable.

An attempt was made to argue that the case fell under Article 31 of the II Schedule to the Provincial Small Causes Courts Act and the decision in *Savarimuthu* v.

* C.R.P. Nos. 907 and 908 of 1949. 31st October, 1950.

Aithurisu Rowther[1], was read in support of that argument. This decision does not apply because all that was decided there was that, where the defendant was in possession under a decree which was subsequently reversed on appeal the plaintiff could not sue him in a small cause Court for the profits the defendant had received from the land. That decision had nothing to do with a claim for damages.

An argument was based on the use in the plaint of the words "unauthorised use and cultivation of the lands and enjoyment of the crops raised by him therein" to the effect that this showed that the claim was for the profits from the land. I

that the plaintiff failed to comply with this requirement and therefore he paid the amount to Koorathalwar and that the plaintiff is therefore not entitled to recover any rent from him.

The learned Subordinate Judge dismissed the suit on the ground that the defendant had never attorned to the plaintiff that the proper remedy of the plaintiff was to file a suit for possession and mesne profits against his mortgagor and that he could not seek to establish his title on the mortgage deed in a small cause suit.

The argument of Mr. T. S. Venkatarama Iyer, learned counsel for the petitioner, was that Koorathalwar was merely a subsequent lessee of the properties, that the subsequent lease would not entitle him to collect the rent from Periaswami Padayachi the earlier lessee, and that he being the mortgagee was the proper person entitled to receive the arrears of rent from Periaswami. The reply on the other side was that the lease in favour of Koorathalwar operates as an assignment of the reversion, that this entitles him to recover the rent from the earlier lessee and also to possession of the properties on the termination of the earlier lease and that it is only subject to these rights, which Govindammal had already created, that the usufructuary mortgage would take effect.

The English law on the point is stated in Halsbury's Laws of England, Vol. 20, page 81 as follows :

"After a lease has been granted, another lease of the same premises is sometimes granted, the term being either concurrent with or subsequent to that of the existing lease. A concurrent lease, provided it is made by deed, operates as a grant of the reversion upon the existing term If the concurrent term is equal to or exceeds the residue of the existing term, the concurrent lessee is entitled to the rent for the whole of such residue, and afterwards to possession for the remainder (if any) of his own term. If the concurrent term is less than the existing term, the concurrent lessee is entitled to the rent during his own term."

Of the English decisions cited, the earliest is *Wordsley Brewery Co.* v. *Halford*[1]. The facts of that case were these. One Mrs. Ann Whiting had granted a lease from year to year in favour of one Halford. Subsequently, Mrs. Whiting granted a lease for 14 years in favour of a brewery company called Wordsley Brewery Co. Thereafter Mr. Whiting, acting as the agent of his wife, issued a notice to Halford to vacate the premises. It was held that the person who should have issued the notice was the Brewery Company and that the notice on behalf of the original lessor was bad. Lord Alverstone, C.J. delivering the judgment of the Court stated

"The grant of the lease, therefore, passes the reversion, and not merely the attornment".

On the basis of this decision, it was argued that the lease to Koorathalwar passed the reversion and entitled him to collect the rent from the earlier lessee, Periaswami Padayachi.

This decision has been followed in this Court in *Manickam Pillai* v. *Rathnaswami Nadar*[2]. In that case, when a tenancy from month to month was outstanding, the properties were leased for a term of 20 years in favour of the plaintiff. The plaintiff issued a notice to quit and sought to eject the earlier tenant from possession. It was held that it was competent to the plaintiff to do so. The decision in *Wordsley Brewery Co.* v. *Halford*[1], was referred to and the learned Judges stated :

"We must adopt this rule unless the Indian law under the Transfer of Property Act is clearly different. Although the matter is not free from difficulty we are inclined to think that the provisions of that Act are not inconsistent with the English rule".

In *Ratnaswami Moopanar* v. *Nagaraja Moopanar*[3] the decision in *Manickam Pillai* v. *Rathnaswami Nadar*[2], is referred with approval and followed.

"Under the English law it is open to a landlord to create concurrent leases, that is, he can execute a lease today for a term and tomorrow he can execute another lease for another term to run from the date on which he executed the latter lease. Such a lease has always been held to be valid and in law would operate as an assignment upon the existing term . . . . . There is nothing to

1. Law Times Reports, Vol. 90, 89.
2. (1917) 33 M.L.J. 684.
3. (1937) 2 M.L.J. 871.

clude the application of this principle to India and it has been adopted by the Indian High urts—Vide *Manickam Pillai* v. *Ratnaswami Nadar*[1]. Therefore, the question is, 'would Exhi- A be a valid lease according to the Transfer of Property Act?' It is conceded that it is. If ubit A had mentioned simply that a lease of the lands which were also the subject-matter of the r lease is being granted that would in law *without anything more* operate as an assignment of the rsion and entitle the lessee under the latter lease to recover the rent due and payable under the ier lease",

h these are Bench decisions and hold the field. It follows that by virtue of the se in his favour Koorathalwar was the person entitled to recover rent from Periaumi Padayachi and the right of the plaintiff would be only to proceed against orathalwar. The plaintiff's suit was therefore rightly dismissed.

Koorathalwar was not made a party in the Court below. So I was asked remand the suit in order to give the plaintiff an opportunity to implead this orathalwar. I do not feel disposed to do so, because the claim against Koorathar for the period covered by the suit is now time-barred.

In the result, the revision petition fails and is dismissed with costs.

V.P.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAGESA SASTRI.

e Venkunaidu .. *Appellant.*

v.

ldu Appanna and another .. *Respondents.*

Limitation Act (IX of 1908), Article 49—Suit by a father-in-law against his daughter-in-law for jewels ted by him and retained by her after her remarriage on the disappearance of her first husband—Limitation—ing point.

Where a suit was instituted in 1945 by a father-in-law against his daughter-in-law to recover in jewels presented to her and retained by her after her re-marriage in 1941 on the disappearance r first husband, (the plaintiff's son), on the question of the starting point of limitation under le 49 of the Limitation Act

Held: The re-marriage was gone through on the supposed death of the first husband, which is admittedly not definitely proved till now. By applying the presumption under section 107 e Evidence Act, the particular step in establishing both the plaintiff's title to the jewels as also nlawful character of the retention now is established and the Court can proceed to act on that . The proper way of applying Article 49 of the Limitation Act to the peculiar facts and circumes of the case is only to hold that it has not been shown that the retention of the jewels was unil at any time prior to three years before the suit was instituted.

Appeal against the decree of the District Court, Vizagapatam, in A.S. No. 171 946, preferred against the decree of the District Munsif Court, Chodavaram .S. No. 306 of 1945.

E. Venkatesam for the Appellant.

D. Narasaraju for the Respondent.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit instituted by the plaintiff-llant to recover certain jewels presented to his daughter-in-law at the time of narriage with his son. It would appear that the son lived for sometime with vife and therafter disappeared. It is now more than seven years since he ppeared and nobody has heard from him. The second defendant, the daughter-w of the plaintiff, married another person in the year 1941. This suit was in December, 1945, for recovery of the jewels or their value. The question decided by me now is one of limitation. The trial Court held in favour e plaintiff and decreed the suit. On appeal the District Judge reversed the e of the trial Court. He was of opinion that the true cause of action is the arriage of the second defendant and limitation commenced to run from the of such re-marriage. As it was more than three years, thereafter, that the suit brought, he dismissed the suit.

1. (1917) 33 M.L.J. 684.

S.A. No. 1730 of 1947. 3rd October, 1950.

In second appeal it is contended that this is a case where the re-marriage is not consequent on divorce between the parties. This is a case where the re-marriage proceeded on the footing of the husband being dead at the time of such re-marriage. Nobody knew for certain whether the husband was really dead or not at that time. But it was certainly on that footing of his supposed or presumed death that the re-marriage took place and it could be valid if at all only on that basis. Even now there is no definite proof that he died or that he died on any particular day. It is only by recourse to the presumption under section 107 of the Evidence Act that the Courts have to act on the basis that the husband is dead. Plaintiff's claim can be sustained only on the footing of his son's death. The difficulty in this case is caused by the fact that neither party is able to prove definitely as to when exactly plaintiff's son died. There is no presumption in law as to the time of death.

Article 49 of the Limitation Act is the Article on which both sides rely as applying to the case. The starting point will be when the possession became unlawful. In the state of affairs as it was in 1941, nobody can say that the retention of the jewels was unlawful. Whether it was lawful or unlawful, depended upon a fact which was unknown to the parties then, and equally unknown till now. But by applying the presumption under section 107 of the Evidence Act, one particular step in establishing both the plaintiff's title to the jewels as also the unlawful character of the retention now is established and the Court proceeds to act on that basis. In these circumstances the proper way of applying Article 49 of the Limitation Act to the peculiar facts and circumstances of this case is only to hold that it has not been shown that the retention of the jewels was unlawful at any time prior to three years before the suit was instituted. In this view it follows that the judgment and decree of the lower appellate Court should be set aside and the appeal remanded to that Court for disposal on the other points. The costs of this second appeal will abide and follow the result of the rehearing of the appeal by the lower appellate Court. Court-fee paid on the memorandum of second appeal will be refunded.

(Leave to appeal is refused).

V.S. *Appeal remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

Kollepara Puthayya *alias* Pulleswara Rao and another .. *Appellants.*

v.

Nalla Suramma .. *Respondent.*

Hindu Law—Joint family—Insolvency of father—Execution proceedings—Official Receiver if should be made a party.

In a joint Hindu family consisting of a father and sons there are three categories of rights : (1) the share of the father (2) the share of the sons (3) the capacity of the father to sell the shares of the sons under certain circumstances. When a father is adjudicated insolvent, only rights which belong to categories 1 and 3 vest in the Official Receiver but not the rights in category 2. And it is open to a creditor of the family to proceed against the rights comprised in category 2 so long as they have not been disposed of by the Official Receiver in exercise of the right in category 3. As there is no bar to the shares of the sons being proceeded against, the sons cannot compel the decree-holder to implead the Official Receiver.

Appeal against the order of the Court of the Subordinate Judge, Eluru, dated 21st October, 1948 in A.S. No. 207 of 1948 (A.S. No.316 of 1947, District Court, Eluru, preferred against the order of the District Munsif Court, Tanuku in E.A. No. 177 of 1947 in O.S. No. 377 of 1942.)

V. Parthasarathi for Appellant.

K. Bhimasankaram for Respondent.

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*A.A.A.O. No. 23 of 1949. 7th November, 1950.

The Court delivered the following

JUDGMENT.—The first objection taken is that the Official Receiver should been impleaded as a party and that the omission to do so renders the execution ceedings incompetent. Now in a joint Hindu family consisting of a father sons there are three categories of rights : (1) the share of the father (2) the e of the sons (3) the capacity of the father to sell the shares of the sons under ain circumstances. When a father is adjudicated insolvent, only rights which ng to categories 1 and 3 vest in the Official Receiver but not the rights in category And it is open to a creditor of the family to proceed against the rights comprised ategory 2 so long as they have not been disposed of by the Official Receiver xercise of the right in category 3. In the present case therefore there is no bar he shares of the sons being proceeded against. The sons cannot compel the ee-holder to implead the Official Receiver. If the Official Receiver thinks ecessary to do so, it is for him to take steps to be brought on record.

The second objection taken, namely, that the Court should not have amended order it made on 14th July, 1943, in I.A. No. 1354 of 1942, is without substance, it is clear that the Court was only rectifying its own mistake which was apparent he face of the record and this too was done after notice and when no objection filed. This Civil Miscellaneous Second Appeal is dismissed with cost.

V. S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

SENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE BASHEER AHMED SAYEED.

M. Arumugam .. *Petitioner* *

v.

State of Madras and another .. *Respondents.*

offender. Eventually he was arrested by the Mathurai Police on 29th April, 1949 under section 54, Criminal Procedure Code, brought to Madras and produced before the Commissioner of Police, who committed him to the Penitentiary, Madras, on the same day. Subsequently he was transferred to the Vellore Jail on 13th August, 1949 by the order of the Inspector-General of Prisons. The order under section 2 (1) (*a*) of the Preventive Detention Act was served on him on 2nd March, 1950 and he is now detained in the Vellore Jail in pursuance of that order.

It is stated in the grounds of detention that the petitioner is an ardent communist and full time non-paid party worker ; and that he was the President of the Tamil Nadu Press Workers' Federation and the keeper of the " Nehru Press " Perambur. The said press under his active connivance and covert activities has always undertaken to print Communist Party propaganda literature for circulation. There are various other activities of a subversive and violent nature attributed to the petitioner and towards the end of the grounds of detention, it is stated that the Communist party is an illegal organisation and the underground Communists all over the state are still indulging in subversive activities such as loot, arson, murder, throwing of bombs etc. It goes on to add that the general situation was, therefore, unsettled and the recent underground circulars and wall posters by the Communists indicate their determination to take advantage of the prevailing conditions to incite labourers and working classes, to cause damage to public institutions and attack police stations and prisons and to try to obtain power by violence. Recent literature seized from the petitioner also indicates that the party is collecting weapons including bombs and revolvers for these occasions. As the petitioner is an active member of this party, according to the Government of the State, in order to prevent acts which are likely to undermine the public safety or the maintenance of public order, the State considers that the petitioner should be detained.

The petitioner in his affidavit before this Court denied most of these allegations, but he does not state that he is not a member of the Communist party as stated in the grounds of detention. The question is, whether under the circumstances, the detention of the petitioner is justified under the provisions of the Preventive Detention Act of 1950. In *Machinder Shivaji* v. *The King*[1], Patanjali Sastri, J. delivering the judgment of the Federal Court in an application for a writ of *habeas corpus* observed as follows :

" It was said that, the Communist party not having been banned in the Province, the appellant's alleged membership of that party, even if true, could not, in the absence of any allegation of acts or conduct on his part suggesting that he was acting or was likely to act in a manner prejudicial to public safety, be regarded as a ground for satisfaction under section 2 (1) (*a*). We cannot accede to this contention. While mere belief in or acceptance of any political ideology may not be a ground for detention under the Act, affiliation to a party which is alleged to be spreading its " doctrine of violence rendering life and property insecure and trying to seize power by violence " may, in certain circumstances, lead to an inference that the person concerned is likely to act in a manner prejudicial to public safety, order or tranquility. The fact that the party had not been out-lawed is immaterial, that being a matter of expediency."

These observations are of great relevancy to the case of the petitioner before us and we are of opinion that this decision should be followed. And if this decision is to be followed the petitioner's application cannot be sustained.

But Mr. N. S. Mani, the learned advocate for the petitioner, strenuously contends that the decision adverted to above, having been passed on 20th January, 1950, is no longer a binding authority on us, in view of the circumstances that India proclaimed itself an Independent, Sovereign Republic on 26th January, 1950, and therefore whatever might have been the binding nature of the decision of the Federal Court on the High Courts prior to 26th January, 1950, subsequent to that date the decision of the Federal Court would not be a binding authority on us. He contends that such judgments can only have a persuasive application and not any binding force. According to the learned advocate, the Federal Court became abolished on 26th January, 1950 and a new Court, the present Supreme Court,

1. A.I.R. 1950 F.C.R. 129, at p. 131.

tion of India. The other argument of the learned advocate is that if we follow
e dicta of the Federal Court extracted above, then we would be following a
cision which deprives the petitioner of the fundamental rights conferred upon
m in Part III of the Constitution. And lastly it is argued that there is no principle
stare decisis in criminal cases and if this decision is not binding, we have to examine
e matter afresh in the context of the circumstances existing at present and find
nether the petitioner being at large is injurious to public safety or maintenance
public order.

At the very outset we may say that even if the matter were *res integra* we would,
a consideration of the grounds set forth in the memorandum of the State Govern-
ent for detaining him; come to the conclusion that the State Government is
stified, in invoking section 2 (1) (*a*) of the Preventive Detention Act against the
titioner. But since the question of law has been elaborately argued before us,
e shall give our opinion on the point.

That the present Supreme Court, is a new Court cannot be disputed, because
is a Court created under the Indian Constitution framed by the representatives
the people of India duly elected to a Constituent Assembly to frame a proper
onstitution for the country. There was no Supreme Court, prior to 26th Jan-
ry, 1950 and there could have been no Supreme Court, with all the plenary,
well as extraordinary powers, which the present Supreme Court has, so long

be bound by the previous decisions of the Federal Court. We shall now advert to the English decisions which have been found out by us.

Indeed, so far as England is concerned, it is well settled that the decision of the House of Lords in a particular case on a point of law is binding in future, unless that decision is held to be wrong by an Act of Parliament. In the *London Street Tramways, Co., Ltd.* v. *The London County Council*[1], the House of Lords laid down that a decision of the House of Lords on a question of law is conclusive and binds the House in subsequent cases. An erronous decision can be set right only by an Act of Parliament. At page 379 in the speech of Lord Halsbury the following passage occurs,

"My Lords, for my own part I am prepared to say that I adhere in terms to what has been said by Lord Campbell and assented to by Lord Wensleydale, Lord Cranworth, Lord Chelmsford and others, that a decision of this House once given upon a point of law is conclusive upon this House afterwards, and that it is impossible to raise that question again as if it was a *res integra* and could be reargued, and so the House be asked to reverse its own decision. That is a principle which has been, I belive, without any real decision to the contrary, established now for some centuries, and I am therefore of opinion that in this case it is not competent for us to rehear and for counsel to reargue a question which has been recently decided."

There are other observations of similar nature at page 380 of the report. In *Young* v. *Bristol Aeroplane Co., Ltd.*[2] a Full Court of Appeal came to the conclusion that a full Court of the Court of Appeal has no greater powers than any division of the Court and that the Court of Appeal is bound to follow previous decisions of its own as well as those of Courts of co-ordinate jurisdiction with three exceptions : (*a*) it may choose between two conflicting decisions of its own ; (*b*) it must refuse to follow a decision of its own, which, though not expressly overruled, is inconsistent with a decision of the House of Lords ; (*c*) it is not bound to follow a decision of its own given *per incuriam*. Similarly a Divisional Court in England, is bound to follow its own decision in previous cases on a point of law. It must as a general rule, follow a previous decision and should, therefore, avoid conflict of authority and lack of finality. Vide *Huddersfield Police Authority* v. *Watson*[3]. We need not multiply authorities, though an interesting discussion on the point can be seen regarding the binding nature of a Divisional Court on a subsequent Court in *Police Authority For Huddersfield* v. *Watson*[3]. That judgment followed the decision in *Young* v. *Bristol Aeroplane Co., Ltd.*[2] There have been conflicting decisions regarding the aplicability about the binding nature of a decision of a Judge sitting in a King's Bench upon another Judge sitting alone. In *Papworth* v. *Battersea Borough Council*[4], Scrutton J. agreeing with Horeidge J, expressed an opinion which has been later not shared by de Parcq, J. in *Green* v. *Berliner and others*[5]. It is also clear in England that the law laid down in undefended cases are sometimes not binding in succeeding cases. Vide *Dodd* v. *Dodd*[6], and also *White* v. *White*[7]. It is well known that a decision in war pension cases has no binding authority. Vide *Minister of Pensions* v. *Higham*[8]. So far as the Privy Council is concerned as we understand, its decisions stand on the same footing as those of the House of Lords. But there have been instances where a judgment delivered by a smaller number of members constituting the Judicial Committee has been held to be not binding when the Board consists of larger number of members. See the observations in *Brij Narain* v. *Mangala Prasad*[9] commenting on the decision in *Sahu Ram's case*[10]. But that is an exception and not a rule.

What we have discussed above relates to the binding nature of the previous decisions of courts of co-ordinated or equal jurisdiction in a county where there has been no change of Government. No decision of any court has been brought to our notice, where, after the status of the country has been changed, the previous decisions

1. (1898) A.C. 375.
2. (1944) 2 All.Eng.Rep. 293 : (1944) K.B. 718.
3. (1947) 2 All. Eng. Rep. 193 : (1947) K.B. 842.
4. (1916) 84 L.J. K.B. 1881 at 1885.
5. (1936) 1 All Eng. Rep. 199.
6. 1906 Probate 189.
7. (1948) 2 All Eng. Rep. 151.
8. (1948) 1 All Eng. Rep. 863.
9. (1923) 46 M.L.J. 23 : L.R. 51 I.A. 129 : I.L.R. 46 All. 95 (P.C.).
10. (1917) 33 M.L.J. 14 : L.R. 44 I.A. 126 : I.L.R. 39 All. 437 (P.C.).

have been held to be binding on the subsequent courts. Therefore the matter is *res integra* and we have to be guided mainly, if not solely, by the provisions of the Constitution of India. But before we discuss the provisions of the Constitution it is necessary to refer to a very recent case which the learned counsel for the petitioner invited our attention to and that is *Rex* v. *Taylor*[1]. Lord Goddard in delivering the judgment of the Court of Criminal Appeal observed that although in civil cases under the rule of *stare decisis* a court of appeal considered itself bound by its own decisions, the same rule did not apply in criminal cases where the liberty of the individual was concerned and, consequently, if, in the opinion of the full court, the law had been misunderstood in an earlier case, the Court would reconsider the matter. Reconsidering the earlier decision in *Rex* v,. *Treanor*[2], the learned Judge held that the law laid down in the previous case was wrong. At page 172 the following observations occur :

"I should like to say one word about the re-consideration of a case by this Court. A Court of appeal usually considers itself bound by its own decisions or by decisions of a Court of co-ordinate jurisdiction. For instance, the Court of appeal in civil matters considers itself bound by its own decisions or by the decisions of the Exchequer Chamber, and, as is well known, the House of Lords always considers itself bound by its own decisions. In civil matters it is essential in order to preserve the rule of *stare decisis* that that should be so, but this Court has to deal with the liberty of the subject and if, on reconsideration, in the opinion of a full Court, the law has been either misapplied or misunderstood and a man has been sentenced for an offence, it will be the duty of the Court to consider whether he has been properly convicted. The practice observed in civil cases ought not to be applied in such a case, and in the present case the full Court of seven judges is unanimously of opnion that *Rex* v. *Treanor*[2], was wrongly decided."

The learned advocate for the petitioner contends that we should hold that the decision of the Federal Court cannot be said to be a decision of superior court, but could only be at the most, one of co-ordinate jurisdiction and therefore following the observations of Lord Goddard it is open to us to consider the correctness or otherwise of those observations. He also invited our attention to Belas Cardinal Rules of Legal Interpretation at page 23 (3rd edition).

Let us now consider the privisions of the Constitution. The second part of sub-clause (2) of Article 374 is to the effect that Judgments and Orders of the Federal Court delivered or made before the commencement of this Constitution shall have the same force and effect as if they had been delivered or made by the Supreme Court. Mark the words " force and effect ". In the New English Dictionary, the meaning of the word " force " is given as " strength or power " and when dealing with the expression " in force " the interpretation is " operative or binding at the time " so that if we give that meaning to the word " force " it follows that the decision of the Federal Court delivered before the commencement of the Constitution shall be binding and have the same effect as if they had been delivered or made by the Supreme Court. A combined reading of Articles 141 and 374 (2) can lead us only to one conclusion and that is that the decisions of the Federal Court given prior to the 26th January, 1950 shall be binding on all the courts within the territory of India. If the second part of sub-clause (2) of Article 374 makes the decisions of the Federal Court of the same binding nature as if they had been passed by the Supreme Court and if the decisions of the Supreme Court shall be binding on all the courts within the territory of India then it necessarily follows that the decisions on points of law passed by the Federal Court will be binding on the High Courts.

In this connection it will be useful to compare and contrast the provisions of Articles 124 and 214. By Article 124 a Supreme Court is established and by Article 214 the High Courts are also established. In Article 214 (2) it is stated that for the purposes of the Constitution, the High Court exercising jurisdiction in relation to any Province immediately before the commencement of this Constitution shall be deemed to be the High Court for the corresponding State. There is no similar provision in Article 124, so that so far as High Courts are concerned the existing High Courts are continuations of the old High Courts that had been functioning prior to the 26th January, 1950, whereas in the case of the Supreme Court, the

1. (1950) 2 All Eng.Rep. 170. 2. (1939) 1 All Eng.Rep. 330.

Federal Court cannot be said to continue. The law laid down by the Federal Court will be binding on all the Courts in India as if the same had been declared by the Supreme Court only as a result of the reading of Articles 374 (2) and 141.

Though the Supreme Court is a new Court as opposed to the High Courts, under Article 374 (1) we find that the Judges of the Federal Court holding office immediately before the commencement of the Constitution shall, unless they have elected otherwise, become on such commencement the Judges of the Supreme Court so that though the legal status of India has changed and though we are now a Sovereign Independent Republic still it cannot be said that in matters of legal procedure we should not continue the same laws and practice which had been in force prior to 26th January, 1950.

It is argued by learned counsel for the petitioner that Article 374 (2) can only be applied as between the parties. We are not prepared to put such a narrow interpretation upon that clause.

Mr. Mani further contended that if we are to follow the dictum of the Federal Court we would be contravening the fundamental rights, especially Articles 19 and 21. If, in our opinion Article 141 enjoins upon us to follow the law laid down by the Federal Court, then we are unable to see how following one provision of the Constitution can be said to offend against another provision of the Constitution. Even otherwise there is no question of any fundamental rights involved when the Preventive Detention Act itself except section 14 has been declared to be *intra vires* the Constitution by the Supreme Court.

In view of the reasons given by us it seems to us that we are bound by the observations of the Federal Court in *Machindra Shivaji* v. *The King*[1]. This petition is therefore dismissed.

Leave to appeal to Supreme Court granted.

V.P.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND BASHEER AHMED SAYEED.

S. Mohan Kumaramangalam .. *Petitioner.**

Preventive Detention Act (IV of 1950)—Detention under the Act by one State in respect of activities in another State—Legality—Transfer of the detenu from a jail in the former State to a jail in the latter State—Cancellation of order of detention by the former State—Effect—Latter State if can keep detenu in detention by merely passing a fresh order of detention.

The State of Bombay cannot for the purpose of the Preventive Detention Act, 1950, pass orders for detaining a person found within its territory for activities in Madras, that is outside that State, or direct that such a person be interned outside the Bombay State, that is, in Madras. When such detention has been ordered but subsequently cancelled after the detenu had been transferred to a jail in the Madras State under section 2 (2) of the Transfer of Detained Persons Act, 1949, it cannot be validated by the Madras Government serving a fresh order of detention. When once the Bombay Government has cancelled the order of detention, the proper procedure to be followed, would be for the Madras Government to release him and if they considered that he should be detained in the State of Madras, a fresh order of detention should be served on him. In the absence of such a procedure his detention in jail would be illegal and he would have to be released.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to issue appropriate directions to the respondent to restore the petitioner back to Bombay and release him within that State or a writ in the nature of *Habeas Corpus*, for production before the High Court, Madras, the person of S. Mohan Kumaramangalam, a detenu to the Central Jail at Vellore to be dealt with according to law and direct that he be set at liberty.

M. K. Nambiar for *Messrs. Row and Reddy* for Peittioner.

The Advocate-General (*K. Kuttikrishna Menon*) for the State Prosecutor for the State.

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1. A.I.R 1950 F.C. 129.

* Crl. M. P. No. 1622 of 1950. 4th October, 1950.

The Court made the following

ORDER.—The petitioner herein who is a graduate of the University of ›ridge and a Barrister-at-law, applies to this Court under the provisions of le 226 of the Constitution of India for the issue of a writ of *habeas corpus* directing spondents to produce him before this Court, and set him at liberty forthwith.

According to the affidavit filed in support of the application it is stated that he was residing permanently in "Rajbhuvan," Sandhurst Road, Bombay, as arrested on the 24th June, 1950, by the Bombay Police at Kistori Court, Sea Face, Bombay, where he and his wife had been invited to stay for a day. arrant was shown to him at the time of his arrest. He was taken to the of the Commissioner of Police, Bombay, where a detention order of the same was served on him. On the 27th June, 1950, one Mr. H. S. Bhat, an Advocate Bombay High Court, wrote a letter to the Commissioner of Police, Greater ›ay, stating that he had been instructed by the wife of the petitioner to move ligh Court of Bombay about the arrest and detention of the petitioner and for purpose he requested the Commissioner to send him the grounds of deten- immediately. It is stated that the Commissioner of Bombay did not supply dvocate with any grounds of detention. On the 5th July, 1950, the Govern- of Bombay, Home Department, Bombay Special, sent a telegram to the rnment of Madras, which reads as follows :

Secret. No. S. C. 11/991-I. Shri Surendra Mohan Kumaramangalam, top ranking com- : of Madras, has been arrested and detained by Bombay police. Arrest was effected mainly e he was wanted by Madras Police for detention. There is not much specific material to ›asis of grounds to sustain his detention in Bombay. Bombay Government therefore propose ısfer him to Madras and solicits Madras Government's consent under section 2 (1) of Transfer ained Persons Act, 1949. Intimation of consent and also name and place of jail in Madras ch Shri Kumaramangalam should be transferred may please be sent by wire."

he 7th July, 1950, the Chief Secretary to the Government of Madras, sent a am to the Government of Bombay stating that the Madras Government agreed transfer of Surendra Mohan Kumaramangalam, to this State and that he be tranferred to the Central Jail, Vellore, North Arcot district. Copies of etention order and grounds therefore were also asked for. On 8th July, the wife of the petitioner wrote a letter to the Commissioner of Police, Greater ›ay, requesting the Commissioner not to transfer the petitioner from Bombay adras, because an application for a writ of *habeas corpus* has already been in the High Court of Bombay against the arrest and detention of the petitioner hat the same was coming up for hearing on the 10th July, 1950. The letter tates that the request for not transferring the petitioner from Bombay to Madras nade so that the object of the petition in the Bombay High Court may not be ted in case the petitioner succeeded in getting a writ of *habeas corpus* in his r. The last paragraph of the letter informed the Commissioner that if an of this request, the petitioner was transferred to Madras, the matter would ought to the notice of the High Court of Bombay when the case comes up aring. We are informed by the petitioner's Counsel that the petitioner was ved from Bombay by train on 8th July, 1950, but whether it was before or the receipt of the letter of the same date from the wife of the petitioner, is not though a copy of the acknowledgment filed along with the copy of the letter that the letter was received in the office of the Commissioner of Police on th July, 1950, itself. The petitioner was brought to Vellore on 10th July, and has been confined as a detenu within the precincts of the Vellore Central ver since.

An application under section 491, Criminal Procedure Code, which had been in the Bombay High Court on 7th July, 1950, came up for hearing on July, 1950, before Dixit and Chainani, JJ., who made the following order :

The learned Additional Assistant Government Pleader informs us that the order of detention elled. The matter will stand over until tomorrow."

On the same date we find a telegram from the Commissioner of Police, Bombay, to the Superintendent, Central Jail, Vellore, wherein it is stated that the detention order issued by the Commissioner of Police, Bombay, against Surendra Mohan Kumaramangalam, has been cancelled and that the Bombay High Court has given directions that he should be released at once if there is no other order or anything against him. The Commissioner of Police Bombay, wanted to be informed as to the action taken. A copy of this telegram was also forwarded to the Deputy Inspector-General of Police, C. I. D., Madras. On 13th July, 1950, when the *habeas corpus* application was again taken up in the Bombay High Court, the learned Judges made the following order :

"The learned Additional Assistant Government Pleader informs that an order for the appellant's release has been sent. In view of this no order is necessary on this application."

Evidently, the order of release mentioned by the learned Judges refers to the telegram of the 12th July, sent by the Commissioner of Police, Bombay, to the Superintendent, Central Jail, Vellore. The petitioner states that he has not been released in pursuance of the telegram from the Commissioner of Police, Bombay, to the Superintendent of the Central Jail at Vellore.

While matters were in this state, on 12th July, 1950, the petitioner was served with a detention order dated 18th April, 1950, issued by the Commissioner of Police, Madras, in exercise of the powers conferred upon him by sub-section (2) of section 3 of the Central Act IV of 1950. The affidavit goes on to state that on 13th July, 1950, the petitioner sent a letter to the Chief Secretary, Government of Madras, stating that his transfer to, and detention in, Vellore Central Jail, were illegal, and demanding his immediate release. In addition to the order of detention passed by the Commissioner of Police on the 18th April, 1950, we find that the Government of Madras passed another order dated 13th July, 1950, wherein it is stated that in exercise of the powers conferred by section 3 (1) (*a*) (ii) of the Preventive Detention Act of 1950, His Excellency the Governor of Madras, directs that Surendra Mohan Kumaramangalam should be detained. On 18th July, 1950, a further order was passed by the Government of Madras revoking the detention order dated 18th April, 1950, issued by the Commissioner of Police. The order of the State Government of Madras dated 13th July, 1950, was served on the petitioner on 14th July, 1950, and the order revoking that passed by the Commissioner of Police was served on him on 20th July, 1950.

The petitioner contends that the order of the Government of Madras detaining him at the Vellore Jail is illegal, improper and *ultra vires*, and since he has been transferred to a jail in this State unjustly and illegally in order to circumvent the assurance given to the High Court of Bombay, the whole proceedings are illegal and he should be released forthwith. It is further alleged that he has been residing in Bombay since May, 1943 and particularly since February, 1950 and therefore the Madras Government has no jurisdiction to detain him and the only authority that could have made an order of such a nature was either the Commissioner of Police, Bombay, or the Union Government, or the Government of Bombay, and since the Commissioner of Police, Bombay, has cancelled his previous order, the petitioner's continued incarceration is totally illegal and therefore he is entitled to be released forthwith.

Before we concern ourselves with the various questions of law raised before us by the learned counsel for the petitioner, it is necessary to consider the legal position regarding the nature of the petitioner's detention in the Vellore Central Jail. As is clear from the telegram of the Bombay Government despatched to the Madras Government on 5th July, 1950, petitioner was transferred to Madras in accordance with the provisions of section 2 (1) of the Transfer of Detained Persons Act, 1949. The object of the Act is to provide for the removal from one unit to another unit, all persons subjected to preventive detention for reasons connected with the maintenance of public order. It lays down that where any person is subject to preventive detention for reasons connected with the maintenance of public order in any Province, the Government of that Province, may with the consent

e each of the States can act only within its own territorial jurisdiction and not
e it.

he second argument relates to the question as to whether it is open to the
s Government to serve an order of detention on a person who is deemed
n the Bombay State and who has not been released in pursuance to the order
by the Police Commissioner of the Bombay Government. We are asked
ide as to what legal effect should be given to the proceedings of the Bombay
Court. In view of the order passed by the learned Judges of the Bombay
Court, it is contended that the order of the Madras Government is *mala fide*
tra vires.

he validity of the petitioner's detention in pursuance to the order of the Com-
ner of Police, Bombay, has to be considered in view of the admission con-

tained in the telegram of the Bombay Government dated 5th July, 1950 that the petitioner was arrested mainly because he was wanted by the Madras Police for detention, as well as the circumstance that there is not much specific material to form the basis of grounds to sustain his detention in Bombay. This raises the question regarding the right of the Bombay Police to arrest a man who was found within the limits of the territorial jurisdiction of the Commissioner of Bombay for his alleged activities outside the Bombay State. If the Bombay police have no power to detain a person for activities outside the State of Bombay, then the arrest itself, with a view to detaining him, should be deemed to be illegal. The provisions of the Criminal Procedure Code are not applicable to the proceedings relating to arrest and detention under the Preventive Detention Act, 1950 (Act IV of 1950). It is only sections 87, 88 and 89 of the Criminal Procedure Code that are made applicable in respect of a person against whom an order of detention has been made and who is absconding or is concealing himself. The learned Counsel for the petitioner urges that section 3 (1) (*a*) (ii) which contemplates the maintenance of public order can be availed of when a State Government issues an order of detention only where such State Government is satisfied that the person should be prevented from acting in a manner prejudicial to the maintenance of public order within the limits of that State. In other words, the Bombay Government cannot arrest and detain a person for his activities outside the Bombay State even though he is found resident within the State of Bombay. For this argument it is necessary to find out whether, under the Indian Constitution, any of the constituent States have extra-territorial jurisdiction or not.

Prior to the enactment of the Government of India Act, 1919, India was governed as a unitary State by the authority of the British Parliament through the Secretary of State for India. The entire executive power was vested in the Governor-General-in-Council and the Provinces did not have any independent existence as such. This position is clear if we follow the various Charters, Acts and Regulations beginning with the Regulating Act of 1872 and culminating in the Government of India Act of 1915. It was only by the Government of India Act of 1919 that there came into existence a classification of central and provincial subjects with some kind of autonomy granted to the Provinces. The preamble to the Government of India Act of 1919 stated that concurrently with the gradual development of self-governing institutions in the Provinces in India, it was expedient to give to those Provinces in provincial matters the largest measure of independence which is compatible with the due discharge by the latter of its own responsibilities. Some kind of development was envisaged and brought into existence by the provisions of the Government of India Act of 1919. The position therefore at the time it was contemplated to enact the Government of India Act, 1935 was that the dominion and authority of the British Crown extended to the whole of British India and it was intended by repealing the Government of India Act of 1919, to take over by the Crown the entire rights and authorities over the whole of the Indian sub-continent and vest some of them in the Provinces and some in the centre, thereby constituting a union of the Provinces with a Federation. That there was such a resumption and redistribution is clear from the report of the Joint Parliamentary Committee contained in paragraphs 151, 152 and 153. These paragraphs were based upon the white paper issued by the British Government wherein it is stated as follows :

> " On the repeal of the present Government of India Act all powers appertaining and incidental to the Government of British India will vest in the Crown , and the transition from the existing constitutional position, will be effected by making them exercisable on behalf of the Crown by the Governor-General, the Governors and other appropriate authorities established by or under the Constitution Act. The powers vested in the Crown in relation to the States and now exercisable through the Governor-General of India in Council, except in so far as they are requisite to the appropriate Federal authority for those purposes, will be exercised by the Crown's representative in his capacity of Viceroy and these powers will be outside the scope of the Federal Constitution ". (*White Paper Proposals*, Introduction, section 9).

It is useful to quote at length paragraphs 152 and 153 of the Joint Parliamentary Report, Volume I :

" The dominion and authority of the Crown extends over the whole of British India and is exercised subject to the conditions prescribed by the existing Government of India Act. It is derived from many sources, in part statutory and in part prerogative, the former having their origin in Acts of Parliament, and the latter in rights based upon conquest, cession or usage, some of which have been directly acquired, while others are enjoyed by the Crown as successor to the rights of the East India Company. The Secretary of State is the Crown's responsible agent for the exercise of all authority vested in the Crown in relation to the affairs of India and for the exercise also of certain authority which he derives from powers formerly vested in the Court of Directors and the Court of proprietors of the East India company, whether with or without the sanction of the body once known as the Board of Control. The superintendence, direction and control of the civil and military Government of India is declared by the Government of India Act to be vested in the Governor-General-in-Council and the Government or administration of the Governors' and Chief Commissioners' Provinces respectively in the local Governments; but powers of superintendence, direction and controls over 'all acts, operations and concerns which relate to the Government or revenues of India' are, subject to substantial relaxation in the transferred provincial field, expressly reserved to the Secretary of State; and whether the Governor-General-in-Council exercises (though no doubt under the general control of the Secretary of State) original powers of his own, or is only the agent and mouthpiece of the Secretary of State, remains perhaps an open question. It is one which has been the subject of dispute in the past between Secretaries of State and the Governor-General; but the sphere of their respective jurisdictions are now well recognised, and the Secretary of State, though maintaining his powers of control, does not in practice exercise any powers of direct administration, a result to which the increasing authority of the Indian Legislature has no doubt materially contributed.

It is clear that in any new Constitution in which autonomous Provinces are to be federally united under the Crown, not only can the Provinces no longer derive their powers and authority from devolution by the Central Government, but the Central Government cannot continue to be an agent of the Secretary of State. Both must derive their powers and authority from a direct grant by the Crown. We apprehend, therefore, that the legal basis of a reconstituted Government of India must be, first, the resumption into the hands of the Crown of all rights, authority and jurisdiction in and over the territories of British India, whether they are at present vested in the Secretary of State, the Governor-General-in-Council, or in the Provincial Governments and Administrations; and second, their redistributions in such manner as the Act may prescribe between the Central Government on the one hand and the Provinces on the other. A federation of which the British Indian Provinces are the constituent units will thereby be brought into existence."

It is therefore clear that when the Government of India Act, 1935, was passed, the Constituent Provinces became autonomous States in whom were vested various legislative and executive powers as defined in and formulated in the sections of the Act. Though federation actually with the Indian States did not come into existence, the system of Government after parts of the Government of India Act, 1935 came into existence, was federal. Schedule 9 in that Act was inserted as a result of section 317 of the Act which was to the effect that pending the establishment of the Federation, the provisions of the Government of India Act, 1919, would continue to be in force in the centre. Section 318 stated that notwithstanding that the Federation has not yet been established, the Federal Court and the Federal Public Service Commission and the Federal Railway Authority shall come into existence and be known by those names, and shall perform in relation to British India the like functions as they are by, or under this Act, to perform in relation to the Federation when established. It is well known that Part II of the Act of 1935 relating to the Federation in the centre was not brought into force even though Part III which dealt with Governors' Provinces was in force. The position, in our opinion, was that the polity and structure of the Government were federal in nature and constitution but that in actual practice Federation with the Indian States had not become an established fact. Though governed by the provisions of the Government of India Act of 1919, as set out in Schedule 9 of the Act of 1935, in so far as the Provinces are concerned, they were considered as constituent units with autonomous powers and to a certain extent there was the Federation of these constituent units for the performance of the powers vested in the Central Government as well. If that is the true and correct position of the Provinces at the time the Indian Independence Act of 1947 was enacted, it is clear that the legislative and executive powers of the States were strictly confined within their territorial jurisdiction.

Section 49 (2) of the Government of India Act, 1935, lays down that subject to the provisions of the Act, the executive authority of each Province extends to the matters with respect to which the Legislature of the Province has power to make laws; and if we look at sections 99 and 100 we find that in the distribution of legis-

lative powers between the Provinces and the Federal Centre, it is enacted that the Federal Legislature may make laws for the whole or any part of British India or for any Federated States, and a Provincial Legislature may make laws for the Province or for any part thereof. Section 100 provides for the subject-matter for the Federal and Provincial Laws, *viz.*, the three lists enumerated in the seventh schedule, as the Federal Legislative List, the Concurrent Legislative list and the Provincial Legislative List. On a reading of sections 99 and 100 the conclusion that one can come to is that a Provincial Legislature cannot make any laws outside the Province at all, and therefore its executive authority is also co-extensive only with its legislative power. Similar provisions are contained in Article 245 of the Constitution of India wherein it is enacted that the Legislature of a State may make laws in the whole or any part of the State. Analogous to section 49 of the Government of India Act, 1935, is Article 162 of the Constitution of India which speaks of the executive power of the State extending to matters with respect to which the Legislature of the State has power to make laws. There is a proviso which holds that in any matter with respect to which the Legislature of the State and Parliament have power to make laws, the executive power of the State shall be subject to and limited by, the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or authorities thereof. On this aspect of the case, our attention was invited to some authorities but it is unnecessary to discuss them in any detail. Whatever might have been the structure of the Government of India and the Provinces prior to the coming into existence of the Independent Republic of India, after the 26th January, 1950, there is no doubt whatever that the territory of India consists of a Union of autonomous constituent States. Regarding the absence of extra-territorial jurisdiction of similar States in Canada and Australia, our attention was invited to *Royal Bank of Canada* v. *Rex*[1], and *Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners Association*[2]. That the conditions in the United States of America are also similar can be seen from page 156, Willoughby's *Constitution of the United States of America*. The observations of Lord Watson at pages 441 and 442 in the *Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick*[3] are relied upon by the learned Counsel for the petitioner but we do not think that it is of any great relevancy to refer to those observations in detail. To our minds, the position is clear that the State of Bombay cannot, for the purpose of the Preventive Detention Act, 1950, pass orders for detaining a person found within its territory for his activities outside that State or direct that such a person be interned outside the Bombay State. The well known case of *Rex* v. *Secretary of State for Home Affairs: O'Brien Ex parte*[4], affords useful guidance for the consideration of topics like this. In that case the Court of Appeal held that after the passing of the Irish Free State Constitution Act on the 5th December, 1922 by which Irish Free State was given a distinct and independent executive, the Secretary of State for Home Affairs in England cannot, under Regulation 14-B of the Regulations made in August 1920, under the Restoration of Order in Ireland Act of 1920, order the internment in the Irish Free State of a person who, at the date of passing the order, was residing in England, At pages 375 and 376 are found the discussion on the subject by Bankes, L.J. Similar expressions of opinion by Scrutton, L.J., are seen in the report at pages 386 and 387. Though alike in certain respects, the observations of Lord Atkin in *Eshugbayi Eleko* v. *Government of Nigeria (Officer Administering)*[5] may be called in aid in support of the contention that the Bombay Government cannot arrest a person and confine him in their State and transfer him to a place outside the State for his alleged activities outside such State.

In *In re Ghate*[6], a Bench of the Bombay High Court held that it was not open to the Commissioner of Police, Greater Bombay, to pass an order under section 3 (2) of the Preventive Detention Act, 1950, with regard to a person who is residing outside Greater Bombay, because the Commissioner of Police cannot exercise

1. (1913) A.C. 283 at 298.
2. 16 C.L.R 664 at 702.
3. (1892) A.C. 437.
4. (1923) 2 K.B. 361.
5. (1931) A.C. 662 at 670.
6. (1950) 52 Bom.L.R. 711.

the powers conferred upon him beyond his own jurisdiction. In that case, at the time the Commissioner of Police passed the order, the person against whom it was directed had already been detained in the Yeravada Prison, Poona, outside the jurisdiction of the Commissioner of Police. At page 713 of the report the learned Chief Justice observes that the jurisdiction under the Preventive Detention Act of the Central Government and the State Governments is not, and cannot be, co-extensive and he expressed his opinion that a State Government could not make an order with regard to a person residing outside the territories of the State Government. It seems to us therefore that when the Commissioner of Police, Bombay, arrested the petitioner as he was wanted by the Madras Police for detention, the arrest was illegal, and the petitioner's detention was also illegal. As already mentioned under section 2 (2) of Central Act XLVIII of 1949, when the petitioner was transferred to Vellore, the provisions of the Bombay Act can alone apply to him as if he had not been removed from that State.

The learned Advocate-General who appears for the Government of Madras contends that since the power of detention implies a power to arrest, in whatever way the petitioner came to be within the State of Madras, when once the order of detention was served on him, he must be deemed to have been validly detained in pursuance of the order passed by the Government of Madras. By way of analogy, he cites instances where persons are arrested under section 151, Criminal Procedure Code and while such persons are in custody, in pursuance of such arrest, orders of detention are served on them and this Court has held that such detentions can be justified. The question is whether a valid order of detention has been served or not and not as to whether the earlier arrest was legal or illegal. Our attention was invited to *Dasappa* v. *The District Magistrate, South Kanara*[1] and *M. R. S. Mani* v. *The District Magistrate, Mathurai and another*[2]. A Full Bench decision of the Bombay High Court in *Jayanthilal*, In re[3], was also relied upon. The Full Bench held that if at the time when a person is undergoing an imprisonment as a result of an illegal arrest and imprisonment an order of detention under the Bombay Public Safety Measures Act was served on him, it cannot be said that the subsequent detention is illegal. In the view of the learned Judges, the detention about which complaint was made was the detention in jail on the date when the application was made and it is immaterial for the determination of this question as to whether the arrest and prior detention were legal or not. The learned Judges further went on to hold that what the Court has to consider was whether on the date when the application for a writ of *habeas corpus* was made the nature of the detention was legal or not. The circumstances under which the petitioner before us has been continued to be detained are different from those obtaining in the Bombay Full Bench case. If the arrest of the petitioner under the authority of the Commissioner of Police, Bombay, was because he was wanted by the Madras Police for detention, as is found from the telegram, then the Bombay Police or the Bombay Government, could have had no reason to believe that the petitioner's being at large in the Bombay State was prejudicial to the maintenance of public order in the Bombay State. Even though the petitioner has been removed to the Madras State from the Bombay State according to the provisions of Act XLVIII of 1949, still the reason underlying the arrest and detention was the fact that the petitioner was required by the Madras Police for being detained. For such a purpose, in our opinion, the Bombay Police or the Bombay Government cannot arrest the petitioner, because according to us, since there is no provision analogous to section 82, Criminal Procedure Code, in the Preventive Detention Act, 1950, the Bombay Police cannot arrest him for being detained in the Madras State. It was on that basis that after the petitioner was transferred to the Madras State, the order of detention passed by the Commissioner of Police, Bombay, was cancelled and therefore when once his order of detention has been nullified by the cancellation of the same, it cannot be validated by the Madras Government by

1. (1949) 1 M.L.J. 583.
2. (1949) 2 M.L.J. 310.
3. (1949) 51 Bom.L.R. 653 (F.B.).

serving a fresh order of detention. Since the Bombay Government had cancelled the order of detention passed on the petitioner, the proper procedure to be followed should have been for the Madras Government to have released him, and if they considered that he should be detained in the State of Madras, a fresh order of detention should have been served in him.

The learned Advocate-General brought to our notice various other decisions, *viz.*, *Empress* v. *Maganlal*[1], *Rudolf Stallmann*, In re[2] and *Jamna* v. *Emperor*[3]. We do not think that the circumstances in those cases can be said to be similar to the present case. In the present case, the petitioner was arrested by the orders of the Commissioner of Police, Bombay, and he was transferred to Madras by the application of the provisions of Act XLVIII of 1949. Until he is actually released from custody he must be deemed to have been governed by the provisions of the law as if he had not been removed from the State of Bombay and when the Bombay Government ordered his release he was entitled to be released.

Had it been a case where as a result of the order of release issued by the Government of Bombay, the petitioner had been released and re-arrested in pursuance to an order of detention passed by the Government, we would not have held that such an order of detention is illegal, because on the materials placed before us it seems to us that the grounds of detention afford sufficient justification for the action of the Government of Madras. In this connection we need only refer to the observations of the Federal Court in *Machindar Shivji* v. *The King*[4]. It is useful to quote the observations in that judgment :

"The grounds communicated to the appellant stated, *inter alia*, that he was working for the communist party of India 'which is spreading its doctrine of violence in different parts of the country, fomenting industrial strikes, causing agrarian unrest, rendering life and property insecure and trying to seize power by violence' and that he was assisting and associating with a named prominent member of the party who had 'gone underground'. It was further stated that, 'from the secret information available to them', the Provincial Government are satisfied that you are likely to go underground and from there guide the various subversive activities of the communist party and thus act in a manner prejudicial to the public safety, order and tranquillity.

It was said that, the communist party not having been banned in the Province, the appellant's alleged membership of that party, even if true, could not, in the absence of any allegation of acts or conduct on his part suggesting that he was acting or was likely to act in a manner prejudicial to public safety, be regarded as a ground for satisfaction under section 2 (1) (*a*). We cannot accede to this contention. While mere belief in or acceptance of any political ideology may not be a ground for detention under the Act, affiliation to a party which is alleged to be spreading its 'doctrine of violence rendering life and property insecure and trying to seize power by violence' may, in certain circumstances, lead to an inference that the person concerned is likely to act in a manner prejudicial to the public safety, order or tranquillity. The fact that the party had not been outlawed is immaterial, that being a matter of expedience. The allegations regarding the subversive activities of the party made in the grounds communicated to the appellant, and later repeated in the affidavit of the Chief Secretary filed on behalf of the Provincial Government remain uncontradicted, the appellant having only stated that he was not a member 'of that party and did not work for it and that he had always been a constitutional trade unionist'. It must therefore be taken, for the purposes of this case, that the said allegations are well founded. If so, membership of that party cannot be ruled out of consideration as material on which no satisfaction could rationally be grounded. There are also allegations already referred to about the appellant assisting and associating with a prominent member of the party who has 'gone underground' and about the likelihood of the appellant himself going underground and from there guiding the alleged subversive activities of the party. On these materials, which are relevant to the purpose of the Act, the Provincial Government say they are satisfied that the appellant is likely to act in a manner prejudicial to the public safety, and it is not for the Court, with its strictly limited powers of interference under section 4 of the Act, to say that they should not be satisfied on such materials."

The grounds of detention served on the petitioner are similar to the grounds dealt with in the case before the Federal Court and we respectfully follow the observations of the Federal Court.

As we have held that the petitioner was not released from the Central Jail, Vellore, as a result of the order cancelling his detention by the Commissioner of Police, Bombay, he is entitled to be released forthwith.

V. S. ——— *Petitioner ordered to be released.*

1. (1882) I.L.R. 6 Bom. 622.
2. (1911) I.L.R. 39 Cal. 164.
3. A.I.R. 1926 Sind 126.
4. A.I.R. 1950 F.C. 129 at 130 and 131.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VISWANATHA SASTRI.

Tej Singh .. *Petitioner**

v.

Soora Subbarayulu Chetty and another .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XV of 1946), section 4 (2)—Fixation of fair rent—Payment of taxes and amount spent for repairs—If can be taken into consideration.

It is erroneous to assume that the payment of taxes and the amount spent or to be spent for repairs cannot properly go into consideration of the question of fixation of fair rent under the Madras Buildings (Lease and Rent Control) Act. It is clear that payment of taxes by the tenant would certainly be one of the circumstances of which the Rent Controller should have due regard in fixing the fair rent under section 4 (2) of the Act.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in H. R. A. No. 524 of 1949, Third Judge of the Court of Small Causes, Madras, and quash the order therein, dated 2nd December, 1949.

M. S. Venkatarama Aiyar and *S. S. Bharadwaj* for Petitioner.

T. C. A. Anandalwar and *S. Kuppuswami* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—In our opinion this application must be allowed and the order of the Appellate Tribunal, the Court of Small Causes, Madras, confirming the order of the Rent Controller, fixing the fair rent of the premises in question must be quashed on the ground that it is vitiated by an error of law apparent on its face. The learned Judge who decided the appeal has assumed that the payment of taxes and the amounts spent or to be spent for repairs cannot properly go into the consideration of the question of fixation of fair rent under the Act. This is clearly erroneous. Under section 4 (2) of the Act in fixing the fair rent regard must be had also to the circumstances of the case including any amount paid by the tenant by way of premium or any other like sum in addition to rent after the 1st April, 1946. It is not necessary to pronounce finally on the question whether the taxes payable by the tenant under a special contract and the amount spent or to be spent for repairs fall within the phrase "any amount paid by the tenant by way of premium or any other like sum". But it appears to us to be clear that such payment by the tenant would certainly be one of the circumstances of which the Controller should have due regard in fixing the fair rent. Undoubtedly, the liability for payment of municipal taxes in respect of the property is primarily on the landlord. If such liability is undertaken by the tenant, the landlord is clearly getting not only the benefit of the rent but also the benefit of the payment of the taxes. If such payment is not taken into consideration in fixing the fair rent, the result would be unfair to the tenant. Whether or not an amount paid by the tenant towards the taxes can be taken into account in ascertaining what the standard rent is according to the English Statutes, the fact would certainly be a circumstance to be taken unto account in fixing the fair rent under section 4 of our Act.

The petitioner also contended that the circumstance that he spent considerable amount on additions and improvements to the building should also be taken into account, but we think that it cannot be. According to an express term in the lease in pursuance of which he effected the improvements, the improvements had to be handed over to the landlord at the end of ten years when presumably they became the property of the landlord. We cannot accept the petitioner's contention on this point.

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* C. M. P. No. 324 of 1950. 3rd October, 1950.

The order of the Appellate Tribunal is quashed. The appeal will have to be heard afresh in the light of this judgment. Whether further evidence should be taken or not is a matter entirely for the Appellate Tribunal in exercise of the discretion conferred on the Tribunal under section 12 (3) of the Act. There will be no order as to costs.

V.S. ——— *Order quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

K. V. R. S. Mani .. *Petitioner.**

Criminal Procedure Code (V of 1898), section 540—Scope of the discretion of Court to call Court witness.

The discretion that is given to Court under section 540, Criminal Procedure Code, is very wide and the very width requires a corresponding caution in using the power given to a Court under that section. By its very nature, the discretion to be exercised under this section depends on the facts of each case. Where the prosecution knowing full well and being in possession of all the materials which can be spoken to by a particular witness and intending to call him as a witness and intimating to the Court at one stage that it intends to call him as a witness, fails to do so, the Court cannot exercise its powers under section 540 of the Code to call such a person as a Court witness. The exercise of the powers of Court in such circumstances will only amount to filling up a gap in the prosecution case.

Case-law reviewed.

Petitions under sections 435 and 439, Criminal Procedure Code 1898, praying that the High Court will be pleased to revise the order of the Court of the Special First Class Magistrate, Madura, dated 25th September, 1950, in C.C. No. 1 of 1948, etc.

V. Ramaswami Aiyar and *C. K. Venkatanarasimham* for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

The Court made the following

ORDER.—These three petitions are preferred against an order passed by the Special First Class Magistrate, Madura, in C. C. Nos. 1, 2 and 3 of 1948 on his file. The order in question was passed under section 540, Criminal Procedure Code, calling Mr. K. R. Venkatarama Aiyar to be examined in the case as a Court witness.

The petitioner is the second accused in the cases and the cases against him and another are for criminal breach of trust in respect of the moneys belonging to the Hindustan Bank of which the first accused was the agent and the petitioner herein, one of his constituents. A civil suit has been filed by the bank which is O.S. No. 65 of 1947 on the file of the Sub-Court, Dindigul, in which the petitioner and his father, the witness sought to be examined, have filed written statements. The suit also relates to the payment of moneys by the first accused to the second accused. The present prosecution is founded very much and is baxed upon the plaint allegations. The case of the prosecution appears to be that the first accused has dishonestly and fraudulently advanced large sums of money to the petitioner herein on securities which are either insufficient or which did not exist contrary to the directions given to the first accused. The charge sheet in the case has been filed after the written statements in the suit have been filed. The prosecution was, therefore, aware of what was contained in the written statement of Mr. Venkatarama Aiyar which was practically adopted by his son, the petitioner herein. After the examination of the prosecution witnesses charges were framed on 7th January, 1950 and when further cross-examination of the witnesses was going on, an application was filed by the prosecution on 6th September, 1950, to examine one Kadir Batcha as additional witness for the prosecution and on the same day, an application was made to examine Mr. K. R. Venkatarama Aiyar as a Court witness. Again on 9th September, 1950, another application was made to examine three more witnesses and all these four additional witnesses were examined between 25th

* Crl. R. C. Nos. 1260 to 1262 of 1950. 18th December, 1950.
(Crl. R. P. Nos. 1190 to 1192 of 1950).

September, 1950 to 30th September, 1950. The order deciding to call Mr. Venkatarama Aiyar as a Court witness was passed on 25th September, 1950. A copy of the application (called memo.) filed to examine Mr. Venkatarama Aiyar as a Court witness has been filed before me. It is stated therein that the prosecution feels that the statement of Mr. Venkatarama Aiyar is substantially true and yet as according to the prosecution it will not be admissible in evidence unless Mr. Venkatarama Aiyar goes into the box and files it and swears to the correctness of the facts mentioned therein, he should be called as a witness to prove the facts. In short, though according to the prosecution, the written statement is not evidence by itself, it must be rendered so by the examination of Sri Venkatarama Aiyar. Another point that is urged in the memo. is that a number of letters from and to Sri Venkatarama Aiyar have been marked as exhibits and that as the proper mode of proving them is by examining Sri Venkatarama Aiyar it prays that the Court may call for him to prove these exhibits. It may be stated at this stage that all these have been filed on the side of the defence. Paragraph 4 of the memo. states that the prosecution are hopelessly unable to take the responsibility of putting him into the box as a prosecution witness as he is the father of the petitioner and has been defending him in Court to some extent. This attempt on the part of the prosecution to get Mr. Venkatarama Aiyar examined as a Court witness was objected to by the petitioner and the lower Court in its order states that the reasons given by the special Public Prosecutor are convincing and there does not seem to be much substance in the objection raised by the second accused and ultimately the Magistrate finds that after going through the evidence of witnesses, he considers that the evidence of Mr. Venkatarama Aiyar is essential for the just decision of the case and so he decided to call Mr. Venkatarama Aiyar as a Court witness.

It appears from the statements made at the Bar that until the charge was framed, Mr. Venkatarama Aiyar was not appearing for the accused but subsequent to the framing of the charge he was appearing for his son now and then. It was therefore contended that to take him as a witness at this stage would be to deprive the petitioner of Mr. Venkatarama Aiyar's assistance and that it would subject the accused to a grave handicap in his legitimate effort to vindicate his innocence. In answer to this, the learned Public Prosecutor stated that at the time when Mr. Venkatarama Aiyar appeared for the petitioner, the prosecution mentioned to the Court that it may call him as a witness. This is not disputed by the other side. Therefore there was no surprise to the defence at Mr. Venkatarama Aiyar being called as a witness and the contention that his being taken away as a witness at a time when his assistance is most needed is likely to prejudice the petitioner's case has no force. But this shows that the prosecution was aware and did think that Mr. Venkatarama Aiyar would be a material witness on its side. In fact the memo. filed itself suggests that his evidence is necessary to prove some of the defence exhibits and that his evidence would also materially help the prosecution. As already stated, at the time when the charge sheet was filed the prosecution was aware of the written statement and if the allegation in the written statement was of material support to the prosecution case, it would have cited him as a witness for the prosecution nor did it subsequently ask the Court to examine him as an additional witness, though it did apply subsequently for examination of additional witnesses who were examined. The prosecution without choosing to examine him on its side chose the method of asking the Court to exercise its powers under section 540, Criminal Procedure Code, to examine him as a Court witness so that it can have an opportunity of cross-examining him. Mr. Venkatarama Aiyar is a prominent member of the Madura Bar and there is no reason for the prosecution to think that he would either go back on his written statement or that he would speak anything contrary to what is contained therein. If his evidence is material it is the duty of the prosecution to call him as its witness and its failure to do so undoubtedly constitutes a defect in its case. The question now is whether he can be permitted to be called as a Court witness under section 540, Criminal Procedure Code, which runs as follows :—

"Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or re-call and re-examine any person already examined; and the Court shall summon and examine or re-call and re-examine any such person if his evidence appears to it essential to the just decision of the case."

This section consists of two parts (1) giving a discretion to the Court to examine the witness at any stage and (2) the mandatory portion which compels a Court to examine a witness if his evidence appears to be essential to the just decision of the case. The discretion that is given under the section, as already stated, is very wide and the very width requires a corresponding caution in using the power given to a Court under that section. By its very nature, the discretion to be exercised under section 540, Criminal Procedure Code, depends on the facts of each case. It is indeed difficult to lay down a general rule as to when and under what circumstances the discretion ought to be exercised. Although the power of the Court to examine a person as a Court witness is governed in this country by section 540, Criminal Procedure Code, such powers exist in the Courts in England also and as our procedure is fashioned mostly on the procedure of the Courts in England, it will be instructive to consider the English decisions on the subject.

In *R.* v. *Chapman*[1] and *R.* v. *Holden*[2], which are the earliest decisions on the point, it was held:

"The presiding Judge at a criminal trial has the right to call a witness not called either by the prosecution or the defence, and without the consent of either the prosecution or the defence, if in his opinion, this course is necessary in the interests of justice."

In *King* v. *Dora Harris*[3], Avory, J., who delivered the judgment, after referring to the above two decisions, states as follows:

"It is true that in none of the cases has any rule been laid down limiting the point in the proceedings at which the Judge may exercise that right. But it is obvious that injustice may be done to an accused person unless some limitation is put upon the exercise of that right, and for the purpose of this case we adopt the rule laid down by Tindal, C.J., in *Reg.* v. *Frost*[4], where the *Chief Justice* said: 'There is no doubt that the general rule is that where the Crown begins its case like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses, because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must close their case before the defence begins; but if any matter arises *ex improviso*, which no human ingenuity can foresee, on the part of a defendant in a civil suit, or a prisoner in a criminal case, there seems to me no reason why that matter which so arose *ex improviso* may not be answered by contrary evidence on the part of the Crown.' That rule applies only to a witness called by the Crown and on behalf of the Crown, but we think that the rule should also apply to a case where a witness is called in a criminal trial by the Judge after the case for the defence is closed, and that the practice should be limited to a case where a matter arises *ex improviso*, which no human ingenuity can foresee, on the part of a prisoner, otherwise injustice would ensue."

The learned Judge held ultimately as follows at page 596:

"In the circumstances, without laying down that in no case can an additional witness be called by the Judge at the close of the trial after the case for the defence has been closed, we are of opinion that in this particular case the course that was adopted was irregular, and was calculated to do injustice to the appellant Harris."

This case was referred to in *Stanley Liddle*[5] and the learned Chief Justice in delivering the judgment states at page 13,

"More than that, it appears also that the matter which was in question was a defence of an *alibi* set up by the prisoner—the commonest of all defences; there is nothing *ex improviso* about such a defence as that. It did not require ingenuity, but only ordinary commonsense to conceive that a person who was charged might be going to say that he was not the man.

In the circumstances it appears to us that neither of the conditions laid down in the case of *King* v. *Dora Harris*[3], was here fulfilled."

The learned Chief Justice held that the course which was taken was irregular and was not rendered necessary by any emergency and as it was likely to cause injustice

1. (1838) 8 C. and P. 558 : 173 E.R. 617.
2. (1838) 8 C. and P. 606 : 173 E.R. 638.
3. (1927) 2 K.B. 587.
4. (1839) 9 C. and P. 129 : 173 E.R. 771.
5. 21 C.A. Rep. 3.

to the accused, allowed the appeal and quashed the conviction. This is approved again in *George Andrew Campbell Memohan*[1]. In *Harold Narman Day*[2], the same rule was applied and the conviction was quashed. The English law as seen from the above decisions proceeds on the principle that though the Court has got a right to call a witness if it thinks necessary, still the discretion is to be limited to the conditions mentioned in the *King* v. *Dora Harris*[3]; that is to say that the practice should be limited to cases where a matter arises *ex improviso* which no human ingenuity can foresee on the part of a prisoner; otherwise injustice will ensue. But, as already stated, we are governed by section 540, Criminal Procedure Code, which consists of two parts, the first part which gives a very wide discretion seems to be similar to the right enjoyed by the English Courts. It is only the second part which enjoins the Court to call a witness if it thinks the evidence of a particular witness is essential for the just decision of the case. Even so, the question is whether when the prosecution knowing full well and being in possession of all the materials which can be spoken to by a particular witness and intending to call him as a witness and intimating to the Court at one stage that it intends to call him as a witness fails to do so whether the Court can exercise its powers to call such a person as a Court witness. The exercise of the power of Court in the circumstances will only amount to filling up a gap in the prosecution case. In *Narayanan Nambiar* v. *Emperor*[4], after referring to the English and Indian decisions Horwill, J., pointed out as follows:

"If, in the present case, the learned Magistrate had examined C.W. 1 for the sole purpose of contradicting D.W. 6, I might have been inclined to hold that he had not exercised his powers under section 540, Criminal Procedure Code, judically."

But then he holds in that case that it is only on account of the lack of foresight on the part of the prosecution the particular witness was not called by it and that need not prevent the Court from examining him as a Court witness. In this case as already pointed out Mr. Venkatarama Aiyar is essentially a witness for the prosecution who should have cited him either in the charge sheet or immediately afterwards. The failure of the prosecution to call him as a witness cannot be made up by the Court exercising its power under section 540, Criminal Procedure Code. Although the Court can examine a witness at the instance of the prosecution or defence, still when the prosecution asks the Court to examine him because it could not examine him, though it had intended to do so, that should be no ground for the Court to exercise its discretion under section 540, Criminal Procedure Code. In my opinion, the Court has in this case exceeded its powers and the order therefore calling Mr. K. R. Venkatarama Aiyar as a Court witness should be quashed. The orders of the lower Court are set aside and the petitions are allowed.

V. P. S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BALAKRISHNA AYYAR.

S. O. Krishna Aiyar .. *Petitioner* *

v.

S. V. Narayanan *alias* S. V. Doraiswami and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 47, rule 1—Scope.

Order 47, rule 1, Civil Procedure Code, is clearly not intended to enable a Judge to write a second judgment reversing his first, because on fuller arguments and further consideration he thought that the view he has first taken was wrong.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the order of the Court of Small Causes, Coimbatore, dated 3rd November, 1948, in I.A. No. 280 of 1948 in S.C.S. No. 191 of 1948.

1. 24 C. A. Rep. 95.
2. 27 C.A. Rep. 168.
3. (1927) 2 K.B. 587.
4. (1941) 2 M.L.J. 787.

* C. R. P. No. 532 of 1949. 21st September, 1950.

S. Ramachandra Aiyar for Petitioner.

R. Desikan for Respondents.

The Court delivered the following

JUDGMENT.—What the learned Judge has really done is to write a second judgment reversing his first because on fuller argument and further consideration he thought that the view he had first taken was wrong. This is clearly not a purpose for which Order 47 (1) is intended. This petition is allowed with costs and the proceedings of the Court below under the power of review which it supposed it had are set aside.

V. S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

Mathradas Valabhadas .. *Petitioner* *

v.

Punathil Aboobacker and others .. *Respondents.*

Contract—Contract for the carriage of goods by boats—Payment of "advance"—Goods not ready—Boatmen going away with their boats after waiting for some time—Forfeiture of deposit.

The plaintiff engaged the defendants to carry certain quantity of tiles by boats from Beypore to Marmagoa and paid them what was called an "advance" of Rs. 100. As the plaintiff was not ready with the tiles, the defendants after waiting for a reasonable time went away with their boats. On a question whether the plaintiff was entitled to a refund of the "advance",

Held: Regard being had to ordinary usage, it must be held that the payment in this case was really a deposit or earnest money and therefore liable to be forfeited on the depositor's default.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of Small Causes, Kozhikode, dated 12th June, 1948, in S.C.S. No. 203 of 1947.

C. Vasudeva Mannadiar and *T. K. Raman Nambisan* for Petitioner.

K. P. Ramakrishna Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff is the petitioner before me. He engaged the defendants to carry a certain quantity of tiles for him from Beypore to Marmagoa and paid them what was called an "advance" of Rs. 100 (Rupees one hundred only). The Court below has found that the plaintiff was not ready with the tiles and that after waiting a reasonable time the defendants went away with their boats. It also found that the defendants were entitled to appropriate the advance towards the expense they had incurred in waiting from 27th October, 1947 to 2nd November, 1947, for the tiles.

Mr. Nambisan the learned advocate for the petitioner contends that the view of the Court below was wrong and cites in support of his argument the decision of the Privy Council in *Muralidhar Chatterji* v. *International Film Co., Ltd.*[1]. Now whether that decision would apply or not would depend upon the question whether the payment of Rs. 100 (Rupees one hundred only) in this case was earnest money or only payment on account. If it was really only payment on account, the Calcutta case would apply and the plaintiff would be entitled to a return of the money, the defendants being relegated to a suit for damages. If on the other hand the payment is regarded as earnest money or as a deposit the defendant would be entitled to forfeit it as explained in *Natesa Aiyar* v. *Appavu Padayachi*[2], because it is an implied term of such a payment that the deposit would be forfeited if the

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*C.R.P. No. 379 of 1949. ° 28th September, 1950.

1. (1943) 2 M.L.J. 369 : L.R. 70 I.A. 35 : I.L.R. (1943) 2 Cal. 213 (P.C.).

2. (1913) 24 M.L.J. 488 : I.L.R. 38 Mad. 178 (F.B.).

epositor made default. Regard being had to ordinary usage, I feel inclined to old that the payment in this case was really a deposit or earnest money and there- ore liable to be forfeited. The civil revision petition fails and is dismissed with osts.

V.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

RESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE RAGHAVA RAO.

.. Akkuliya Naidu .. *Appellant* *

v.

lattiba Venkataswamy Naidu and others .. *Respondents.*

Malicious Prosecution—Proceedings under section 145, Criminal Procedure Code—If amounts to a "prosecution"—Successful party to whom costs are not awarded in such proceedings—If can maintain action for damages r malicious prosecution.

A proceeding under section 145, Criminal Procedure Code, constitutes a prosecution which ould sustain an action for damages for malicious prosecution. As costs are provided for in the riminal Procedure Code in respect of such proceedings, where such costs are not awarded to a ccessful party, it is because he did not deserve them and therefore such a party cannot maintain an tion for damages for malicious prosecution.

Appeal under clause 15, Letters Patent, against the judgment and decree of ie High Court, dated 16th January, 1948, in A.A.O. No. 378 of 1946, preferred gainst the order of the Subordinate Judge's Court, Vellore, in A.S. No. 86 of 1946 O.S. No. 59 of 1945, District Munsif's Court, Tirupattur, North Arcot district).

V. T. Rangaswamy Ayyangar and *K. Kalyanasundaram* for Appellants.

A. Sundaram Aiyar for Respondent.

The Judgment of the Court was delivered by

Satyanarayana Rao, J.—This Letters Patent Appeal is against the judgment Rajamannar, J. (as he then was) in C.M.A. No. 378 of 1946. The action out which the appeal arises was one for damages for malicious prosecution in which e plaintiff claimed a sum of Rs. 500 as damages on the ground that at the insti- ation of defendants 2 and 3 the first defendant made a report to the Village Munsif, ie third defendant, which ultimately resulted in proceedings under section 145, riminal Procedure Code, regarding the possession of a house. The case was ventually dismissed after enquiry. The defence to the action which was disposed on two preliminary issues was (1) that a proceeding under section 145, Criminal ocedure Code was not a "prosecution" in respect of which a suit for damages r malicious prosecution would lie, and (2) that in any event the suit was not aintainable as there was provision in the Code for awarding costs to the success- l party and if the costs were refused it must be taken that they were refused on e ground that he did not deserve them. The learned Judge, on a consideration the authorities both English and Indian, was of opinion that an action for mali- ous prosecution was not necessarily confined to criminal proceedings in respect an offence, but that it is maintainable even in respect of civil proceedings and so in respect of other criminal proceedings such as proceedings under section 144 section 145, Criminal Procedure Code. The learned Judge, in the course of s judgment, pointed out that the gist of the action is "damages" and that the mage may be of three kinds as laid down by Holt, C.J., in the case of *Savile* v. *berts*[1]. In a proceeding under section 145 of the Criminal Procedure Code, mages under the first and second of the heads would not arise for consideration. he damages, however, may be of the third sort as where a man is forced to expend oney in necessary charges to prosecute the proceedings or to defend it. In res- ct of proceedings under section 145, Criminal Procedure Code, however, as other civil actions, provision is made in the Code in section 148 (3) for awarding

* Letters Patent Appeal No. 36 of 1948. 1st November, 1950.

1. (1698) 1 Ld. Raym, 374.

costs on the basis of expenses incurred by the successful party. If the Judge however refused to award costs, it is because the successful party did not deserve them and therefore was not entitled to get the costs; and that is the only mode by which the successful party can indemnify himself in respect of costs incurred in a proceeding of that description. He therefore came to the conclusion that a proceeding under section 145, Criminal Procedure Code, constituted a prosecution in respect of which a suit for damages for malicious prosecution would lie. He, however, held that the suit was not maintainable, as costs are provided for in respect of proceedings under section 145, Criminal Procedure Code and as costs were not awarded by the Criminal Court in favour of the plaintiff.

On the authorities referred to by the learned Judge in the course of his judgments we think that the view taken by the learned Judge on both the points is correct. The dictum in *Kandaswami Asari* v. *Subramania Pillai*[1] that

> "to sustain such an action there must have been a prosecution by the defendants against the plaintiffs for an offence"

is, in our opinion, opposed to decisions, English and Indian. In that case, which arose out of proceedings under sections 107 and 110 of the Criminal Procedure Code the proceedings were dropped at the initial stage after a report from the Sub-Magistrate was received. In view of that fact the observations of the learned Judges in that case is undoubtedly obiter.

In the decision of *Appalanarasimhulu* v. *Mahant Har Narayan Das Bavaji*[2], which arose out of a proceeding under section 144, Criminal Procedure Code, it was assumed that an action for damages for malicious prosecution was sustainable even though the proceedings did not involve an "offence" under the Criminal law.

The decision of Wadsworth, J., in *Narayana Mudali* v. *Kalathi Mudali*[3], which also related to a proceeding under section 144, Criminal Procedure Code, is authority for the view that an action in respect of proceedings under section 144, Criminal Procedure Code, would be maintainable, as such proceedings would amount to a "prosecution" in the wider sense. The objection, therefore, that a proceeding under section 145, Criminal Procedure Code, is not a prosecution which would sustain an action, which was taken before the learned Judge was rightly overruled by him.

In view of the provision for costs under the Criminal Procedure Code and for the reasons given by the learned Judge, the action for damages against the second and third defendants also would not be sustainable. The point strongly pressed before us is that as the second and third defendants were not parties to the proceedings under section 145 of the Criminal Procedure Code, the action should have been tried at least as against them. If the basis for the refusal to award costs against the first defendant was that the plaintiff did not deserve them, it is difficult to see what useful purpose would be served by prosecuting the action against defendants 2 and 3. It cannot be said that by the action of defendants 2 and 3 in instigating the first defndant, the plaintiff had suffered any damages additional to the damages which would have been recoverable from the first defendant. The view of the learned Judge that the action is not sustainable against defendants 2 and 3 also is to be understood, as has been stated in the judgment itself, in this light. No doubt the plaintiff would have ordinarily a cause of action against defendants 2 and 3 and nobody disputes this position. But no useful purpose could be served in prosecuting the case against defendants 2 and 3 when it is obvious, in view of the refusal of the criminal Court to award damages against the first defendant, that the plaintiff did not suffer any damages. We therefore agree with the learned Judge that the action need not be tried even as against the defendants 2 and 3 and hold that the dismissal of the suit of the plaintiff is perfectly justified.

The Letters Patent Appeal therefore fails and is dismissed with costs.

V. S. *Appeal dismissed.*

1. (1903) 13 M.L.J. 370.
2. (1901) 11 M.L.J. 122.
3. (1939) 2 M.L.J. 296.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Ramiah and others .. *Petitioners**.

Penal Code (XLV of 1860)—Sections 186 and 21—Commissioner appointed by a Court to divide property metes and bounds—If a public servant—Obstruction to his proceedings—If an offence under section 186.

A Commissioner appointed by a Court to divide the properties by metes and bounds as a result a preliminary decree for partition though not a permanent Government servant like an amin or a ocess server or a clerk, still he is an officer appointed specially by a Court of justice to investigate d report on a question of fact and so is a public servant within the meaning of section 21, Penal de and as such an obstruction to his proceedings would be an offence under section 186, Penal de.

Petitions under sections 435 and 439, Criminal Procedure Code, 1898, praying at the High Court will be pleased to revise the order of the Court of the Sub-ivisional Magistrate, Rajampeta, dated 13th December, 1948, in C. A. Nos. 291 id 292 of 1948, preferred against the order of the Court of the Sub-Magistrate, hitvel, in C. C. Nos. 367 and 368 of 1948.

K. Bhimasankaram for Petitioners.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

The Court made the following

ORDER.—Two points have been argued by Mr. Bhimasankaram for the peti-oners and the first of them is that the Commissioner appointed by the Court to vide the properties by metes and bounds in a partition suit where a preliminary ecree has been passed is not a public servant within the meaning of section 21 of e Indian Penal Code. What happened here is that after the passing of a preli-inary decree for partition, the District Munsiff appointed a Commissioner under rder 26 of the Civil Procedure Code, to go to the spot, identify the properties, divide em, demarcate the boundaries and report to the Court. While the Commis-oner with the assistance of people whom he had taken was measuring the lands e petitioners objected to it and used force by dragging the chain by which the nds were being measured. Petitioners 1 to 5 obstructed on the first day and at eir instigation petitioners 6 to 10 did it on the next day. For this act they were arge-sheeted under section 186 of the Indian Penal Code and found guilty by th the lower Courts.

The argument of Mr. Bhimasankaram is that since the Commissioner is not public servant any obstruction to the work done by him cannot be termed an ence coming within the ambit of section 186, Indian Penal Code. The answer this depends upon the interpretation of the fourth clause of section 21, Indian nal Code and this contemplates that any person specially authorised by a Court justice to perform any of the duties such as investigate or report on any matter law and fact is a public servant within the meaning of the term. Though the ommissioner here is not a permanent Government servant like an amin or a pro-ss server or a clerk, still he is an officer appointed or specially authorised by a urt of justice to investigate and report on a question of fact. I have no hesita-n in coming to the conclusion that a Commissioner appointed by a Court to divide e properties by metes and bounds as a result of a preliminary decree for parti-n is a public servant within the meaning of the term under section 21 of Indian nal Code.

The next argument to the learned counsel is that the Commissioner had no tification, after the protests of the petitioners, to enter upon the lands and measure The proper course which the Commissioner ought to have taken was to have orted to the Court to the effect that there was obstruction to his proceeding th the work. Not having done so and the Commissioner proceeding to measure e lands in spite of the protests by the petitioners who claimed the lands to be

* Cr.R.C. Nos. 665 and 666 of 1949. (Cr.R.P. Nos. 611 and 612 of 1949). 30th November, 1950.

theirs, the action of the petitioners in preventing such work cannot be said to be an offence. I am afraid this argument proceeds upon the assumption that it is open to a party to obstruct a public servant in the discharge of his duties if the public servant is told by the party that he should not act as such. The proper procedure for the petitioners would have been to apply to the Court stating that the Commissioner was trespassing upon the lands which are not the subject-matter of the suit. This they have not done. Even otherwise on the finding by the trial Court that the petitioners insisted in the property being leased to each of them their action in preventing the Commissioner amounts to an offence under section 186, Indian Penal Code.

Since both the points argued by the learned counsel are unacceptable to me, the order of the lower Court is confirmed. These revisions are, therefore, dismissed.

V. S. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

Gonvindarajulu Mudaliar .. *Petitioner* *

v.

The North Vellore Thottapalayam Town Co-operative Bank by its Secretary and another .. *Respondents.*

Court-Fees Act (VII of 1870), Section 7, Clause (iv-A)—Mortgage to Co-operative Society—Default—Award—Sale in execution of—Suit for declaration of sale as opposed to law—Court-fee payable—Sale certificate if a document of title.

The petitioner executed a mortgage over some of his properties in favour of a Co-operative Society and when he fell in arrears of repayment of the debt, the Deputy Registrar of the Society passed an award and in execution of it, the hypotheca was sold and purchased by another party. The petitioner alleging an agreement between him and the president of the society for reconveyance of the hypotheca and that the value of the property was many times more than the value in the sale certificate, sued for a declaration that the sale by the society was opposed to law and that it would not pass absolute title or that the purchaser in any event could get right only to possession till satisfaction of the debt covered by the mortgage. On the question of Court-fee payable

Held : (1) that the sale certificate in favour of the purchaser was not a document of title securing property which the plaintiff was bound to sue to set aside.

Case-law referred to.

(2) that the plaintiff could not get the relief he wanted unless he got the sale set aside, in other words he should obtain a declaration that the sale was in operation and not binding on him. In respect of such a declaration the market-value of the property would determine the jurisdiction.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order dated 22nd April, 1949, of the District Court, North Arcot, Vellore, in C. M. A. No. 20 of 1949, preferred against the order dated 24th February, 1949, of the Court of the District Munsiff, Vellore, in O. S. No. 105 of 1947.

G. R. Jagadisa Aiyar for Petitioner.

T. L. Venkatarama Iyer for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff is the petitioner. In 1928 he executed a mortgage over some of his properties in favour of the North Vellore Thottapalayam Town Co-operative Bank, for a sum of Rs. 300. The amount was repayable in instalments. A clause in the deed of mortgage entitled the bank in case of default by the plaintiff to take possession of the hypotheca and appropriate the income towards the debt due to it. The plaintiff fell into arrears and the Deputy Registrar of Co-operative Societies passed what is called an award but which is really in the nature of a decree. In execution of this award the hypotheca was sold on 23rd

* C.R.P. No. 1869 of 1949. 30th August, 1950.

February, 1935, and purchased by the second defendant for Rs. 610. The sale was confirmed on 14th April, 1935, and the sale certificate was issued in due course. According to the plaintiff, the secretary of the first defendant bank is a relation of his. The second defendant who purchased the property at the auction sale is also another relation of his. The plaintiff alleged that there was an understanding between him and the president of the first defendant bank and the second defendant

"that the suit property might be purchased by the second defendant, that on his being recouped from the income or cash payment a reconveyance could be obtained from him. It was because of this specific arrangement that properties worth over Rs. 5,000 were allowed to be sold for Rs. 610 only."

The plaintiff would have it that the defendants refused to abide by this agreement and he therefore sued (*a*) for a declaration that the sale by the Co-operative Society was opposed to law, not in accordance with the terms of the award or decree, and that it could not pass "absolute title" and was null and void; or that in any event the second defendant could get only a right to be in possession till satisfaction of the debt covered by the mortgage; (*b*) for a direction to the second defendant to render an account of the income from the suit properties from about 1st July, 1935, till delivery of possession after adjusting it towards the balance due on the mortgage; and (*c*) for possession of the properties.

In view of the admission that the property was worth over Rs. 5,000 the issues were raised whether the Court of the District Munsiff in which the plaint had been presented had jurisdiction to try the suit and whether the court-fee paid was correct.

Section 7, clause (iv-A) Court-Fees Act, provides that in a suit for cancellation of "a . . . . . document, securing money or other property having such value," court-fees shall be paid according to "the value of the subject-matter of the suit." Decisions of this Court have made it clear that "value" here means "market value". The learned District Munsiff took the view that the sale certificate which had been issued in favour of the second defendant was a document of title and therefore a document securing property having money value, that the plaintiff could not get the reliefs he had asked for without removing the impediment created by the sale deed, that in substance the suit was one for cancellation of that instrument and that the plaintiff should pay court-fee on the market value. He also held that the suit was beyond his pecuniary jurisdiction and so returned the plaint for being presented to the proper Court. An appeal was taken to the District Judge of Vellore who dismissed it. The petitioner has now come to this Court.

The view of the Courts below that a sale certificate is a document of title and therefore comes within the scope of section 7, clause (iv-A) of the Act is clearly erroneous. As far back as the case in *Mst. Bukuns Kowur* v. *Lalla Buhooree Lall*[1], it has been laid down that

"a sale certificate does no more than create statutory evidence of the transfer in place of the old mode of transfer by bill of sale."

See also *Tribeni Prasad Singh* v. *Ramasray Prasad Chowdhuri*[2], where this position has been re-stated:

"A purchaser of immoveable property at an auction sale can establish his title by evidence independent of the sale certificate *which does not create title but is merely evidence of it.*"

Title passes when the sale is confirmed and not because a sale certificate is issued.

In the case reported in *Sodemma* v. *Krishnamurti*[3], the meaning of the word "securing" which occurs in section 7, clause (iv-A) has been explained as meaning

"Documents whereby the rights are transferred or released, such as sales, gifts, leases, mortgages, or releases . . . . . It seems to me that the document which is sought to be set aside must of itself have secured the property, that is, there must have been a conveyance of the suit property or of a release of rights *thereunder* which would operate as an extinguishment of the right of the person conveying or releasing."

1. (1872) 14 M.I.A. 496.
2. (1931) I.L.R. 10 Pat. 670 (F.B.).
3. A.I.R. 1938 Mad. 824 at 825.

It is thus clear that the sale certificate in favour of the second defendant is not a document of title securing property which the plaintiff was bound to sue to set aside.

* * * * *

It remains to deal with the decision reported in *Sahul Hameed Rowther* v. *Mohideen Pichai*[1], to which Mr. Jagadisa Aiyar referred. In that case the plaintiff had executed a sale deed which he alleged was sham and nominal. He prayed for a declaration to that effect and for an injunction restraining the defendant from interfering with his possession. It was held that the plaintiff was not bound to pray for cancellation of the instrument or pay court-fee therefor. In the present case we are not concerned with a sale deed executed by the plaintiff but by a sale in pursuance of an order of a judicial tribunal. An execution sale may be vitiated by irregularities, there might be fraud about it, there might be collusion about it, but it is difficult to see how it can even be described as sham and nominal. This decision therefore has no application.

In order to avoid further argument on the subject in the Courts below Mr. Jagadisa Aiyar asked that in the event of my being unable to accept the view he was pressing me to take, namely, that the Court of the District Munsiff had jurisdiction and that the court-fee paid was correct, a decision might be given on the question of court-fee actually payable. The suit would be cognizable in the Sub-Court and he suggested that the court-fee payable would be Rs. 100. Since he has already paid Rs. 15, the excess he has to pay is Rs. 85. Mr. Venkatarama Aiyar, on the other side, agreed that this figure was right. I too share that view. It is therefore found that the excess court-fee the plaintiff has to pay is Rs. 85. With this observation this civil revision petition is dismissed with costs.

K.C. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Thadi Konda Veeraswami .. *Petitioner* *

v.

Thullum Peda Lakshmudu calling himself Thadikonda Peda Lakshmudu and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 23, rule 1 (2)—Application for withdrawing suit with leave to file a fresh suit—Court if can refuse to allow leave to file fresh suit and dismiss application—Court if bound to give reasons for refusal of leave.

When a plaintiff files a petition to withdraw the suit with permission to file a fresh suit regarding the same subject-matter under Order 23, rule 1 (2) of the Civil Procedure Code, the Court has the right to dismiss the petition telling the petitioner that he might withdraw the suit if he wants, but it will not give him permission to file a fresh suit regarding the same subject-matter. Such an application must be allowed or refused *in toto*. If liberty is refused the suit should not be dismissed at once but retained for trial in the usual course. The Court cannot divide the petition into two and accept the withdrawal and refuse the liberty in the same order. Though in giving liberty to file a fresh suit it should give facts and reasons, no reasons are required to be given by law for refusing permission to file a fresh suit, though it is desirable to give such reasons in order to let the party and the superior Courts know the reasons.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Bapatla, dated 9th November, 1945, in I.A. No. 1374 of 1945 in O.S. No. 95 of 1944.

K. Kotayya and *N. Rammohan Rao* for Petitioner.

D. Munikanniah, S. Vaidyanathan and *K. Kanniah* for Respondents.

The Court delivered the following

JUDGMENT.—The question involved in this Civil Revision Petition is very simple, namely, whether when a plaintiff files a petition to withdraw the suit with

1. (1948) 1 M.L.J. 270.

*C.R.P. No. 126 of 1947. 24th November, 1950.

permission to file a fresh suit regarding the same subject-matter, under Order 23, rule 1 (2), Civil Procedure Code, the Court has got the right to dismiss the petition telling him that he might withdraw the suit if he wants but that it will not give him permission to file a fresh suit regarding the same subject-matter. The lower Court is said to have dismissed the suit (O.S. No. 95 of 1944) later on, but we are not concerned in this Civil Revision Petition with this alleged later order of dismissal, which is not filed here, on a subsequent unconditional withdrawal or non-prosecution of the suit. I have absolutely no doubt that the lower Court had the right and jurisdiction to pass an order it did. The law regarding the withdrawal of a suit under Order 23, rule 1, Civil Procedure Code, is well settled. Order 23, rule 1 (1) gives the plaintiff the liberty to withdraw from a suit unconditionally on finding it unsustainable, or for any other reason. No leave or order is necessary for this. See *Lakshman* v. *Muthayya*[1] and *Mahant* v. *Parshotamdas*[2]. The plaintiff need not assign any reason for such an unconditional withdrawal. Order 23, rule 1 (2), Civil Procedure Code, contemplates a withdrawal from the suit with liberty to bring a fresh suit. Here the plaintiff must ask for leave and must make out a case within clause (*a*) or (*b*). The Court has no jurisdiction to allow such withdrawal with liberty unless the suit must fail by reason of some formal defect, under clause (*a*) or unless there are "other sufficient grounds" for allowing the plaintiff to institute a fresh suit regarding the same subject-matter under clause (*b*). See *Harshamukhi* v. *Sarat Chandra Ata*[3] and *Raj* v. *Ram*[4]. An application to withdraw a suit with liberty to file a fresh suit regarding the same subject-matter must be either allowed or refused *in toto*. If liberty is refused, the suit should not be dismissed at once but retained for trial in the usual course. See *Marudachala* v. *Chinna*[5]. The Court cannot divide the petition into two, and accept the withdrawal and refuse the liberty in the *same order*. It is bound to give the facts and reasons when giving the liberty to file a fresh suit regarding the same subject-matter. See *Shamanandan Prasad* v. *Mulchand*[6], *Sukumar* v. *Chairman, District Board of Gaya*[7] and *Reasuddin* v. *Mirsajid*[8], *Abdul* v. *Mohammed*[9] and *Subhasini* v. *Ashutosh*[10]. "Other sufficient grounds" in clause (*b*) has been interpreted to mean "grounds *ejusdem generis*" to those mentioned in clause (*a*) "or at least analogous to them." See *Mabulla* v. *Hemargini*[11], *Nagamma* v. *Lakshminarasu*[12], *Sukumar* v. *Chairman, District Board, Gaya*[7] and *Ram Rao* v. *Babu Appanna*[13]. In the present case, the petitioner, the first plaintiff, had asked for permission to withdraw his suit, O.S. No. 95 of 1944 for possession of properties as the nearest reversioner to one Seshayya, whose widow Alivelu died on 30th November, 1941, against the alleged adopted son of Seshayya, the first defendant and others. The grounds alleged by him in this I.A. No. 1374 of 1945 for withdrawal with liberty, were that his vakil, Mr. P. Chalapati Rao, had taken a portion of his the (petitioner's) properties in advance in the name of his relative the second plaintiff for conducting the suit, and had then filed a genealogical table which would not support the petitioner's case and has also refused to amend the plaint and the genealogical table suitably. The first defendant had attacked the genealogical table as false and mythical, and had contested the petitioner's claim to be the nearest reversioner, besides asserting the truth and validity of his own adoption. The suit was filed in 1944. This I. A. was filed on 9th November, 1945, after giving up his vakil and revoking his vakalat. On 9th November, 1945, itself the lower Court passed the order as below :

"The petitioner may withdraw the suit if he wants. This is not a case for which permission can be given to withdraw the suit with liberty to bring a fresh suit. Petition is dismissed."

This is the order covered by this Civil Revision Petition. The later order dismissing the suit has not been filed in this Civil Revision Petition. So the reason for dismissing

1. (1919) 40 M.L.J. 126.
2. (1902) I.L.R. 32 Bom. 345.
3. (1928) 32 C.W.N. 1244.
4. (1921) I.L.R. 1 Pat. 90 (F.B.).
5. (1931) M.W.N. 1148.
6. (1920) 1 Pat.L.T. 292.
7. A.I.R. 1935 Pat. 251.
8. I.L.R. (1944) All. 396.
9. (1946) 2 M.L.J. 113.
10. (1924) 39 C.L.J. 371.
11. (1910) 11 C.L.J. 512.
12. A.I.R. 1928 Mad. 1085.
13. A.I.R. 1950 Bom. 121 (F.B.).

the suit cannot be definitely ascertained. Nor are we concerned with its correctness in this Civil Revision Petition.

I cannot see any merits in this Civil Revision Petition. Insufficient evidence, or a false genealogical table, or even the fraud of plaintiff's vakil, will not come under clause (*a*) or (*b*) of Order 23, rule 1 (2), Civil Procedure Code, being neither a formal defect, nor falling under "other sufficient grounds". See *Bikaji* v. *Ananti*[1] and *Ramarao* v. *Babu Appanna*[2]. So, the lower Court was right in refusing permission to file a fresh suit and dismissing the interlocutory application, *in toto* remarking that the petitioner might withdraw his suit unconditionally if he wanted. It was an order perfectly within its jurisdiction, and was not tainted by any illegality, nor was there any failure of justice. No doubt, it did not give reasons for refusing permission to file a fresh suit, as Mr. Kotayya, for the petitioner, complained. But there is nothing in law forcing a Court to give reasons when *refusing permission* though it must give reasons when *granting permission*. It seems to me that, as in a discharge order under section 253 (1), Criminal Procedure Code, no reasons are required to be given by law for refusing permission to file a fresh suit, though it is desirable to give reasons in order to let the party and the superior Courts know the reasons. Here the thing was so obvious (a facility could not be given to invent a new genealogical table), that the lower Court perhaps thought that no reasons need be given. The Privy Council ruling in *Venkatagiri* v. *Hindu Religious Endowments Board, Madras*[3], will make an interference in revision in the circumstances of this case impossible. Mr. Kotayya relied on the ruling in *Gurprit Singh* v. *Punjab Government*[4]. The facts were different there. On the *facts*, it was held there that the lower Court's order refusing permission to file a fresh suit was wrong. Here, that cannot be said at all. In that case, it was found *as a matter of fact* that there was a failure on the part of the lower Court to exercise jurisdiction vested in it. That is not so here. Each case has, of course, to be decided on the facts of that case. The general observations in *Gurprit Singh* v. *Punjab Government*[4], cannot prevail against the wording of section 115 of the Civil Procedure Code or the Privy Council ruling in *Venkatagiri* v. *Hindu Religious Endowments Board, Madras*[3].

This petition, therefore, deserves to be and is hereby dismissed, but, in the peculiar circumstances, without costs as it is the lower Court's failure to give reason which has led to the filing of this Civil Revision Petition. Of course, I give no finding at all about the legality or otherwise of the subsequent dismissal of the suit O.S. No. 95 of 1944 itself, as that order of dismissal has not been filed in this case and is not the subject-matter of this Civil Revision Petition.

K. S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Muthuveeranna Chettiar .. *Appellant**

v.

Muthuvenkatarama Chettiar and others .. *Respondents.*

Limitation Act (IX of 1908), Article 182 (5)—Final order—Test—"Struck off", "lodged", "recorded" or "closed"—Effect.

If an execution petition is "struck off", "lodged", "recorded" or "closed" while yet the reliefs prayed for, or some of them, remain undisposed of, without being covered by final orders either granting or refusing those reliefs, then the petition will continue to be on the file of the Court despite its being "struck off", "lodged", "recorded" or "closed".

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1. A.I.R. 1929 Bom. 320.
2. A.I.R. 1940 Bom. 121 (F.B.).
3. (1949) 1 M.L.J. 505 : L.R. 76 I.A. 67 : I.L.R. 1950 Mad. 1 (P.C.).
4. A.I.R. 1946 Lah. 429.

* A.A.A.O. No. 298 of 1946.

3rd November, 1950.

It is the clear duty of a Court to dispose of an execution petition really, effectively and validly in one of the ways known to law. It should not close it for statistical purposes in its anxiety for quick disposal. The law is there to give redress and relief and not for nominal and quick disposals giving no relief or redress. Where a petition is closed for statistical purposes it must be deemed to be pending and proceeded with.

Appeal against the order of the District Court, Tiruchirapalli, dated 13th February, 1946, in A.S. No. 321 of 1943 (E.P. No. 505 of 1943 in O.S. No. 251 of 1932, District Munsif Court, Tiruchirapalli).

K. V. Srinivasa Aiyar for Appellant.

Respondents not represented.

The Court delivered the following

JUDGMENT.—This Civil Miscellaneous Second Appeal is against the order of the District Judge of Tiruchirapalli, dated 13th February, 1946, in A.S. No. 321 of 1943 filed against the order of the District Munsif of Tiruchirapalli, dated 8th July, 1943, in E.P. No. 505 of 1943 in O.S. No. 251 of 1932. The facts are briefly these :

One Kanakavallithayarammal sued her step-son, Muthuvenkatarama Chettiar, and his minor son, Bhaskara Chettiar, for maintenance in O.S. No. 251 of 1932, District Munsif's Court, Tiruchirapalli. The suit was decreed on 29th November, 1932. Both the defendants were directed by the decree to pay, on or before 29th March, 1933, the maintenance accrued due to the plaintiff at Rs. 14 per month from 1st July, 1931, till the date of the decree, and future maintenance to the plaintiff at Rs. 14 per month from the date of the decree during the life of the plaintiff, at the end of each year, and plaintiff's costs Rs. 85-2-6. The decree-holder, Kanakavallithayarammal, filed E.P. No. 272 of 1934 praying for the recovery of maintenance which had accrued due till 1st January, 1934 and costs of suit and execution. The amount claimed was Rs. 518-13-0. The reliefs claimed in that execution petition were : (1) to attach the arrears of rents of Rs. 30 due at Rs. 15 each, per month from Ponnuswami Pillai and Baluswami Naidu, two tenants, regarding two shops belonging to the judgment-debtors ; (2) for collecting the future rents from these two shops every month from them and depositing them regularly into Court with correct accounts, by appointing the petitioner or anybody else, as the Court thought fit, as receiver for that purpose ; (3) out of the rents thus attached, or collected by the receiver, the amount claimed in the execution petition to be paid to the petitioner, and for that purpose, accounts of collections to be filed regularly every month by the receiver appointed. The District Munsif ordered the attachment of the arrears of rents payable by Ponnuswami Pillai and Baluswami. The execution petition was filed in January, 1934. On 11th May, 1934, Ponnuswami Pillai appeared in Court and said that he had paid advance rent enough to cover the rent payable till 15th May, 1934, on which date he was quitting the premises. The fact has not now been disputed and Mr. Srinivasa Aiyar, for the appellants, assures me that Ponnuswami Pillai actually quitted the shop on 15th May, 1934. Baluswami Naidu appeared in Court on 28th June, 1934 and stated that he had been a tenant under the judgment-debtors only till 15th April, 1934, and had paid up his rent in full till then, and that nothing was payable by him, and that, indeed, the judgment-debtors owed him some money out of the advance of rent paid by him, and that he had attorned after 15th April, 1934, to the knowledge of the judgment-debtors to the mortgagee of the shop, one Muthulakshmi Ammal, from them and executed a registered lease deed in her favour, and so could not be made to pay any rent into Court under this Execution Petition. The District Munsif found the contentions of these two tenants to be too complicated to be gone into in the execution petition. So, he appointed the decree-holder herself as receiver, in E.A. No. 1274 of 1934, a petition filed by the petitioner in that execution petition for the appointment of receiver on 28th July, 1934, and directed her to collect the arrears of rents from the two shops in question filing suits, if necessary, against Ponnuswami Pillai and Baluswami Naidu if they were really liable and to collect the future rents from the premises, from those liable, and deposit the amounts in Court to the credit of the execution petition as prayed for. Curiously enough,

he " closed " E.P. No. 272 of 1934 on 28th July, 1934, itself without waiting for the receiver to collect the arrear rents or future rents or to report inability to collect anything, or about the liability of Ponnuswami or Baluswami and the advisability of filing suits against them and passing suitable orders, or asking or allowing the decree-holder to amend the execution petition and pursue other remedies like bringing the properties to sale. Sale had not been asked for in the first instance as the execution petition amount was small and was expected to be easily recovered from the rents. The decree-holder did not apply for permission to file a suit, and was also not able to collect a pie as rent. She was, it is said, a helpless and ignorant woman. She assigned her rights to the arrears of maintenance till 20th February, 1942, to the present petitioner, finally, in despair. He filed E.P. No. 505 of 1943 for recognising him as the assignee decree-holder ; for treating this petition as a continuation of the E.P. No. 272 of 1934, which, he contended, had been improperly closed for statistical purposes ; for continuing the old receiver and making her collect the rents or for discharging her and appointing another receiver ; and for the sale of all the charged properties to realise the execution petition amount which now amounted to nearly Rs. 1,900 and odd.

The District Munsif of Tiruchirapalli held that E.P. No. 272 of 1934 had not been improperly " closed " for statistical or other collateral purposes ; that it was properly " closed " after granting or refusing all the reliefs prayed for, and that, therefore, it could not be revived ; and that E.P. No. 505 of 1943 should be treated not as a continuation of E.P. No. 272 of 1934, as prayed for by the petitioner, but as an entirely new petition, and only the amoun. claimable under the limitation law under this execution petition should be claimed. He dismissed the execution petition with costs because the petitioner was persisting in his plea that E.P. No. 272 of 1934 had been improperly closed, and it was clear that he would not amend E.P. No. 505 of 1943, treating it as a new execution petition and reducing the amount to the amount claimable on that basis.

On appeal, by the *present appellant*, the District Judge of Tiruchirapall agreed with the District Munsif that E.P. No. 272 of 1934 had not been shown to have been improperly or irregularly " closed " and that it could not therefore be revived and continued. But he gave the appellant an opportunity to amend E.P. No. 505 of 1943 so as to convert it into a fresh petition claiming the amount claimable on that basis. This Civil Miscellaneous Second Appeal is against that judgment and decree (in A.S. No. 321 of 1943).

After the filing of the second appeal, the first respondent, Muthuvenkatarama Chettiar, the step-son of Kanakavallithayarammal, was sentenced to death for murder, and hanged. The second respondent, Bhaskara Chettiar who was a minor when the execution petition was filed, became a major even by the time of A.S. No. 321 of 1943. He was *ex parte* in the appeal. Mr. E. A. Viswanathan presented a "vakalat" for him in this Civil Miscellaneous Second Appeal at first, but did not re-present it when it was returned to him for rectifying certain defects. So, Mr. E. A. Viswanathan does not represent him, and does not want to file a proper vakalat and represent him. There was thus no vakil legally on record, and, as no other vakil appeared for Bhaskara Chettiar, the second respondent was served by substituted service. He has remained absent and has been declared *ex parte*. The third and fourth respondents are also absent, and *ex parte* in this Civil Miscellanous Second Appeal. The fourth respondent was *ex parte* even in A.S. No. 321 of 1943. The third respondent had appeared by vakil there, Kanakavallithayarammal is still alive, as admitted by Mr. Srinivasa Aiyar, but has no interest in this Civil Miscellaneous Second Appeal. Hence, only the counsel for the appellant argued. None of the respondents were present in person or by counsel.

It is clear to me, after a perusal of the records, and after hearing Mr. Srinivasa Aiyar, for the appellant, that both the lower Courts were wrong in holding that E.P. No. 272 of 1934 had been validly terminated in one of the ways known to law. The correct principle has been laid down by the District Munsif, Tiruchirapalli, *viz.*, that if an execution petition is "struck off, "lodged", "recorded" or "closed",

while yet the reliefs prayed for, or some of them, remain undisposed of, without being covered by final orders either granting or refusing those reliefs, then the petition will continue to be on the file of the Court despite its being "struck off", "lodged", "recorded" or "closed". But he went wrong in considering that all the reliefs prayed for in E.P. No. 272 of 1934 had been disposed of by 28th July, 1934, when the District Munsif appointed the decree-holder as receiver and "closed" the execution petition by a final order granting or refusing them. One of the reliefs prayed for was that a receiver should be appointed to collect the past and future rents of the two shops from Ponnuswami and Baluswami or any others occupying those shops and deposit the same in Court and that the execution petition amount be paid out of those deposits. But the learned District Munsif simply appointed the decree-holder as a receiver and directed her to collect the rents from the lessees of the two shops and pay them into Court (for payment towards the execution petition dues) seeking the Court's permission to file suits if necessary against Baluswami and Ponnuswami, and *closed the execution petition on the very day he appointed the receiver*. This closing could only have been for statistical purposes and could not be deemed to be a valid order according to law terminating the execution petition or a final order regarding the reliefs prayed for. The execution petition had asked for the appointment of a receiver to collect the rents and pay the decree-holder's dues. As held in *Hemangini* v. *Kumode*[1], in a decree for maintenance charged on immoveable property, a receiver should generally be appointed in suitable cases to realise the execution petition dues. But the execution petition could be terminated validly by the Court (as apart from consent of parties) only by waiting till the receiver had collected enough to pay the amount (here Rs. 518-13-0) claimed and made the reports required (like the desirability of filing suits), as a receiver is an *officer of Court*. The mere appointment of the decree-holder as a receiver (in which capacity she was an *officer of Court*) by itself, had not disposed of the relief asked for in E.P. No. 272 of 1934. She did not report whether Ponnuswami or Baluswami deserved to be sued for arrears or do anything else. In the circumstances, it served no useful purpose at all as the woman could not collect a pie and as Ponnuswami and Baluswami could not evidently be sued as they were not liable and as the tenant who succeeded Ponnuswami paid nothing to the receiver, and the judgment-debtors went on collecting the rents merrily ignoring the helpless receiver. Mr. Srinivasa Aiyar urges that no receiver's account was kept by the District Munsif regarding this execution petition to watch the collections and ensure the satisfaction of the execution petition dues from them. Nor did the *Court* give any directions to the receiver. It appointed the receiver and closed the execution petition that very moment. The decree-holder gained little by this ephemeral act. It was, in the circumstances, like closing the execution petition after an order to attach and before sale proceedings. The appointment was thus only a pretext to close the execution petition at once. Nor did the decree-holder want the execution petition to be closed; nor was the execution petition *dismissed* owing to impossibility of collecting anything from the lessees of the shops as, for instance, on the ground that the shops did not belong to the judgment-debtors or had been validly alienated.

It is the clear duty of a Court to dispose of an execution petition really, effectively and validly in one of the ways known to law. It should not close it for "statistical purposes" in its anxiety for quick disposal. The law is there to give redress and relief and not for nominal and quick disposals giving no relief or redress. I hold that E. P. No. 272 of 1934 was improperly closed, for statistical or other purposes, and had not been really, effectively and validly terminated by one of the methods known to law, and that it must be deemed to be therefore still pending, and that the appellant is entitled to have it proceeded with, as the assignee-decree-holder, by reminding the Court about it, as he did in E. P. No. 505 of 1943. His execution petition (E. P. No. 505 of 1943) is a composite one. It comprises not only a claim to Rs. 518-13-0 claimed in E. P. No. 272 of 1934,

1. (1898) 3 C.W.N. 139.

and the amount claimable on the basis of treating this execution petition as a fresh execution petition but also a large sum which *had become barred by limitation in between the two execution petitions*. So, it has to be split up into two execution petitions to be separately proceeded with.

In the end, therefore, I set aside the judgment and decree of the District Judge, Tiruchirapalli, in A. S. No. 321 of 1943 and direct the District Munsiff, Tiruchirapalli, to restore E. P. No. 272 of 1934 to file and proceed with it till it is terminated in a way known to law, by either appointing a fresh receiver or by sale of the properties, and to allow the petitioner to amend E. P. No. 505 of 1943, treating it as a fresh execution petition and claiming therein only the maintenance amount due from 3rd June, 1939 till 20th February, 1942. The execution petition was filed only on 3rd June, 1942, and, of course, only the maintenance due from 3rd June, 1939, could be claimed therein under the law of limitation. The assignment was on 20th February, 1942 and, of course, the decree-holder could not assign future *maintenance*. That is how the period of claim in E. P. No. 505 of 1943 has been fixed by me as from 3rd June, 1939 to 20th February, 1942. In the circumstances, I direct all the parties to bear their own costs in A. S. No. 321 of 1943, and here, themselves, but direct the District Munsiff, Tiruchirapalli, to pass suitable orders regarding costs in both the execution petitions when disposing of them afresh.

K.S. ———— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE BASHEER AHMED SAYEED.

The Official Receiver, East Tanjore, representing the estate of the insolvent, the first respondent in I. P. No. 14 of 1949, Official Receiver's Court, East Tanjore .. *Appellant**

v.

Sait Jessasingh Chathurbujadas and another .. *Respondents.*

Provincial Insolvency Act (V of 1920), section 28 (7)—Scope and effect of—Filing of petition to adjudicate a person as an insolvent during the pendency of a suit against him for specific performance to execute a mortgage—Ex parte decree in the suit—Subsequent adjudication of the defendant—Official Receiver not a party to the suit—Application to execute decree praying for the addition of the Official Receiver as party and directing him and the insolvent to execute the mortgage—Maintainability.

The second respondent herein executed an agreement in favour of the decree-holder first respondent herein to execute a mortgage over certain properties for the discharge of a debt due by him to the first respondent. A suit was filed by the latter for specific performance of the contract. While the suit was pending an application to adjudge the second respondent as an insolvent was filed and an interim receiver was appointed to take possession of the second respondent's estate. An *ex parte* decree was later on passed against the second respondent in that suit. Subsequently the second respondent was adjudicated insolvent and his estate vested in the Official Receiver. Though the Official Receiver was interim receiver also he was not a party to the suit with the result that when the *ex parte* decree was passed the Official Receiver was not a party to the suit. The decree-holder, first respondent herein, filed an application to execute the decree for specific performance and the prayer was to add the Official Receiver appellant herein as a party and that he and the insolvent should be directed to execute the mortgage. On the question whether without leave of Insolvency Court the Official Receiver could be sought to be made a party and whether even if such is not necessary the Official Receiver could be held bound by an *ex parte* decree passed against the insolvent so as to compel him to execute a mortgage,

Held, that by the operation of section 28 (7) of the Provincial Insolvency Act the insolvency of the second respondent related back to the date of the filing of the application and therefore since the Official Receiver was not made a party to the suit the decree for specific performance obtained against the insolvent was not binding against him and therefore he cannot be impleaded in execution of that decree and no relief could be claimed against him in execution.

Case-law reviewed.

Appeal against the order of the Court of the Subordinate Judge, Trichinopoly, dated 28th February, 1950, in E. P. No. 579 of 1949 in O. S. No. 80 of 1948.

S. V. Venkatasubramaniam and *T. S. Kuppuswami Aiyar* for Appellant.

S. Ramachandra Aiyar for Respondents.

*A.A.O. No. 322 of 1950. 23rd November, 1950.

The Judgment of the Court was delivered by

Govinda Menon, J.—The Official Receiver of East Tanjore, representing the estate of the insolvent in I. P. No. 14 of 1949 on the file of the District Court of East Tanjore, appeals against the order of the Subordinate Judge of Tiruchirapalli, directing that he should be added as the 2nd respondent in E. P. No. 579 of 1949 in O. S. No. 80 of 1948 on the file of the said Subordinate Judge, and that execution should proceed after the Official Receiver is added as the 2nd respondent.

On 17th December, 1947, the 1st respondent before the lower Court executed an agreement in favour of the decree-holder, who is the 1st respondent in this appeal, promising to execute a mortgage over certain properties for the discharge of a sum of Rs. 22,000 and odd due by him to the 1st respondent in this Court. O. S. No. 80 of 1948 in the Sub-Court of Tiruchirapalli was filed on 20th April, 1948, for specific performance of the contract to execute the mortgage in which the present 1st respondent was the plaintiff and the present 2nd respondent, Subbarama Nadar was the defendant. While that suit was pending, on 30th September, 1948, an application to adjudge Subbarama Nadar as an insolvent was filed by a creditor of his in the District Court of East Tanjore and pending disposal of that application, the Official Receiver of East Tanjore was appointed interim receiver to take possession of the estate of Subbarama Nadar on 4th October, 1948. The appointment of interim receiver was notified on 19th October, 1948, in the Fort St. George Gazette, and in the Tanjore District Gazette on 11th November, 1948. Subbarama Nadar did not contest the suit filed against him for specific performance and an *ex parte* decree was passed against him on 13th December, 1948. After this the application to adjudicate him as an insolvent came up for final hearing before the District Court of East Tanjore and he was adjudicated an insolvent on 9th July, 1949, and all his estate vested in the Official Receiver of East Tanjore. It may be mentioned at this stage that though the Official Receiver was appointed interim receiver for Subbarama Nadar's estate on 4th October, 1948, he was not impleaded as a party in O. S. No. 80 of 1948 with the result that when the *ex parte* decree was passed on 13th December, 1948, the Official Receiver was not a party to O. S. No. 80 of 1948. The decree-holder Sait Jessasingh Chathurbhujdas thereafter filed E. P. No. 579 of 1949 on 16th September, 1949, to execute the decree for specific performance and the prayer was that the Official Receiver in whom the estate of Subbarama Nadar has vested should be added as a party in the execution application and that he and the insolvent should together be directed to execute the mortgage in favour of the plaintiff. Objection was taken by the Official Receiver to the prayer for impleading him as a party to the execution petition on two grounds: Firstly that leave of the Insolvency Court was not obtained to implead him as a party; and secondly that even if no leave is necessary, still, since the Official Receiver was not a party to O. S. No. 80 of 1948, the *ex parte* decree passed against the insolvent would not bind him and if the decree is not binding on the Official Receiver, it is illegal to implead him as a party in the execution petition with the object of compelling him to execute a mortgage in favour of the decree-holder. The learned Subordinate Judge disallowed both these contentions. Hence this appeal.

Whether the leave of the Insolvency Court is necessary in a matter like this depends upon the correct interpretation of section 28 (2) of the Provincial Insolvency Act, which lays down that on the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver and shall become divisible among the creditors, and therefore, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall, during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose. There is no dispute that the execution proceedings in question are legal proceedings against the insolvent and his estate; but the difficulty is whether a decree for specific performance to execute a mortgage can be considered to be a debt provable under the Provincial Insolvency Act. The learned

Subordinate Judge thinks that the decree-holder is not enforcing any debt. In the suit brought by him he was not seeking any remedy in the property of the insolvent in respect of any debt.

Mr. T. S. Kuppuswami Aiyar for the appellant relies upon certain observations contained in *Atchutaramayya Garu* v. *Official Receiver, East Godavari*[1], where Cornish, J., referring to a suit for specific performance filed against an insolvent after the adjudication, states that the suit was in respect of a debt, *viz.*, to enforce performance of an agreement by the debtor to execute a mortgage to the creditor as security for his debt. In the view of the learned Judge a suit for specific performance of an agreement was a suit to enforce a debt and therefore since in the case he was considering the suit was filed after the application for adjudication was filed, section 28 (2) of the Provincial Insolvency Act prevented the plaintiff from proceeding with the suit. Can it be said that an execution application for a relief that the judgment-debtor and a person claiming as his representative should be directed to execute a mortgage in favour of the decree-holder be termed a "legal proceeding" in respect of a "debt"? The decree does not provide for the payment of any damages to the plaintiff in case the mortgage is not executed. Nor is there any provision for reciprocal execution of a decree as is sometimes found in decrees for a specific performance. Whatever might be said regarding the view that a suit to enforce an agreement to execute a mortgage, for which the plaintiff has to pay a sum of money to the defendant, may be termed a "proceeding" in respect of a debt, in our opinion it cannot be said that when once the agreement has become fructified in a decree, by which one of the parties is directed to do a certain thing, there is any question of a proceeding regarding a debt. The inclusive definition of the word "debt" in section 2 (*a*) of the Act would, if at all, lead to the conclusion that a decree compelling one of the parties to perform a certain act, cannot be called a judgment-debt. As the decree for specific performance stands, there is nothing which the decree-holder has to get in terms of money or other equivalent from the judgment-debtor. On the other hand, the decree-holder, on paying a sum of money to the judgment-debtor, can demand the execution of a conveyance, here a mortgage, in his favour, and get it registered. That being so, can it be contended that the execution of such a directory decree, compelling the judgment-debtor to execute a document, can under any stretch of language be termed as execution for a "debt" within the meaning of the term in section 28 (2) of the Act? We think not. Therefore, if the Official Receiver is otherwise bound to honour the decree and execute the mortgage deed, then the fact that for, the application to which he is sought to be made a party no previous leave of the Insolvency Court was applied for, or obtained, cannot have any force.

The second of the controversies raises a point of some difficulty, *viz.*, whether a decree obtained in a suit filed at a time when no insolvency application was pending, but before the suit was decreed an insolvency petition had been filed which culminated in the final order of adjudication only after the decree in the suit was passed, can be said to be binding on the Official Receiver. Sections 51 and 55 of the Provincial Insolvency Act relate to restriction of rights of creditor under execution and protection of *bona fide* transactions respectively. It is conceded that section 51 can have no application here and so far as section 55 is concerned there has been no payment by the insolvent to any of his creditors; nor any payment or delivery to the insolvent; nor any transfer by the insolvent for valuable consideration; nor any contract or dealing by or with, the insolvent for valuable consideration in the present case. We may therefore rule out the possible application of sections 51 and 55 from consideration. Section 28 (7) dealing with relation back of an order of adjudication is the one provision of law which requires consideration in dealing with the question now before us. What that section says is that an order of adjudication shall relate back to, and take effect from, the date of the presentation of the petition on which it is made. The result in this case therefore is that though the final adjudication was made only on 9th July, 1949,

1. (1935) 69 M.L.J. 241 : I.L.R. 58 Mad. 1032 at 1043.

by the principle of relation back enacted in sub-section (7) of section 28, it should be deemed as if the insolvency took place on the date of the filing of the insolvency petition, *viz.*, 30th September, 1948. Unlike the provisions of the Presidency Towns Insolvency Act which have followed section 37 (1) of the English Bankruptcy Act in laying down that an order of adjudication shall relate back to the date on which the act of bankruptcy has taken place, the Provincial Insolvency Act makes the relation back a more restricted one and says that such a relation back would take effect only from the date of presentation of the petition and not from the date of the commission of the Act of bankruptcy. If sub-section (7) has to be applied to the present case, the insolvency must be deemed to have taken place on 4th October, 1948, and therefore the person who could have validly represented the estate was not a party to the suit at the time the decree was passed on 13th December, 1948. Such being the case, it is argued that a decree obtained for specific performance of a contract in a suit to which the person who is entitled to represent the estate was not a party is a nullity and in execution of a null and void decree, an alleged representative of the judgment-debtor cannot be added as a party. Here again, the learned advocate for the appellant referred to a passage at pages 1038 and 1039 of the report in *Achutaramayya Garu* v. *Official Receiver, East Godavari*[1]. As already stated in that case, the insolvency petition was filed prior to the filing of the suit for specific performance and therefore if the principle of relation back has to be applied, at the time the suit was filed the Official Receiver, who was the owner of the property not merely from the date when the order of adjudication was made but from the commencement of the insolvency proceedings, was not on record. But the facts of the present case are different. Here, when the suit was filed, there was no insolvency petition and the suit was properly filed against the owner of the property. The devolution took place during the pendency of the suit and if the principle of section 52 of the Transfer of Property Act can be applied, the person in whom the estate has devolved *pendente lite* must be bound by the result of the decree as if he was a party to the suit.

Under the provisions of the Provincial Insolvency Act (III of 1907), the Privy Council had to consider a case where mortgaged property had vested in the Receiver and their Lordships held that section 16, sub-section (4) and the proviso to sub-section (5) does not entitle the mortgagee to bring or continue a suit for foreclosure without making the receiver a defendant. A decree obtained in his absence is not *res judicata* against him so as to affect his right to redeem, even if the Court, in rejecting an application by him to be made a party has heard and rejected his objections to the decree being passed. Vide *Kalachand Banerjee* v. *Jagannath Marwari*[2]. Here again it was a case where, before the suit, there was an insolvency and if at the time the suit was filed, the estate was represented by an Official Receiver and he was not made a party to the suit, it should be deemed that the suit was proceeded with without the necessary party, as contemplated by Order 34, rule 1, Civil Procedure Code and a decree as such would not be binding on the Official Receiver.

The three cases on which the learned advocate for the appellant relies for his contention that there is a distinction between a devolution pending suit by act of parties and a devolution by operation of law are : *Punithavelu Mudaliar* v. *Bhashyam Aiyangar*[3], *Subramania Aiyar* v. *Ramakrishna Aiyar*[4] and *Indian Cotton Co.* v. *Ramacharan Lal*[5]. At page 413 of the report in *Punithavelu Mudaliar* v. *Bhashyam Aiyangar*[3], Sir Arnold White, C.J., states as follows :

> "It has been argued on behalf of the appellant that the Official Assignee is bound by the decree, though not a party to the suit, inasmuch as the devolution of interest took place *pendente lite*. This, in my opinion, is clearly not so. In the first place, the subject-matter of the suit was not real property. In the second place, the interest devolved by operation of law, and so far as the Official Assignee is concerned the devolution was *in invitum*."

1. (1935) 69 M.L.J. 241 : I.L.R. 58 Mad. 1032.
2. (1927) 52 M.L.J. 734 : L.R. 54 I.A. 190 : I.L.R. 54 Cal. 595 (P.C.).
3. (1901) 12 M.L.J. 282 : I.L.R. 25 Mad. 406.
4. (1920) 42 M.L.J. 426.
5. A.I.R. 1939 Nag. 128.

At page 423 of the same report Bhashyam Aiyangar, J., expresses the same view in stronger terms thus :

"The principle of the decision in *Wood* v. *Sutt*[1], is that the Official Assignee being one appointed '*in invitum*' and not a 'voluntary purchaser' as in the case of a transfer by act of parties or by an 'involuntary sale' in execution of a decree, the doctrine of *lis pendens* cannot affect him and the party seeking to bind him (the Official Assignee) by the result of the suit, pending which the interest of its subject-matter has devolved on him by operation of law, ought to take proceedings to join him as a party to the suit (under section 372, Civil Procedure Code) and obtain the decree against him."

It has to be noted that in the aforesaid case, the insolvency petition must have been filed after the filing of the suit for we find from the statement of facts at page 409 that the suit against the insolvent was filed on 25th July, 1899, and the adjudication of the defendant as an insolvent took place on the 18th September, 1899. In August, 1899, the plaintiff decree-holder, upon an *ex parte* application, got an order of injunction restraining the mortgagor from disposing of the stock-in-trade and outstandings and debts payable to him. It therefore seems to be clear that at the time the injunction order was obtained, there was no insolvency. From the facts as stated in the judgment of Spencer, J., in *Subramania Aiyar* v. *Ramakrishna Aiyar*[2], it is seen that the adjudication of the insolvent had been made on the 29th February, 1916, whereas the suit was filed on the 22nd March, 1916, and decree obtained on the 11th July, 1916. On these facts both the learned Judges held that the decree obtained was in a suit in which a person was impleaded as defendant who had no right whatever in the property ordered to be sold and it was therefore a nullity so far as the true owner (not made a party to that suit) was concerned. The principle of *lis pendens* cannot affect the Court or the receiver. Spencer, J., relied upon *Punithavelu Mudaliar* v. *Bhashyam Aiyangar*[3], in holding that a party seeking to bind another by the result of the suit must apply to have that person joined as a party to the suit under Order 22, rule 10, Civil Procedure Code.

In the Nagpur case, Pollock, J., considered both the Madras cases. The facts of the case do not show that the application for adjudging the mortgagors as insolvents was prior to the filing of the suit. It is stated that the suit was filed in 1929 and a preliminary decree for sale was obtained on the 15th January, 1930, whereas the application on which the two mortgagors were adjudicated insolvents was made on 18th December, 1929. The Receiver was admittedly not impleaded in the proceedings. Pollock, J., rejected the contention that the doctrine of *lis pendens* applied because he held that if the Receiver stands in the same position as a transferee *pendente lite*, he will be bound, for it is not obligatory on a plaintiff to implead a transferee *pendente lite*, because section 52 of the Transfer of Property Act provides that during the pendency of any suit, in which the right to immoveable property is in question, the property cannot be transferred or otherwise dealt with by any party to the suit so as to affect the rights of any other party thereto. Then the learned Judge considered the question as to whether *lis pendens* applies in the case of a devolution by operation of law in these words :

"The question is whether property can be said 'transferred or otherwise dealt with' when its owner files an insolvency application and is adjudged insolvent so that his property vests in the Court or the receiver appointed by the Court. In such a case it cannot, in my opinion, be said that the former owner of the property has transferred it or otherwise dealt with it. His whole estate has devolved on the receiver just as, in case of his death, it would devolve on his heir. This is the view taken by Sir Dinshah Mulla in his Transfer of Property Act, Edition 2 at page 234, and in *Punithavelu Mudaliar* v. *Bhashyam Aiyangar*[3] and *Subramania Aiyar* v. *Ramakrishna Aiyar*[2]. See also Mulla's Transfer of Property Act, 3rd Edition, page 254 under the heading 'insolvency'."

It seems to us that the decisions in *Punithavelu Mudaliar* v. *Bhashyam Aiyangar*[3] and *Indian Cotton Company* v. *Ramacharan Lal*[4] apply to the facts of the present case.

The decision in *Kalachand Banerjee* v. *Jagannath Marwari*[5] has been followed subsequently by this Court in *Ponnuthayee Ammal* v. *Official Receiver, Coimbatore*[6] and *Ammanna* v. *Ramakrishna Rao*[7]. In both these cases, the adjudication was subse-

1. (1854) 19 Beav. 551 : 52 E.R. 465.
2. (1920) 42 M.L.J. 426.
3. (1901) 12 M.L.J. 282 : I.L.R. 25 Mad. 406.
4. A.I.R. 1939 Nag. 128.
5. (1927) 52 M.L.J. 734 : L.R. 54 I.A. 190 I.L.R. 54 Cal. 595 (P.C.).
6. (1933) 65 M.L.J. 833.
7. (1949) 1 M.L.J. 249.

quent to the filing of the suit, the decree in which was sought to be executed against the Official Receiver; but the insolvency petition had been filed earlier than the filing of the suit and, as had already been decided by the Privy Council, the decree cannot bind the Official Receiver because it was passed in his absence, though the equity of redemption had become assigned, by operation of law, in him.

A somewhat different view is deducible from the decision of Ramesam, J., in *Kaliaperumal Naicker* v. *Ramachandra Aiyar*[1], where the learned Judge held that Order 22, Civil Procedure Code, deals with the devolution of interest by operation of law and not by act of parties and that though there is a rule dealing with the position of a plaintiff becoming an insolvent, there is no rule dealing with a defendant becoming an insolvent, and that section 29 of the Provincial Insolvency Act of 1920 provides for such a case. He further held that the filing of a suit prior to the adjudication must be regarded outside the purpose of the Insolvency Act with reference to the provisions of section 28 (2) of the Act and the bringing in of the Official Receiver as a party to the suit is merely a matter of compliance with such orders as the Court may pass under section 29 of the Act. It was also held by him that the order of appointment of interim receiver has not got the same effect as the vesting order or the order of adjudication. The suit in that case was for enforcement of a mortgage and therefore was practically outside the scope of section 28 of the Provincial Insolvency Act and further the Official Receiver was added as a defendant at a certain stage of the suit. The only question that had to be considered was whether at the time the Official Receiver was sought to be impleaded the suit was barred by limitation against him. This cannot be said to be a case where a decree was passed in the absence of the proper owner in whom the property has become vested and as such null and void. Though there are certain observations of the learned Judge tending to take a somewhat different view from those expressed in some of the other cases, we feel that this case does not help the contention of the respondent. On the other hand Pandrang Row, J., in *Henry Meriau* v. *Official Receiver, Madura*[2], following *Raghunathdas* v. *Sundardas Khetri*[3] and *Anantarama Aiyar* v. *Kuttimalu Kovilamma*[4] laid down that where the property of the judgment-debtor is sold by the decree-holder after the judgment-debtor has applied for insolvency, without notice to the Official Receiver, the sale is a nullity as the adjudication of the insolvent relates back to the date of his petition and the Official Receiver is entitled to all the properties of the judgment-debtor from that date. It is unnecessary to multiply authorities on the question of relation back though we may find useful observations in *Kandasami Pillai* v. *Kandasami Pillai*[5] and *Venkatappayya* v. *Official Receiver, Guntur*[6]. The passages in Mullah's Insolvency Act at pages 411 and 414 and a summary of the discussions at page 415 may also be referred to for guidance. If therefore the principle of relation back applies, then the insolvency must be deemed to have taken place on the 30th September, 1948, when the application to adjudicate Subbarama Nadar was made and if the doctrine laid down in *Punithavelu Mudaliar* v. *Bhashyam Aiyangar*[7] that devolution in favour of the Official Receiver is a devolution by law and not a devolution by act of parties in which the doctrine of *lis pendens* does not affect as applied, it should be deemed as if the decree was passed without the necessary person being made a party to the suit.

But it is urged for the first respondent that in a decree for specific performance no right to property is insolved and therefore it is not a case as if any property of the insolvent was concerned in the suit which vested in the Official Receiver. What is urged is that though not a right in property, when the Official Receiver takes the property, he takes it with all the liabilities, equities and duties and the

1. (1927) 53 M.L.J. 142.
2. A.I.R. 1935 Mad. 907.
3. (1914) 27 M.L.J. 150 : L.R. 41 I.A. 251 : I.L.R. 42 Cal. 72 (P.C.).
4. (1916) 30 M.L.J. 611.
5. (1947) 1 M.L.J. 203.
6. (1944) 1 M.L.J. 215 : I.L.R. (1944) Mad. 779 at 784.
7. (1901) 12 M.L.J. 282 : I.L.R. 25 Mad. 406.

same obligations as the insolvent and he is bound to discharge these obligations and duties as the insolvent himself has to do. Sir W. M. James, L.J., makes the following observation in Ex parte *Holthausen* : In re *Scheibler*[1] :

" The law of England is, that, with certain exceptions the trustee in bankruptcy is bound by all the equities which affect a bankrupt or a liquidating debtor ; that is to say, if a bankrupt or a liquidator debtor, under circumstances which are not impeachable under any particular provision connected with his bankruptcy or insolvency, enters into a contract with respect to his real estate for a valuable consideration, that contract binds his trustee in bankruptcy as much as it binds himself."

Cozens-Hardy, J., in *Pearce* v. *Bastable's Trustee in Bankruptcy*[2] has made strong observations regarding the binding nature of the contracts entered into by the insolvent on the trusteee in bankruptcy. See also *Nandgopal* v. *Baluk Prasad Gupta*[3], where the discussion centered round the point as to the binding nature of the equities and liabilities of the insolvent on the Official Receiver. That an Official Receiver would in such matters have the same position as that contemplated by sections 40 and 91 of the Transfer of Property Act does not require such discussion. All these decisions only show that the Official Receiver, under such circumstances, is bound by the equities and the liabilities of the insolvent. But that does not show that if he is not made a party, the decree would be binding on him.

While a suit for specific performance was pending one of the defendants sold the property to another and was later on adjudged an insolvent and on an application to bring the Official Assignee as a party to the suit it was held that it should be allowed because, on insolvency, the legal estate vested in the Official Assignee subject to the equities of third parties and the proper person to execute a deed in pursuance of a decree for specific performance against the insolvent is the Official Assignee. Vide *Purushottam Naidu* v. *Ponnurangam Naidu*[4]. We may also refer to the observations of the Judicial Committee in *Sheobaran Singh* v. *Kulsum-un-nissa*[5], where it is stated that the Official Assignee takes the property of an insolvent exactly as it stood in his person with all its advantages and all its burdens. The case considered there was one of pre-emption. Our attention was also invited to the observations contained in *Valliappa Chettiar* v. *Govinda Das*[6], where in discussing the meaning of the word "land" in clause 12 of the Letters Patent of the High Court, there are certain dicta about the nature of the right involved in a suit for specific performance. At page 822 Ramesam, J., observes that in a suit for specific performance, the decree is primarily addressed to the defendant, *i.e.*, the Court acts *in personam* which a court of equity is of course entitled to do. Though the land may be described in the conveyance, it is not going to be touched even in the execution of a decree as in the case of a decree for sale on mortgage ; nor does any issue as to title to the land arise in such a suit, and therefore the learned Judge held that a suit for specific performance is not a suit for land. It is not necessary for us to discuss the correctness of these observations because the whole question is whether any property of the insolvent vested in the Official Receiver or not. It cannot be said that in a suit for specific performance the Court acts solely *in personam* and moreover those observations are not shared by the other learned Judges and are not necessary for the discussion.

The case in *Ponnuthayee Ammal* v. *Official Receiver, Coimbatore*[7], was a case where, pending a suit for maintenance by a widow against the members of the joint family of her husband, and claiming a charge on the properties, one of the defendants was adjudicated an insolvent, but without adding the Official Receiver as a party, the matter proceeded and a decree was passed as prayed for making her future maintenance a charge on certain properties belonging to the joint family; and the widow, when executing the decree, tried to bring the properties to sale, the Official Receiver objected to it on the ground that the decree is invalid. It was held by this Court that such execution proceedings are invalid because, pending the suit, the property had vested in the insolvent and the Official Receiver was a necessary party.

1. (1874) 9 Ch. App. Cases 722 at 726.
2. (1901) 2 Ch. D. 122 at 124.
3. (1931) I.L.R. 54 All. 17.
4. (1913) 21 I.C. 576.
5. (1927) 52 M.L.J. 638 : L.R. 54 I.A. 204 : I.L.R. 49 All. 367 (P.C.).
6. (1928) 57 M.L.J. 190 : I.L.R. 52 Mad. 809.
7. (1933) 65 M.L.J. 833.

That the Official Receiver cannot be said to be a legal representative of the nsolvent and so the decree where he was not made a party cannot be executed igainst him is also deducible from the observations contained in *Nainar Rowthan v. Kuppai Pichai Rowthan*[1] and *Kaharjannessa* v. *Saradind Narayan Roy*[2]. The learned idvocate for the appellant posed the question whether, if the point raised by the irst respondent that the Official Receiver takes the property subject to all the xquities against the insolvent and a decree passed without the Official Receiver is binding on him is accepted, a decree for specific performance against a person who has assigned the property, which was the subject-matter of the aggreement, would be binding on such assignee even if he was not a party to the suit What he contends is that if, after a valid agreement to sell a property was entered nto, the offerer sells the property to a third party, and a suit for specific performance s brought without making the third party a defendant, is it possible for the decree-iolder to execute the decree for specific performance? Section 27 (*b*) of the Specific Relief Act only contemplates cases where a person who has taken an assignment of the property with notice of the agreement to sell will be bound by a decree for pecific performance if he is made a party. Instances can be multiplied like the ase of a suit against a father for a pre-partition debt and a decree obtained against im after the sons have become divided. It needs not much argument to show hat such a decree cannot be executed against the divided sons who were not parties o the suit.

The preponderance of authority is to the effect that even if the Official Receiver s bound by the equities, since he should be made a party to the suit, the decree annot be executed against him. Whether the decree-holder can prove his claim n insolvency or whether a separate suit will lie by making the Official Receiver . defendant, we are not concerned with at this juncture. We are therefore decidedly f opinion that by the operation of sub-section (7) of section 28 of the Provincial nsolvency Act, the insolvency of Subbarama Nadar related back to the date of the ling of the application and therefore, since the Official Receiver was not made party to the suit, the decree obtained would not be binding against him.

In the counter affidavit filed by the Official Receiver, it is stated that the etitioner in the lower Court appeared to be a friend of the insolvent and he had nowledge of the insolvency proceedings and yet he did not implead the Official Receiver as a party. This is not denied in any reply affidavit; nor was there any vidence let in to show that the contention of the Official Receiver is unjustified. No oral or documentary evidence was let in on behalf of the petitioner in the ower Court to show that he was not aware of the filing of the application for adjudi-ating Subbarama Nadar as an insolvent. Under these conditions we have to hold hat the decree in O. S. No. 80 of 1948 is not binding on the Official Receiver and herefore he cannot be impleaded in execution of that decree and no relief can be aimed against him. The appeal is therefore allowed and the order of the Sub-ordinate Judge adding the Official Receiver as second respondent is set aside with osts here and in the Court below.

K.C. ——— *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE BASHEER AHMED AYEED.

vasubba Nadar .. *Accused.**

Criminal Trial—Judge putting questions to the witnesses both while prosecution examined them as well as the time when the defence cross-examined them—Propriety—Evidence Act (I of 1872), sections 138 and 165—ope.

1. A.I.R. 1929 Mad. 609 at 611. 2. A.I.R. 1935 Cal. 130.

* Referred Trial No. 98 of 1950. 4th October, 1950.
(Cr. Apa. Nos. 567 and 695 of 1950).

The practice of Judges and Magistrates questioning the witnesses as if they were cross-examining counsel must be deprecated. It is opposed to the provisions of section 138 of the Evidence Act and not fair to the prisoners.

It is not the province of the Court to examine the witnesses unless the pleaders on either side have omitted to put some material question or questions, and the Court should, as a general rule, leave the witnesses to the pleaders to be dealt with as laid down in section 138 of the Evidence Act. The Judge's power to put questions under section 165 is certainly not intended to be used in such cases. It will be embarrassing to counsel examining a witness when the trial Judge or Magistrate puts questions during the course of either examination-in-chief or cross-examination which would take him away from the trend of his questions.

Noor Bux Kazi v. *The Empress*, (1880) I.L.R. 6 Cal. 279 (283), relied on.

Trial referred by the Court of Session of Tirunelveli division for confirmation of the sentence of death passed upon the said prisoner in C. C. No. 28 of 1950 and appeal by the prisoner.

K. S. Jayarama Aiyar for *C. K. Venkatanarasimham* for Accused.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

The Judgment of the Court was delivered by

Basheer Ahmed Sayeed, J.—Accused 1 and 2 have preferred these appeals against their conviction and sentence by the learned Sessions Judge of Tirunelveli for the offences falling under sections 324 and 302, Indian Penal Code. The first accused has been convicted and sentenced to three years rigorous imprisonment under section 324 and the second accused under section 302 to death.

The prosecution case is that these two accused stabbed the deceased Sudalaimani Nadar on the 4th November, 1949, when he was in the hotel of P. W. 1 and also when he went out near the hotel of P. W. 3 and finally at the end of the street where the fatal blow seems to have been dealt by the second accused as a result of which the deceased fell down and died. It is common ground between the prosecution and the defence that there has been enmity between the Nadars of Korangani and Navidupannai for a long time over certain temple of the village, fishery rights and other matters. The deceased himself is said to have attacked, sometimes before the date of occurrence, the first accused and was convicted. His appeal before the Sessions Court was dismissed and the matter is now pending revision in this Court. He is said to have been released on bail. Besides this, the deceased is also said to have attacked one Naicker prior to the occurrence and the charge sheet is pending enquiry before the Magistrate and the deceased was absconding at the time when he is said to have been stabbed by these two appellants.

The entire case for the prosecution depends on the evidence of P. Ws. 1, 2 and 3 corroborated by that of P. Ws. 10 and 12 to some extent. The learned Sessions Judge who heard the witnesses believed all of them and convicted and sentenced the accused, as stated above. Mr. Jayarama Aiyar for the appellants contends before us that the evidence of P. Ws. 1, 2 and 3 cannot be relied on for convicting the appellants of the offences with which they were charged on various grounds. In the first place, he says that there has been a faction in the village and these witnesses have been suborned to give false evidence against the accused on account of the faction. In the second place, his contention is that the evidence is all artificial and unnatural and cannot be taken as true and accepted for the purpose of convicting the appellants. In the next place, his point is that these witnesses are impecunious and men of no means and their evidence has been simply secured for money; at any rate, his attack against the evidence of P. Ws. 1 and 3 seems to be based on this. As regards the evidence of P. W. 2, Mr. Jayarama Aiyar would say that his evidence is wholly improbable in that it is full of contradictions and the evidence given before the Sessions Court is at variance in many material points with that given in the Magistrate's Court.

We have been taken through the entire evidence that is relevant to the case and, in our opinion, except the evidence of P. W. 1 the rest of the evidence, particularly that of P. Ws. 2 and 3 does not appear to be acceptable.

* * * * * *

(After reviewing the facts and the evidence, his Lordship continued:)

Taking all these facts into consideration and the evidence in the case, we el that the guilt of the murder has not been brought home to the second accused. ut what has been proved beyond reasonable doubt appears to be that he was sponsible for stabbing the deceased in the hotel as spoken to by P.W. 1 and for using the injuries found on the person of the deceased as testified to by the amination of the doctor and the post-mortem certificate issued by him. In ese circumstances, we feel that we shall be justified in setting aside the conviction id sentence against the second accused for the offence of murder; but we nvict him for the offence under section 324, Indian Penal Code and sentence m to rigorous imprisonment for three years. We do not find that there is any stification to interfere with the sentence that has been imposed on the first ppellant and that will be confirmed. With these modifications the appeals are ismissed.

Before departing from this case, it is necessary to refer to a matter of procedure adopted by the learned Sessions Judge. During the course of the evidence P. Ws. 1 to 3 as well as of P. W. 10, it is seen that the learned Judge has put ry many questions to the witnesses both while the prosecution examined them well as at the time when the defence cross-examined them. Large chunks the deposition of these witnesses consist of answers to Court questions and in ct so far as P. W. 10 was concerned, after he was examined and cross-examined id re-examined, he was recalled and the Court put to him quite a large number questions with the result that a cross-examination was begun as it were *de novo*. lore than 70 years ago in *Noor Bux Kazi* v. *The Empress*[1], at page 283 Sir Richard arth, C.J., and Tottenham, J., deprecated the practice of judges and magistrates estioning witnesses as if they were cross-examining counsel in the following ords:

"We think it right to point out to the Sessions Judge that the course which he adopted in the amination of the witnesses for the prosecution was irregular, opposed to the provisions of section 8, Evidence Act, and not fair to the prisoners.

We find that, on the examination-in-chief being finished, the Judge questioned almost all the tnesses at considerable length upon the very points to which he must have known that the cross-amination would certainly and properly be directed. The result of this, of course, was to render cross-examination by the prisoner's pleaders to a great extent ineffective by assisting the witnesses explain away, in anticipation, the point which might have afforded proper ground for useful cross-amination.

It is not the province of the Court to examine the witnesses, unless the pleaders on either side ve omitted to put some material question or questions; and the Court should, as a general rule, ve the witnesses to the pleaders to be dealt with as laid down in section 138 of the Act. The Judge's wer to put questions under section 165 is certainly not intended to be used in the manner which we ve had occasion to notice in the present case."

ne observations of the learned Judges apply very aptly to what has happened in se under consideration. Any person with some experience either of examination chief or cross-examination would feel the embarrassment and trouble when the arned Judge puts questions during the course of either examination in chief or oss-examination which would take him away from the trend of his questions. e therefore desire to impress upon the learned Judge that the procedure adopted him has been irregular.

K.S. *Sentences modified.*

1. (1880) 6 Cal. 279.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE PANCHAPAKESA AYYAR

Mangina Venkataswami and another .. *Petitioners**

v.

Nuli Manikyam and others .. *Respondents.*

Constitution of India (1950), *Article* 133—*Value of subject-matter of suit and appeal Rs.* 10,000 *in regard to judgment delivered prior to the date when the Constitution came into force—Right to leave to appeal to Supreme Court—Suit for redemption—Valuation of subject-matter.*

An appeal will lie to the Supreme Court if the value of the subject-matter of the suit and that of the appeal was Rs. 10,000 in regard to judgments delivered prior to the date when the Constitution came into force.

In a suit for redemption it is not correct to state that the property in dispute is the security given for the loan. The subject-matter is the loan for which the security was given. Where the value of such loan is less than Rs. 10,000 leave to appeal to the Supreme Court cannot be granted.

The mere fact that if the loan is not repaid in the time fixed by the decree, the mortgaged property will be sold does not raise any question affecting the security.

Nadir Hussain v. *Municipal Board, Agra*, I.L.R. 1937 All. 405 and *Ishwari Prasad Singh* v. *Kameshwar Singh*, A.I.R. 1941 Pat. 288, dissented from.

Satibaladasi v. *Chotanagpur Banking Association, Ltd.*, (1948) I.L.R. 27 Pat. 237 relied on.

Subramania Iyer v. *Sellammal*, (1915) 30 M.L.J. 317 : I.L.R. 39 Mad. 843, referred to.

Therefore the plaintiff cannot take advantage of Article 133 (1) (*b*) of the Constitution either.

Petition praying that in the circumstances stated in the affidavit filed therein the High Court will be pleased to grant leave to the petitioners herein to appeal to the Supreme Court of India at New Delhi against the decree and judgment of the High Court, Madras, dated 25th January, 1950, in A. S. No. 377 of 1948, preferred against the decree of the Court of the Subordinate Judge, Eluru in O. S. No. 73 of 1946.

M. Seshachalapathi for Petitioners.

V. Rangachari and *K. Mangachari* for Respondents.

The Court made the following

ORDER.—This is an application under Article 133, of the Constitution of India for leave to appeal to the Supreme Court against the decree and judgment of this Court dated 25th January, 1950, in Appeal No. 377 of 1948.

The trustee of Sri Chenna Kesavaswami Temple instituted O. S. No. 73 of 1946 on the file of the Court of the Subordinate Judge of Ellore, against several defendants for recovery of possession of certain properties and for mesne profits. The suit comprised of various items ; but before the trial, the plaintiff compromised with some of the defendants and the suit was disposed on the merits only against defendants 1 to 6 and 17 to 28. Their claim related to items 1 and 7 of the plaint schedule. The case of the plaintiff was that the lands in question belong to the deity and the mortgages effected by the archakas were invalid and therefore the plaintiff was entitled to recover possession of the same with mesne profits. The 5th defendant who is the son of the mortgagee under Exhibit B-1, one of the impugned mortgages, raised the plea that he acquired a right by prescription, the mortgagee's right. The Subordinate Judge decreed the suit in respect of both the items. In appeal, this Court confirmed the decree of the Subordinate Judge in regard to item 7 but in respect of item 1 held that the 5th defendant acquired a right to the mortgage by prescription. In the result, we directed the lower Court to give a decree for redemption after determining the sums due to the mortgagee under Exhibit B-1. The effect of our judgment is that the plaintiff obtained a decree for redemption in respect of item 1. His title to that item was not negatived

*C.M.P. No. 7117 of 1950. 10th October, 1950.

that the property in dispute is the security given for the loan. The subject-matter is the loan for which the security was given. That the value of the subject-matter of a suit is the mortgage money and not the property given as security is also supported by the judgment of the Judicial Committee in *Mirza Abid Hussain Khan* v. *Ahmad Hussain*[1]. In that case, the suit was filed to enforce an annuity of Rs. 125 per annum. The Privy Council held that the 110th section of the Code of Civil Procedure, 1908, applies to the value of the annuity which is sought to be recovered, not to the value of the property upon which that annuity of Rs. 125 is charged. We cannot, therefore, hold that the value of the subject-matter in dispute in appeal is more than Rs. 10,000. We may also point out that the value of the property secured is also not admitted by the respondents to be of the value of upwards of Rs. 10,000.

It is then contended that the petitioner would be entitled under Article 133 (1) (*b*) of the Constitution for leave. Learned counsel's argument is that our judgment involved directly or indirectly some claim or question respecting property of the like amount or value. *In Subramania Iyer* v. *Sellammal*[2], in construing the second paragraph of section 110, Civil Procedure Code, which is analogous to Article 133 (1) (*b*) of the Constitution, the learned Judges held that the words "involved, directly or indirectly" contained in the second paragraph of section 110, Civil Procedure Code could not be read as including cases which involved nothing but

to be sold. The High Court held that the amount of Rs. 7,625 was charged on the property. It is therefore clear that the value of the subject-matter so far as defendants 2 to 4 were concerned, was less than Rs. 10,000. But the learned Judges gave leave under the second paragraph to section 110, Civil Procedure Code. They observed as follows :

"But it cannot be disputed that property worth more than Rs. 7,625 can be put up for sale at auction in execution of the mortgage decree and sold. After the realisation of Rs. 7,625 the balance will have to be paid to the defendants. It is also clear that at auction the mortgaged property may not fetch its value and therefore property worth more than Rs. 10,000 may be sold at auction for realisation of Rs. 7,625 only".

On the aforesaid reasoning, they held that the appeal involved directly or indirectly a claim in respect of property of the value of more than Rs. 10,000. The same view is expressed by the Patna High Court in *Ishwari Prasad Singh* v. *Kameshwar Singh*[1]. There the plaintiff brought a suit for a declaration that a certain property could not be attached and sold in execution of the certificate in Certificate Case, No. 1099 of 1934-35. The suit was valued at Rs. 7,699 odd because that was the amount for which the certificate was issued. It was conceded that the value of the property which was liable to be sold was Rs. 52,000 odd. On those facts, the learned Judges held that paragraph 2 of section 110, Civil Procedure Code applied and gave leave to appeal to the Privy Council. The reason for their decision is found in the following passage :

"It is plain that if the plaintiffs do not succeed in this litigation the property which they have purchased in execution of their mortgage decree will be liable to be sold, and that property is worth much more than Rs. 10,000. That being so, it is difficult to hold that the decree which is sought to be appealed from does not involve indirectly a question respecting property more than Rs. 10,000".

We are unable to accept the above interpretation put upon section 110 (*b*), Civil Procedure Code. The paragraphs in section 110, Civil Procedure Code must be read together so as to reconcile the various provisions. If the provisions of the second paragraph are interpreted in the aforesaid manner, the provisions of the first paragraph would become nugatory. If the view adumbrated above is logically extended, it will have to be held that even in money decrees the judgment and decree of the appellate Court involved, directly or indirectly, a question respecting property of a value not less than Rs. 10,000 as, in execution of that money decree, properties of that value may be sold. Under section 110, paragraph 2, the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value. Can it be said that the appellate decree involved a claim or question in respect of the property given as security. These words were construed in *Appalaraju* v. *Rangappa Naicker*[2]. The learned Judges say at page 14 :

"But in construing the word 'property' in the second paragraph, we cannot lose sight of the first paragraph of section 110 to which the second is an alternative. I think 'property' in the second paragraph of section 110 means rights in property inferior to full ownership, where such inferior rights alone are the subject-matter in dispute. Hence the second paragraph means that the suit must, to satisfy its conditions, involve rights and claims to property which rights and claims are worth Rs. 10,000 and upwards."

In this case the claim is either the right to redeem the mortgage or the claim to recover the amount. That claim is not either directly or indirectly, of the value of more than Rs. 10,000. In *Satibaladasi* v. *Chotanagpur Banking Association, Ltd.*[3], when a similar contention was raised, it was negatived with the following observation :

"In a mortgage suit the property which is given as security for the loan is not the 'property' in dispute in the suit, nor is a decision that the mortgagee is entitled to recover the money which he advanced one involving either a claim to or question respecting the security. The only property in dispute in a mortgage suit is the loan advanced to the mortgagor by the mortgagee. The mere fact that, if this loan is not repaid in the time fixed by the decree, the mortgaged property will be sold, does not, in my opinion, raise any question affecting the security".

We respectfully agree with these observations. The claim in this appeal does not raise any question either directly or indirectly, affecting the security. The only

1. A.I.R. 1941 Pat. 288.
2. (1917) 33 M.L.J. 481 : 6 L.W. 12.
3. (1948) I.L.R. 27 Pat. 237.

question is whether the plaintiff is bound to redeem the mortgage by paying the amount ascertained by the Court below. We therefore hold that the plaintiff cannot take advantage of Article 133 (1) (*b*) either.

It is then contended that we should give a certificate under clause (*c*) of Article 133 (1) on the ground that the appeal involved a question of public importance, *viz.*, whether an idol is a 'person' and therefore eligible to come within the definition of an "agriculturist" within the meaning of section 3 of Madras Act IV of 1938. But we have abstained from deciding that point as the suit was brought only on behalf of the temple, a religious institution, which is excluded from the definition of a "person" in section 3 of Madras Act IV of 1938. It therefore follows that no question of public importance arises in this case. In the view we are taking it is unnecessary to call for a report on the question of the valuation of item 1 of the plaint schedule property.

In the result, the petition is dismissed with costs.

K. S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, AND MR. JUSTICE VISWANATHA SASTRI.

The Manager, United Commercial Bank, Ltd., Mathurai .. *Petitioner* *

v.

The Commissioner of Labour, Madras and another .. *Respondents.*

Madras Shops and Establishments Act (XXXVI of 1947), section 41 (2)—Appeal filed by dismissed employee of a Bank to prescribed authority (Labour Commissioner, Madras)—If taken away or affected by subsequent reference of certain industrial disputes relating to Banks under Industrial Disputes Act (XIV of 1947, as amended by Act LIV of 1949), section 10.

The Madras Shops and Establishments Act and the Industrial Disputes Act (Central) are not in *pari materia*. Though in one sense section 41 (2) of the Madras Act concerns a dispute between an employee and an employer, an individual dispute falling under it would not by itself be an industrial dispute falling within the scope of the Industrial Disputes Act. It may be that the dismissal of even one workman can become the subject of an industrial dispute, but then it is no longer an individual dispute between the dismissed workman and the employer only, it becomes a dispute between the workmen on the one hand and the employer on the other. Such a dispute, which may be called a collective dispute, certainly cannot be the subject-matter of an appeal under section 41 of the Madras Act. Such a dispute would have to be referred to a tribunal or other authority under section 10 of the Industrial Disputes Act, either by the Government *suo motu* or at the instance of one or both the parties.

An appeal filed on 22nd July, 1949, under section 41 (2) of the Madras Act by a dismissed employee of a bank would be competent and would not abate or become incompetent because of the reference by the Central Government on 21st February, 1950, under section 10 of the Industrial Disputes Act to an Industrial Tribunal of disputes between banks and their employees for adjudication.

Per *Viswanatha Sastri, J.*—It would perhaps be a different matter if the dismissed employee had taken his case before the Tribunal to which an industrial dispute had been referred under Act XIV of 1947 and got an adverse decision against him from the Tribunal before he filed an appeal under section 41 (2) of Madras Act XXXVI of 1947. In such a case it might possibly be contended that, having elected his remedy by way of submitting his dismissal to the decision of the Tribunal he could not after he got an adverse order from the Tribunal, seek relief by way of an appeal under section 41 (2) of Madras Act XXXVI of 1947.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a Writ of *Certiorari* calling for the records in Case No. 232 of 1949, Commissioner of Labour, Madras, and quash the order of the said Commissioner of Labour made therein overruling the preliminary objection of the petitioner.

K. Umamaheswaram and *A. Kuppuswami* for Petitioner.

V. Ramaswami Aiyar and The State Counsel (*John and Row*), for Respondent.

The Court made the following orders

The Chief Justice.—This application for the issue of a Writ of *Certiorari* to quash an order of the Commissioner of Labour, Madras, has been filed in the following

* C. M. P. No. 3616 of 1950. 3rd November, 1950.

circumstances. C. G. Sarma, the second respondent herein was an employee of the United Commercial Bank, Ltd., at its Mathurai branch. His services were dispensed with by the bank on 30th June, 1949 on the ground that he misbehaved towards a respectable constituent to the Bank and that this conduct both inside and outside the office was extremely unsatisfactory. He preferred an appeal against this order of dismissal to the Commissioner of Labour, Madras, under section 41 of the Madras Shops and Establishments Act of 1947 (hereinafter referred to as the Madras Act). That section runs thus :

"41. (1) No employer shall dispense with the services of a person employed continuously for a period of not less than six months except for a reasonable cause and without giving such person at least one month's notice or wages in lieu of such notice, provided, however, that such notice shall not be necessary where the services of such person are dispensed with on a charge of misconduct supported by satisfactory evidence recorded at an inquiry held for the purpose ;

(2) The person employed shall have a right to appeal to such authority and within such time as may be prescribed either on the ground that there was no reasonable cause for dispensing with his services or on the ground that he had not been guilty of misconduct as held by the employer.

(3) The decision of the appellate authority shall be final and binding on both the employer and the person employed."

By orders of the Central Government, dated 13th June, 1949 and 28th September, 1949 the industrial disputes between certain banking companies mentioned in Schedule I annexed to the order including their branches and their employees were referred to an Industrial Tribunal for adjudication. On 21st February, 1950 a notification was published in the *Gazette of India, New Delhi*, in and by which the Central Government in the exercise of the powers conferred by clause (*c*) of sub-section (1) of section 10 of the Industrial Disputes Act (Act XIV of 1947) referred certain further industrial disputes which had arisen after the 13th June, 1949 or were apprehended between the banking companies mentioned in schedule I annexed thereto and their employees in respect of matters specified in schedule II annexed thereto. One of the banks mentioned in schedule I is the United Commercial Bank, Ltd., the applicant before us. Schedule II was in these general terms :

"(1) Retrenchment, discharge or dismissal of workmen after the 13th June, 1949 (specific cases to be cited by employees).

(2) Stoppage of increments and withholding of promotions (specific cases to be cited by em-employees):"

The schedule contained a note that the list was not intended to be exhaustive. In pursuance of this later notification the Central Government Industrial Tribunal at Calcutta gave directions that the employees should deliver their statements of claims to the office of the Tribunal at Calcutta concerning matters referred to adjudication on 15th March, 1950 and should give a copy thereof to the employers on the same day. The employers were directed to deliver within ten days thereafter their written statement in answer to the said claims and give a copy thereof to the employees concerned.

It is common ground that neither the second respondent nor any union on his behalf delivered a statement of claim as regards his dismissal.

When the appeal was taken up for hearing, the employer raised a preliminary objection that the Labour Commissioner had no jurisdiction to proceed with the enquiry in view of the provisions of the Industrial Disputes (Banking and Insurance Companies) Act, 1949. The Commissioner overruled the objection holding that the Act did not affect the rights of the employee under section 41 (2) of the Madras Shops and Establishments Act of 1947. He therefore posted the appeal for disposal on the merits to 17th April, 1950. It is to quash this order that this application was filed on 12th April, 1950.

The contention of the petitioner as set out in the affidavit filed in support of the application is that the Labour Commissioner had no jurisdiction to entertain the appeal, because under the provisions of the Central Act LIV of 1949 read with Act XIV of 1947, namely, the Industrial Disputes Act, and having regard to the terms of the reference made by the Central Government already referred to the

employee's only remedy was to appear before the Tribunal and state his claim and that the appeal preferred under section 41 of the Madras Shops and Establishments Act was incompetent. Subsequent to the filing of this application, the petitioner sought to raise another point formulated as follows :

"Under the Industrial Disputes Act, which is an enactment of the Central Legislature, it is the Tribunal which is constituted under section 7 of the said Act to which the disputes are referred under section 10 that is solely empowered to decide disputes between the bank and its employees. Under the notification No. L. R. 2/273 of the Government of India published in the *Gazette of India*, dated 21st February, 1950, all cases of dismissal of workmen after 13th June, 1949, were declared to be industrial disputes and were referred to the Industrial Tribunal at Calcutta for adjudication. The dispute in question being one that arose after 13th June, 1949, it is only the Tribunal that has jurisdiction to decide the dispute. In so far as the Madras Shops and Establishments Act XXXVI of 1947 enables or purports to enable an employee to appeal to a different authority, namely, the Commissioner of Labour, under section 41 of that Act, the said Act is inconsistent with the provisions

"2-A. Notwithstanding anything contained in sub-sections (1) and (2) where a tribunal has been constituted under this Act for the adjudication of disputes in any specified industry or industries, and a dispute exists, or is apprehended in any such industry, the employer or a majority of the workmen concerned, may refer the dispute to that Tribunal."

Appropriate Government means in relation to certain industries and concerns the Central Government and in relation to other industrial disputes the Provincial Government. Section 2, clause (*j*) of the Act defines "industry" as meaning "any business, trade, undertaking, or manufacture". "Industrial dispute" means "any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person." "Workmen" means "any person employed (including an apprentice) in any industry to do any skilled or unskilled manual or clerical work for hire or reward".

There were two Ordinances VI of 1949 and XXVIII of 1949 promulgated by the Governor-General which made special provision for the adjudication of industrial disputes concerning certain banking and insurance companies having branches or other establishments in more than one Province. The provisions of these Ordinances were subsequently embodied in the Act of the Central Legislature, Act LIV of 1949 called the Industrial Disputes (Banking and Insurance Companies) Act, 1949. *Inter alia* this Act provided that it shall not be competent for a Provincial Government or any officer or authority subordinate to such Government to refer any industrial dispute concerning any banking or insurance company or any matter relating to such disputes as defined in that Act to any tribunal or other authority for adjudication, enquiry or settlement. Any proceedings relating to such disputes already pending before Provincial Tribunals were declared to have abated and the Central Government had to refer such disputes to an Industrial Tribunal constituted under the Act. Even when awards or decisions had been made in respect of any industrial disputes concerning such banking or insurance companies by any tribunal or authority appointed by a Provincial Government or authority, the Central Government was given the power to refer the same dispute or any of them to an Industrial Tribunal constituted under the Act for re-adjudication. Meanwhile, the implementation of the prior award or decision was stayed. It is common ground that notifications abovementioned under which reference was made by the Central Government in this case were issued in accordance with the provisions of this enactment (Act LIV of 1949).

The main question for "our decision" in this case is whether there is anything in the Industrial Disputes Act or in the later Industrial Disputes (Banking and Insurance Companies) Act which deprives a discharged or dismissed employee like the second respondent before us of the right of appeal conferred on him by section 41 (2) of the Madras Act. There is no express provision which has that effect and that is conceded by the learned counsel for the petitioner. But it is said that when the Central Government have referred the industrial dispute between a banking company as defined in Act LIV of 1949 and its employees to a Tribunal constituted under that Act, the only remedy of a discharged or dismissed employee was to make his claim before that Tribunal for adjudication. We do not think that anything turns on the actual making of a reference. The learned counsel for the petitioner perceived the difficulty of contending that the right of appeal under section 41 (2) of the Madras Act would be available if there was no reference under Act LIV of 1949, but such right of appeal would not exist or would cease to be effective the moment a reference was made. In this case the appeal by the second respondent was filed on 22nd July, 1949, long before the notification, dated 21st February, 1950, relied upon by the petitioner. If on that date there was no reference, then it would follow that the appeal was quite competent, and the petitioner would be forced to argue that what was a perfectly competent appeal on the date it was filed somehow became unsustainable at a later stage. In the absence of express statutory provisions, it is impossible to support such a result. It therefore became apparent that before the petitioner could succeed, he should

be able to convince us that whether a reference was made or not, the right of appeal conferred under section 41 (2) of the Madras Act was by implication taken away by Act LIV of 1949 which is a later enactment of the Central Legislature. This would again depend upon the applicability of the provisions of the Industrial Disputes Act itself to an appeal under section 41 (2) of the Madras Act. This is because the power of the Central Government to make any reference of industrial disputes concerning any banking company as defined in Act LIV of 1949 is only by virtue of section 10 of the Industrial Disputes Act.

The point for decision ultimately reduces itself to this. When an individual employee seeks to set aside an order of dismissal against him, is there an industrial dispute within the meaning of the Industrial Disputes Act? If it can be said that a mere individual dispute, such as for instance that in the present case, is an industrial dispute, then it would follow that the remedy of the aggrieved employee would only be a reference under the Industrial Disputes Act. The result would be that section 41 (2) of the Madras Act would have no application at all to the case of dismissed employees except in cases, if there be any *such*, which would not fall within the Industrial Disputes Act. Having regard to the very wide definition of "Industry" in section 2 (*j*) of the Industrial Disputes Act, it is difficult to conceive of any such case. "Industry" means "any business, trade, undertaking, manufacture or calling of employers". It would therefore include all the classes of establishments covered by the Madras Act. The result would be that section 41 (2) would be practically useless.

In my opinion, this is not the result. The two Acts, namely, the Industrial[1] Disputes Act and the Madras Act are not in *pari materia*. Though in one sense section 41 (2) of the Madras Act concerns a dispute between an employee and an employer, an individual dispute falling under it would not by itself be an industrial dispute falling within the scope of the Industrial Disputes Act. It may be that the dismissal of even one workman can become the subject of an industrial dispute, but then it is no longer an individual dispute between the dismissed workman and the employer only; it becomes a dispute between the workmen on the one hand and the employer on the other. Such a dispute, it may be called a collective dispute, certainly cannot be the subject-matter of an appeal under section 41 of the Madras Act. Such dispute would have to be referred to a tribunal or other authority under section 10 of the Industrial Disputes Act, either by the Government *suo motu* or at the instance of one or both of the parties. In the *Kandan Textiles, Ltd.* v. *The Industrial Tribunal, Madras*[1], it was held by a Bench of this Court that something more than an individual dispute between a worker and the employer is required to make the dispute an industrial dispute. It was pointed out in that case that a dispute which in its origin might be an individual dispute may at a later stage develop into a collective dispute which could be properly called an industrial dispute. We have not been referred to any authority which holds to the contrary. In each of the several cases which recently came up before the Federal Court there were disputes which could be deemed to be collective disputes and not merely industrial disputes. The case in *Shamnugger Jute Factory Co., Ltd.* v. *Modak*[2] might appear to concern an individual dispute, but an analysis of the facts clearly shows that a collective dispute ensued as a result of the termination of the services of certain individuals. One Kishen Deo was dismissed from service and the dismissal resulted in a general unrest among the workers and apprehending breach of the peace, the employment put up a notice closing the mill. The mill was reopened after a few days but the workmen did not return to work because Kishen Deo and two other dismissed workmen were not offered re-employment. It was then that the Government of West Bengal acting under the Industrial Disputes Act referred for adjudication by the Industrial Tribunal the disputes which had arisen between the management and the workmen.

I am therefore of opinion that the appeal by the second respondent under section 41 (2) of the Madras Act to the Commissioner of Labour, the prescribed

1. (1949) 2 M.L.J. 789. 2. (1949) F.L.J. 370.

authority under that Act, was competent and did not abate or become incompetent because of the reference by the Central Government under section 10 of the Industrial Disputes Act made on 21st February, 1950.

The application is dismissed with costs of the second respondent.

Viswanatha Sastri, J.—I entirely agree with my Lord. But as the matter is one of first impression I add a few words of my own.

The Madras Shops and Establishments Act (XXXVI of 1947) passed by the Provincial Legislature with the assent of the Governor-General was intended, according to its preamble, to provide for the regulation of conditions of works in shops, commercial establishments, restaurants, theatres and other establishments. The Industrial Disputes Act (XIV of 1947) passed by the Federal Legislature was intended, as the preamble indicates, to make provision for the investigation and settlement of industrial disputes. Section 41, sub-section (2) of Madras Act XXXVI of 1947 gives the right to an employee who had been in service for six months or more, but whose services have been dispensed with by his employer, to appeal to the authority designated by the Government against his dismissal or discharge. The decision of the appellate authority on the propriety or otherwise of the termination of the services of the employee is made final and binding on both the employee and employer by section 41, sub-section (3) of Madras Act XXXVI of 1947. The question is whether the right of appeal which is given in general terms under section 41 (2) of Madras Act XXVI of 1947 is excluded or restricted in any, and if so, in what cases, by the provisions of Act XIV of 1947. Under section 10 of Act XIV of 1947 if an industrial dispute exists or is apprehended, the Government or the employer or a majority of the workmen may refer the dispute for adjudication by a tribunal constituted under section 7. The award of the Tribunal would be in force for one year or such other period as the Government may determine, not exceeding three years, and would be binding on all parties to the industrial dispute including among them all persons employed in the establishment or part of the establishment to which the dispute relates, on the date of the dispute and also all persons subsequently employed therein. The definition of "industrial dispute" in section 2 (*k*) of Act XIV of 1947 is wide enough to include a dispute between an employer and his workmen if it relates to the "employment or non-employment" of the latter. In *Western India Automobile Association* v. *Industrial Tribunal, Bombay*[1], the Federal Court ruled that if an employer dismissed a few workmen or declined to employ them and the aggrieved workman or their fellow workmen took up his cause and questioned the propriety of the act of the employer, a dispute as to non-employment arose and that reinstatement of dismissed workmen was a matter connected with "non-employment" and was therefore within the ambit of the definition of "industrial disputes". The Court also held that, by its award, the tribunal to which an industrial dispute is referred, could direct the reinstatement of employees whose services had been dispensed with by the employer.

The argument of the petitioner is that the operation of section 41, sub-section (2) of Madras Act XXXVI of 1947 should be limited to cases where the termination of the services of an employee could not possibly form the subject of an "industrial dispute" or a reference to a Tribunal under Act XIV of 1947. According to him, it is not even necessary that an industrial dispute should be pending and it is sufficient if an industrial dispute might conceivably arise and comprise within its ambit the termination of the services of an employee. It was said that, otherwise, there would be a clash or conflict of decisions of two statutory bodies adjudicating on the same matter. For instance, the appellate authority might hold under section 41 (2) of Madras Act XXXVI of 1947 that the dismissal of an employee was proper while the Tribunal adjudicating upon an "industrial dispute" under Act XIV of 1947 might come to an opposite conclusion and order his reinstatement. To avoid such anomalous results, the operation of Madras

1. (1949) F.L.J. 154.

Act XXXVI of 1947 should, it was argued, be restricted in the manner above suggested.

This argument, to some extent, overlooks the objects and scheme of the two enactments. Chapter 7 of Madras Act XXXVI of 1947 in which section 41 is found, deals with an individual dispute between an employer and employee whose services have been terminated, in which dispute the other employees have no interest and with which they need not or do not concern themselves. Act XIV of 1947 deals with an industrial dispute, a collective dispute, a dispute between the employer on the one hand and the body of workmen or a section of that body on the other. The distinction between an individual dispute and an industrial dispute is, if I may respectfully say so, well brought out in the judgment of my Lord in *Kandan Textiles Co., Ltd.* v. *Industrial Tribunal, Madras*[1], citing *inter alia* a passage from the judgment of Isaacs, J., in *George Hudson, Ltd.* v. *Australian Timber Works Union*[2]. A dismissed employee might question the propriety of his dismissal even though the other employees either approve of such dismissal or are indifferent to it. In such a case it must be held that the dispute is only an individual dispute between the employer and the employee affected by the dismissal and not an "industrial dispute" under Act XIV of 1947. If, however, the dismissal of an employee is the result of victimisation, if the employees in services or a substantial section of such employees threaten to strike work, or having struck work refuse to resume work, unless the person dismissed is reinstated, in other words, if the resuming workmen or a substantial body of them or a union of workmen takes up the cause of the victimised employee and demands his reinstatement, there is an industrial dispute. In between these two extreme cases there may be disputes about "employment and non-employment" of which it would be difficult to say *a priori* that they are individual disputes or industrial dispute. It is also possible that a dispute which originated as an individual dispute might develop into a collective dispute or an industrial dispute in its later stages, as pointed out in the judgment of my Lord already cited.

Now, section 41 (2) of Madras Act XXXVI of 1947 gives a remedy to an individual employee by way of an appeal against an improper termination of his services by his employer. Why should he be deprived of this cheap and expeditious remedy merely because it might possibly form the subject of a reference along with many other disputes to a tribunal under section 10 of the Act XIV of 1947? Such a reference might or might not be made by the Government of its own accord. The majority of the remaining workmen may not be in favour of any reference. If so, why should an individual employee lose the statutory right given to him by section 41 (2) of the Madras Act XXXVI of 1947. An award made by the Tribunal under Act XIV of 1947 remains in force only for a limited period of one year or even less, if the Government thinks fit to limit the period. In no case can it remain in force for more than three years even if the period of one year is extended by Government. Can it be said that a direction for reinstatement contained in the award of a tribunal becomes inoperative on the expiry of the life of the award and that the dismissal or discharge of an employee would automatically take effect thereafter? We think not. If that be so, there is no reason why the right of appeal given by section 41 (2) of Madras Act XXXVI of 1947 which, if successfully asserted, might secure unconditional reinstatement to an employee without any limitation as regards the period for which the reinstatement should be in force, should be denied to him. It might be, as the tribunal has held in some cases brought to our notice, that if an employee has been unsuccessful in an appeal against an order of dismissal preferred by him under section 41 (2) of Madras Act XXXVI of 1947, the appellate decision is final and binding between him and his employer, and the Tribunal would not thereafter order his reinstatement as part of its award in case the dispute happens to be referred to it as a part of an industrial dispute under section 10 of Act XIV of 1947. It is unnecessary to express any opinion on this point. Suffice it to say that the right of appeal given to an individual employee

1. (1949) 2 M.L.J. 789, 796 and 797. 2. 32 Com.L.R. 413-441.

against an order of the employer dispensing with his services under section 41 (2) of Madras Act XXXVI of 1947 is not taken away either expressly or by necessary implication by any of the provisions of Act XIV of 1947.

There is the further consideration that, as pointed out by my Lord in *Kandan Textiles, Ltd.* v. *Industrial Tribunal, Madras*[1], the definition of "workmen" in section 2 (*s*) of Madras Act XIV of 1947 is such as not to bring within the operation of the Act employees whose dismissal preceded the industrial dispute, even though such dismissal might have subsequently led to the dispute. The Federal Court, however, appears to assume that such employees stand on the same footing as those discharged already during an industrial dispute and that Act XIV of 1947 would apply in either case. Even so, it is difficult to say that the dismissal of one or a few of the workmen starts an industrial dispute unless such dismissal leads to a threatened or actual strike or lock-out or unless a large section of the remaining workmen or a union of workmen backs up the former and espouses their cause.

Madras Act XXXVI of 1947 and Act XIV of 1947 are not in *pari materia*. The appeal preferred by the second respondent in 1949 under section 41 (2) of Madras Act XXXVI of 1947 against the order of the Bank, dated 30th June, 1949, dispensing with his services was quite in order and was validly preferred. It did not become infructuous or incompetent by reason of a subsequent reference made on 21st February, 1950, under section 10 of Act XIV of 1947 by the Government to the Tribunal of disputes between the petitioner bank and its employees, one of which was described in these terms,

"Retrenchment, discharge or dismissal of workmen after 30th June, 1949 (specific cases to be cited by the employees)."

The second respondent could not have anticipated a reference to the Tribunal. He did not put forward his case before the Tribunal. Nor did he seek any relief by way of reinstatement before it, but was content to pursue his remedy by way of appeal which he had preferred under section 41 (2) of Madras Act XXXVI of 1947. No body of workmen and no union of workmen complained of his discharge. There is nothing in Act XIV of 1947 and no other reason has been shown, to deprive him of his right to pursue the appeal which he had preferred long before the reference to the Tribunal under Act XIV of 1947 was made. It would, perhaps, be a different matter if the second respondent had taken his case before the Tribunal to which an industrial dispute had been referred under Act XIV of 1947 and got an adverse decision against him from the tribunal before he filed an appeal under section 41 (2) of Madras Act XXXVI of 1947. In such a case it might possibly be contended that, having elected his remedy by way of submitting his dismissal to the decision of the tribunal he could not, after he got an adverse order from the tribunal, seek reliefs by way of an appeal under section 41 (2) of Madras Act XXXVI of 1947. This question, however, does not call for decision in the present case.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VISWANATHA SASTRI.

The Bombay Life Assurance Society, Limited, by its agents S. A. Ramaswamy and Brothers .. *Applicants.**

v.

The Council, Corporation of Madras .. *Respondents.*

Madras City Municipal Act (IV of 1919), section 137-B—Scope and applicability—If applies to a case of escape of tax on property—If confined only to cases of complete escape of assessment.

There is nothing in the language of section 137-B, Madras City Municipal Act, which compels the Court to exclude from the scope of its application the property tax leviable under the Act.

1.—(1949) 2 M.L.J. 789, 798.

* Case Refd. No. 25 of 1949. 6th October, 1950.

same date purporting to be under section 137-B of the Act was as follows :—

"Whereas you are the owner of the buildings and lands shown in the schedule below (hereinafter referred to as the premises) :

Whereas under section 104 of the City Municipal Act you are the person liable to pay the property tax assessed on the premises :

Whereas the premises were assessed for property tax for the half-year ending 30th September, 1946, on an annual value of Rs. 7,644 and on such assessment a sum of Rs. 956-2-0 was paid :

Whereas the annual value of the premises which shall be deemed to be the gross annual rent at which they may reasonably be expected to let from month to month in the abovementioned half-year, namely, the half-year ending 30th September, 1946, was Rs. 23,380 and the property tax payable thereon was Rs. 2,818-8-11 and not Rs. 856-2-0 at which the premises were assessed :

Whereas you have in consequence escaped assessment in the aforesaid half-year and you are liable to pay the amount of tax which has escaped assessment, namely, a sum of Rs. 2,618-8-11.

I hereby in exercise of the powers conferred upon the Commissioner by section 137-B of the Madras City Municipal Act and delegated to me under section 16 thereof give you notice assessing you to the tax of Rs. 2,618-8-11 which has escaped assessment and I hereby demand payment thereof within fifteen days from the date of service of this notice. Please take notice that if payment is not made within the period abovementioned, steps will be taken against you for realisation of the aforesaid amount of Rs. 2,618-8-11.

Premises above referred to No. 378, China Bazar Road, 8th Division."

The appellant availed himself of the remedies provided by the Act. There was an appeal to the Taxation Appeals Committee before whom he was unsuccessful and there was a further appeal to the Court of Small Causes which was also dismissed. The appellant thereafter applied to that Court to make a reference to this Court under rule 17 of Schedule IV of the Act and accordingly this reference was made.

The first point need not detain us long. Dr. John the learned counsel for the Corporation did not attempt to justify the issue of the three notices abovementioned simultaneously. Undoubtedly they are mutually contradictory and would certainly have the effect of leaving the appellant completely confused. By the notice Ex. A-2 under rule 3, the appellant was informed of a proposal to alter the annual value and the tax; whereas by the notice Ex. A-1 under rule 3-A he was informed that the valuation had been increased. The third notice without making any reference to the other two notices called upon the appellant to pay the enhanced tax within 15 days from the date of service of the notice. By Ex. A-2 the appellant was informed that this objection would be heard on 6th March, 1947. In Ex. A-1 he was given 30 days to file a revision petition. The third notice did not give him any opportunity to raise any objection. But I do not think it necessary to discuss this question, because it will be academic in the view we are disposed to take on the construction of section 137-B of the Act.

The second and third questions call for a construction of section 137-B and arguments of counsel on both sides were practically confined to these two questions. Section 137-B runs thus:

"Notwithstanding anything to the contrary contained in this Act or the rules made thereunder if for any reason any person liable to pay any of the taxes or fees leviable under this chapter has escaped assessment in any half-year or year, the Commissioner may, at any time within three years from the date on which such person should have been assessed, serve on such person a notice assessing him to the tax or fee due and demanding payment thereof within fifteen days from the date of such service; and the provisions of this Act and the rules made thereunder shall so far as may be apply as if the assessment was made in the half-year or year to which the tax or fee relates."

To appreciate the contentions of parties as regards the construction of this section, it is necessary to have a brief survey of all the material provisions relating to the property tax which are contained both in the Act and in Schedule IV to the Act. Under section 98 of the Act, the council may levy among other taxes, property tax. If the council by resolution demands that a property tax shall be levied such tax shall be levied on all buildings and lands within the city save those exempted whether under that Act or any other law [section 99 (1)]. The property tax comprises a tax for general purposes, a water and drainage tax and lighting tax. These taxes shall be levied at such percentages of the annual value of buildings and lands as may be fixed by the council [section 92 (2)] and for the purpose of assessing the property tax, the annual value of any building or land shall be determined by the Commissioner [section 99 (3)]. The method of assessment of the property tax is set out in section 100. The annual value of the lands and buildings shall generally be deemed to be the gross annual rent at which they may at the time of assessment reasonably be expected to let from month to month or from year to year less certain deductions. Section 103 declares that the property tax shall, subject to the prior payment of the land revenue due to the Government, be a first charge upon the buildings and lands and upon the moveable property, if any, found within or upon such buildings or lands belonging to the person liable to such tax. The property tax shall be levied every half-year and shall except as otherwise expressly provided in Schedule IV be paid by the owner of the assessed premises within fifteen days after the commencement of the half-year (section 104). The express provision in Schedule IV referred to is that under which an occupier of a property may be

led upon to pay the tax, though he may not be the owner. Section 106 lays wn the relative obligations of transferor and transferee in respect of the tax. Sec- 1 109 confers on the commissioner power to call on the owner of any property urnish him with returns of the rent payable for it, the cost of erecting the building l other information for the purpose of assessing the property tax.

The procedure for assessment, levy and collection of the property tax is laid vn in schedule IV, part I-A. Part I contains provisions common to taxes in eral. The material provisions of Part I-A which have a bearing on the ques- is to be decided in this case are the following. The Commissioner shall enter the assessment books the annual value of all lands and buildings and the tax rable thereon (Rule 1-C). These books shall be completely revised by the mmissioner once in every five years (1-D). An assessment once made shall ntinue in force until it is revised and until the revised assessment takes effect E). Rule 2 relates to the preparation of the assessment books for the first time l to the general revision of such books. The aggrieved parties are given the ht to file revision petitions in respect of the entries in the books so prepared or ised. Rules 3 and 3-A are very important and they are in these terms :

"3. The Commissioner may after giving notice to the parties concerned and hearing their objec- s if any, amend the property tax assessment books at any time between one general revision and ther by inserting therein or removing therefrom any property or by altering the valuation of any perty or the amount of tax. Such amendment shall be deemed to have taken effect on the first of the half year in which it is made :

Provided that when the amendment is made in any half-year after the demand notice for that -year has been issued, it shall have effect only from the succeeding half-year.

3-A. In every case in which between one general revision and another the Commissioner assesses property for the first time or increases the assessment on any property otherwise than in conse- ace of a general enhancement, the Commissioner shall intimate by a special notice to the owner ccupier of such property that a petition for revising the assessment will be considered if it reaches municipal office within thirty days from the date of service of such notice in the case of Govern- t, a railway administration or a company and within fifteen days from the said date in other s".

le 4 provides for revision petition to reduce the tax on the ground that the annual ue has decreased since the last assessment. Part VI of the same schedule tains rules relating to the collection of taxes including the property tax. Rule 29 bles the Commissioner to require the occupier of a property to pay the tax and this provision which is referred to in section 104 already mentioned.

The first contention on behalf of the appellant which is embodied in ques- 1 2 is that section 137-B will not apply to property tax. The argument is based irely on a distinction sought to be made between assessment on a person and ssment on a property. Under the several provisions of the Act, the property is assessed on the property. In contradistinction the profession tax is assessed the person. Though it is correct to say that in the last instance it is the person o is liable to pay the property tax as much as any of the other taxes nevertheless he case of property tax, it is the property that is assessed ; the person himself er is. So when section 137-B speaks of the person having escaped assessment, an only have reference to a tax which can be properly described as a tax assessed he person. The words "the date on which such person should have been assessed" "A notice assessing him to tax" clearly indicate that the tax is one which ssessed on the person and this could not be property tax because it is the pro- ty that is assessed. So the argument ran. Reference was made to section 99 he Act which says that the property tax is levied on all buildings and lands, ection 100 which provides that every building shall be assessed in a particular ner, to the expression " the assessed premises " in section 104, and a like expres- n in section 106 (4). In antithesis, our attention was drawn to rules 7 and 8 chedule IV which provides that companies and person shall be assessed. Much ance was also placed on the use of the word " assessed " in section 11 (1) (*b*). vas therefore urged that when section 137-B refers to a person having escaped ssment and to a person who should have been assessed and to assessing him to tax, it could not be in respect of the property tax, because under the Act the perty tax is assessed and levied on the property and not on the person.

In my opinion, it will be most unsafe to draw any inference from the mere use of the words "assess" or "assessment." These words do not have one and an only meaning and connotation. In taxation statutes, the word "to assess" is sometimes used as meaning "to fix the amount of tax"; sometimes in the sense "to impose the tax" and sometimes to mean "to value or calculate for taxation." The word "assessment" in the Indian Income-tax Act does not have the same meaning throughout the Act. Lord Romer in *Commissioner of Income-tax* v. *Khemchand Ramdas*[1], observed:

> "One of the peculiarities of most Income-tax Acts is that the word "assessment" is used as meaning sometimes the computation of income, sometimes the determination of the amount of tax payable and sometimes the whole procedure laid down in the Act for imposing liability upon the taxpayer".

In *Income-tax Commissioners* v. *Gibbs*[2], Viscount Simon, L.C., said:

> "The word "assessment" is used in our Income-tax Code in more than one sense. Sometimes, by "assessment" is meant the fixing of the sum taken to represent the actual profit for the purpose of charging tax upon it. In another context the "assessment" may mean the actual sum in tax which the taxpayer is liable to pay on his profits. These two things are of course, not the same. . . . . It is remarkable that these two separate meanings of the word "assessment" may occasionally be found within the bounds of a single section".

Lord Macmillan in the same case makes the following caustic comment:

> "Verbal consistency is the last virtue that can be attributed to a Code which uses so vital a term as "assessment" in not less than eight differing senses".

If this be so where qualified persons draft the enactment in their own language, it is idle to expect draftsmen using a foreign language to be consistent in the use of the word "assessment." We respectfully follow the dictum of Lord Wrenbury that:

> "No reliance can be placed upon an assumption of accuracy in the use of language in these Acts (*Kensington Income-tax Commissioner* v. *Aramayo*)[3]."

That the words "assessed" and "assessment" have been used in the City Municipal Act indiscriminately to import different processes in taxation can be demonstrated by a few references. In section 99 (3) we have the words "for the purpose of assessing the property tax." Here the "assessing" evidently means recokoning or calculating or fixing, but it is the tax which is said to be assessed, *vide* also section 109 (1). In the very next section namely, section 100 (1) every building is to be "assessed" together with its site and adjacent premises. Here apparently it means "valued." In schedule IV, Part I, which contains provisions common to taxes in general, rule 1 provides that the commissioner shall prepare and keep assessment books in such form as he thinks fit showing the persons and property liable to taxation. Under rule 12 any assessee who is dissatisfied with the assessment of any tax under this Act other than the property tax, the transfer duty and the tax on timber may make an application in writing to the commissioner for the revision of such assessment. Here "assessment" may mean the fixing of levy, but rule 13 (*b*) mentions the tax based on the "assessment prevailing" in the year previous to the year in question. A distinction is made between tax and assessment and there is mention of the tax being based on the assessment. In my opinion much cannot be made out of the use of the words "assessment" and "assess" in section 137-B. It expressly applies to any person liable to pay any of the taxes leviable under that chapter, *i.e.*, Chapter V. Now, certainly one of the taxes which a person is liable to pay is the property tax on property belonging to him. Though the property tax may be calculated on its annual value and therefore in one sense it may be said that it is assessed on the property, *i.e.*, it is reckoned on the value of the property, there can be no doubt that it is the person, *i.e.*, the owner (and it may be on occasions the occupier as well) who is liable to pay the tax when assessed. We do not think it very inaccurate to speak of the owner of a

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1. (1938) 2 M.L.J. 115 : L.R. 65 I.A. 236 : I.L.R. 1938 Bom. 487 (P.C.).
2. (1942) A.C. 402.
3. (1916) 1 A.C. 215.

property being assessed to the tax on property belonging to him. Rigby, L.J. in dealing with the word "assessed" with reference to water rate remarked :

"The word "assessed" means "reckoned on the value". It is not accurate to say "assessed on the premises"; but it is not very far from accurate to say that a water rate is a rate assessed upon the lessees in respect of the house" (*Re-Floyd* v. *Lyons and Co.*[1])

Then again except in rule 8 nowhere else in the Act or in the rules are persons mentioned as being assessed to any tax. The word is not used in the provisions relating to taxes on carriages and animals but it would not be inaccurate to say that a person being in possession of a taxable carriage has been assessed to the tax on the carriage.

In my opinion there is nothing in the language of section 137-B which compels us to exclude from the scope of its application the property tax leviable under the Act. My answer to question No. 2 is in the affirmative.

The last question remains. Section 137-B was inserted in the Act by section 81 of the Madras City Municipal Amendment Act X of 1936. This Act also made important changes in the provisions contained in schedule IV. To understand the scope of the new section it is necessary to acquaint ourselves with the scheme of assessment in respect of the property tax before the amending Act. Before the amendment, Part I of schedule IV contained the rules relating to the assessment of the property tax. Rule 1 corresponded to the present rule 1-A. Rules 1-D and 1-E are new. Rules 3, 4, 5 and 6 in schedule IV as they stood before the amendment ran as follows :

"3. The Commissioner shall amend the property tax registers by altering adding or deleting items as circumstances may require.

4. In every case in which any building or land is assessed for the first time, the commissioner shall give the owner or occupier special notice of the assessment.

5. In every case in which the assessment on any building or land is increased, otherwise than in consequence of the enhancement by the council of the rate at which the property tax is leviable, the commissioner shall give the owner or occupier special notice stating the amount of the increase and the reasons therefor.

6. When the commissioner makes an amendment under rule 3, it shall be deemed to have taken effect from the earliest date in the current year in which the circumstances justifying the amendment existed ; no instalment of the property tax at the revised rate shall, however, be payable until fifteen days after the service or sending of the notice required by rule 4 or rule 5 ".

It is important to note that while rule 6 before the amendment provided that an amendment shall be deemed to have taken effect from the earliest date in the current year on which the circumstances justifying the amendment existed, under the new rule 3, the amendment shall be deemed to have taken effect on the first day of the half-year in which it is made, and a proviso is added that when the amendment is made in any half-year after the demand notice for that half-year has been issued, it shall have effect only from the succeeding half-year.

In the sister Act relating to the Municipalities in the moffussil, namely, the Madras District Municipalities Act which contains similar provisions regarding property tax, originally the rule relating to the effect of an amendment of the valuation of a property ran thus,

"*Rule* 15.—When the chairman has amended the assessment books of his own notion otherwise than in the course of a general revision . . . . . the amendment shall be deemed to have effect from the earliest date on which the circumstances justifying the amendment existed in the year to which the orders have reference".

Rule 8 conferred the power on the chairman to amend at any time the assessment books by inserting therein or removing therefrom any property or by altering the amount of tax. In the *Municipal Council of Kumbakonam* v. *The South Indian Railway Company Ltd*[2]., the legal implications of rules 8 and 15 of schedule IV came up for consideration. In that case the Municipal Council of Kumbakonam assessed the South Indian Railway for the year 1921-22 to property tax on a certain footing.

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1. (1897) 1 Ch. 633 at 640.

2. (1929) 57 M.L.J. 251 : I.L.R. 52 Mad. 792.

A demand notice for a certain amount was sent on 31st July, 1921 with a foot-note that the demand was provisional and subject to revision under proviso (*a*) to section 82 (2) of the Act. This proviso did not relate to any power of revision. Such power was contained in rule 8 of schedule IV. In February, 1923, the chairman amended the tax and sent a communication to the railway company informing them of the altered assessment and also stating that the new assessment would take effect from 1st April, 1921. The question was whether the amendment made in 1923 could be made so as to operate from 1st April, 1921. Ramesam and Jackson, JJ., held that there was nothing in the Act to prevent an amendment in 1923 of an assessment made in 1921. The year to which the orders had reference (rule 15) was held to be the year 1921, the date of the original demand. But they held that because of section 345 an amendment made more than three years after the year for which it was intended to have effect was useless, and as the rules and the Act stood, the amendment of an assessment could be made at any time within three years so as to operate retrospectively. It was urged before the learned Judges that inconvenience may result by such a construction as they adopted of rule 15, but they said :

> " In the face of the section and the rules the inconvenience cannot prevent the operation of the Act and the rules made thereunder ".

This decision was given on April 18, 1929. In 1930 the Madras District Municipalities Act was amended by Madras Act X of 1930. There was a radical alteration in the rule relating to the amendment of the assessment. Rules 6 to 12 were substituted for the original rules. Rule 8 (2) runs thus :

> " The executive authority may amend the assessment books at any time between one general revision and another by inserting therein or removing therefrom any property or by altering the valuation of any property or the amount of tax. Such amendment shall be deemed to have taken effect on the first day of the half-year in which it is made :
>
> Provided that when the amendment is made in any half-year after the demand notice for that half-year has been issued, it shall have effect only from the succeeding half-year ".

The result of the alteration has been practically to abrogate the decision in *Municipal Council of Kumbakonam* v. *South Indian Railway Company, Ltd.*[1]. Apparently it was thought that the result held to follow from the old rule 15 by the learned Judges of this Court would lead to hardship and inconvenience and therefore a new rule was substituted which considerably restricted the retrospective effect of the amendment.

Six years later the City Municipal Act was amended. Rule 3 of schedule IV after the amendment is in *pari materia* with rule 8 (2) of schedule IV of the District Municipalities Act. As the rules stand both in the District Municipalities Act and in the City Municipal Act, no amendment of the assessment books by the alteration of the valuation will have effect except in respect of the half-year in which it was made and even this result would be excluded if a demand had been made for that half-year. Now it must not be overlooked that section 137-A was inserted in the City Municipal Act by the same amending Act which also inserted rule 3 in schedule IV of the Act. According to well established canons of statutory construction, both section 137-B and rule 3 ought to be so read as not to make one of the sections nugatory. It is not permissible to ascribe to the Legislature an intention on the one hand to restrict the retrospective operation of an alteration of valuation by rule 3 to the half-year in which the amendment is made and at the same time to attribute to it an intention to give retrospective effect to such an alteration extending to three years. It may be said that rule 3 deals with both adding to and removing from the assessment books and altering the valuation either by increase or by decrease. This may be so, but from the point of view of the tax payer, it is only when there is an increase in valuation that a retrospective operation causes hardship. To begin with, therefore, section 137-B should not be read so as to override rule 3. There is also another aspect of the circumstance,

1. (1929) 57 M.L.J. 251 : I.L.R. 52 Mad. 792.

the insertion of both section 137-B and rule 3 by the same enactment. If ler section 137-B there can be an amendment which becomes effective from ee years past why is it necessary to provide in rule 3 that the amendment shall deemed to take effect on the first day of the half-year in which it is made. The ger power would obviously include the much lesser power.

Let us look at the language of section 137-B. Is there anything in it which ables the Corporation to obtain any relief when a property has been under-essed by imposing an additional assessment at any time within three years from date on which such person may be said to have been underassessed. We think t. The section only provides that if any person liable to pay any tax, leviable der that Chapter has escaped assessment in any half-year or year, the Commissioner ay serve on such person a notice assessing him to the tax due and demanding yment thereof. There is no mention there of increase of tax already assessed. person should have been liable to pay a tax, and that person should have escaped ing assessed to that tax. Then the Corporation can within three years from e date on which the person should have been assessed, assess him to that tax which was liable to pay but which was not levied on him. In this case the appellant as no doubt liable to pay the property tax in respect of the building owned by But it has not escaped assessment of that tax. So, there can be no question the Corporation assessing the appellant to that tax. On the plain meaning the words of the section, it does not appear to contemplate the case of an escape the taxpayer from what may be considered subsequently as the proper assess-ent of any tax. The section would obviously apply to a case where a person as liable to pay the profession tax for a particular half-year but the tax was not posed on and collected from him. It would also apply to other taxes from which person has escaped liability. It may possibly apply to the case of property x as well. It may be said that, if a person was the owner of a building within e area of the Municipality in a particular half-year, but the property tax in res-ct of that building had not been levied on and collected from him, he has escaped sessment of the property tax in respect of it. But in the case of a building the nual value of which is found entered in the assessment books the position is tirely different. An assessment once made shall continue in force until it is vised and until the revised assessment takes effect ; so says rule I-E of schedule IV. he only provision which fixes the time from which a revised assessment takes effect, hen the revision is not general, is rule 3 and under that rule the amendment ill take effect only from the first day of the half year in which it is made and if a emand has been made it would have effect only from the succeeding half-year ill an enhancement of valuation is made and it duly takes effect from a particular me, it cannot be said that a person has been under-assessed in respect of the pro-erty when a tax has been levied on him calculated on the assessment found in e assessment books and which must be deemed to continue in force until a revised sessment takes effect. It should not be overlooked that section 137-B by itself oes not give the power to the Corporation to amend the valuation of a property r the purpose of imposing the property tax. That section gives power only to emand from a person a tax to which he was liable but which he has escaped from aying. If the procedure under rules 3 and 3-A is not resorted to, then the entries the assessment books will continue to be in force and the property tax will have be calculated only on the valuation contained in the books. If a person has aid that amount of tax, then one fails to see how he has escaped assessment ven partially, assuming that the section applies to the case of a partial escape. ven in the case of profession tax, though a person who was liable to that tax, but who has escaped from paying it may under section 137-B be compelled to pay it, et if he has already paid the tax on a particular scale as demanded by the council uring a half-year, he cannot under section 137-B be made liable to pay an en-anced tax on a higher scale for the same half-year. This is because the person as not escaped assessment of the profession tax.

It is not difficult to explain why section 137-B was introduced into the Act. t was evidently to get over the difficulty pointed out in the decision in *Prince of*

Arcot v. *Corporation of Madras*[1]. In that case the learned Judges held that under the provisions of the City Municipal Act and the rules made thereunder, profession tax becomes " due " by a person liable to pay it only after he has been assessed to a particular amount by the commissioner. Such assessment must be made in each respective half-year, and hence, profession tax for any half year prior to the current half-year cannot be levied unless it had been assessed in that half-year. Now under section 137-B such assessment though it had not been made in that half-year can be made and levied subsequently within a period of three years from the date on which the person should have been assessed. In *Sarweswara Rao* v. *Umamaheswara Rao*[2], Wadsworth, J., observed as follows with reference to this section :

" It seems to us that this provision was obviously intended to make the machinery for the levy of the tax applicable to a retrospective assessment and to meet any possible objection which might be raised owing to the delay in making the assessment. The whole of section 137-B was apparently drafted to meet the situation created by the decision in *Prince of Arcot* v. *Corporation of Madras*[1]."

Applying it to the case of property tax, if there has been a delay in the assessment of the property tax in any year, then the Corporation can even after the lapse of the year, proceed to make the assessment.

Reliance was placed by Dr. John on decisions under the Indian Income-tax Act, 1922 construing section 34 of that Act as it stood before the amendment of 1941. That section *inter alia* provided that if for any reason, profits or gains chargeable to income-tax has escaped assessment in any year or has been assessed at too low a rate, the Income-tax Officer may at any time within one year of the end of that year serve on the person liable to pay tax on such income, profits or gains a notice and proceed to assess or re-assess such income, profits or gains. In *Madan Mohan* v. *Commissioner of Income-tax, Punjab*[3] and other cases it was held that even if an item of income was included in the return submitted by the assessee but was left unassessed by the Income-tax Officer and in similar circumstances, income can be said to have escaped assessment within the meaning of that section. But the observations of their Lordships of the Privy Council in *Rajendranath* v. *Commissioner of Income-tax, Bengal*[4], throw considerable doubt on the proposition that a case of an under-assessment is also a case of an escaped assessment. Their Lordships said that they could not assent to reading the expression " has escaped assessment " as equivalent to " has not been assessed." This was apparently why the section was amended in 1941 inserting the words " or have been under-assessed." It must not be overlooked that under section 34 it is the income or the profits or gains that is described as having escaped assessment and not any person. Under section 3 which is the charging section, income-tax shall be charged for any year in respect of the total income of the previous year of every individual, family, company, etc. Section 6 of that Act enacts that certain heads of income " shall be chargeable to income-tax in the manner hereinafter appearing." Under section 137-B, however, it is a person who has escaped assessment of any tax that is rendered liable to be served with a notice of demand of the tax which he has escaped from paying. The notion of an item of income or a portion of the income escaping assessment is not warranted by the language of section 137-B. If a person has been assessed to property tax, it cannot be said that he has escaped assessment of the property tax because less tax was demanded from him than might have been demanded on an enhanced valuation which was the proper valuation.

The general principle is well stated in Dillon on Corporations, Vol. IV, at page 2440 thus :

" The legislature may, unless restricted or controlled by constitutional provision, authorise a municipality *to levy and collect retrospective taxes* upon property which was subject to taxation in past years, but which has escaped taxation through omission from the assessment roll or otherwise ;

1. (1929) 57 M.L.J. 536 : I.L.R. 52 Mad. 866.
2. (1940) 2 M.L.J. 841 : I.L.R. 1941 Mad. 383.
3. A.I.R. 1935 Lah. 742.
4. (1933) 61 I.A. 10 : I.L.R. 61 Cal. 285 (P.C.).

. . . . . The Legislature has also authority to *re-value and re-assess property* which in pre- years has been grossly under-valued ; a gross under-valuation of property is within the principle able to an entire omission of property."

remarks in the note to this statement have a direct bearing on the present case.

A statute which authorises the assessment of property omitted in previous years does not autho- crease in the valuation of property which was assessed in previous years. . . . . where the plaintiff's credits were assessed and a tax paid thereon, an assessor cannot in a subse- year impose an additional assessment upon the credits for the past year on the ground that a ereof was omitted. But when the credits were entirely omitted from the assessment of the s year, an assessment thereon may be imposed under the statute . . . . . -valuation of taxable property through mere error does not authorise a re-assessment if taxes een levied and paid."

on 137-B speaks of escaped assessment. "Escape" when used with reference bility imports the idea of the existence of the liability. You cannot escape a thing unless the thing exists. Now if the property tax calculated on the tion in force in a particular half-year is demanded and paid, it cannot d that there has been an escape from a higher assessment, because that higher ment did not exist during that half-year, and unless there is an escape of ment the power under section 137-B cannot be exercised. For altering the ion, the Corporation must go to the provisions of rules 3 and 3-A of Schedule Those rules clearly fix the limit of retrospective operation. The opening of section 137-B :

Notwithstanding anything to the contrary contained in this Act or the rules made thereunder ",

themselves help the Corporation in the circumstances. I find that this view so taken by Horwill, J., in C. C. C. Appeal No. 53 of 1949.

My answer to question No. 3 is that the operation of section 137-B is confined es of complete escape of assessment and does not extend to cases where there ready been an assessment but at a lesser amount than what is proper.

section 137-B on that basis. It is the owner and in some cases the previous owner and in others the occupier, that is liable to pay the " property tax " under the Act. The tax is in this sense a tax on " persons " though it is based on the annual value of the property and is further secured by a statutory charge on the property in order to avoid loss of revenue to the Corporation.

The further question is whether there can be a retrospective assessment of property tax under section 137-B unhampered by the limitations imposed by rule 3, Part I-A of Schedule IV of the Act. Dr. John for the Corporation lays stress on the opening words of section 137-B which runs as follows :—

" Notwithstanding anything to the contrary contained in this Act or the rules made thereunder, if for any reason any person liable to pay any of the taxes or fees leviable under this Chapter has escaped assessment in any half-year or year, etc."

He also relies on decisions interpreting section 34 of the Income-tax Act, as justifying the back assessment that has been sought to be made in this case.

In my opinion the income-tax decisions are not of assistance on account of the fundamental difference between the scheme of income-tax legislation and the provisions of the City Municipal Act. Income-tax, as Lord Macnaughten reminded us, is a single tax on income and not a collection of taxes essentially distinct, though for convenience of computation and levy, it is divided into different heads. It is really the State's share of citizen's income, profits and gains. Sections 7 to 12 of the Income-tax Act merely prescribe different methods of computing income according to the different sources from which it is derived. Though property is a source of income, income-tax is levied on the owner at a rate varying with his total income from all sources. There is no difference in kind between duties of income-tax as assessed under one or other of the heads of charge enumerated in section 6 of the Income-tax Act. Since the whole block of income is assessed to income-tax, if any portion of that income is either not disclosed by the assessee or is mistakenly left out of account by the Income-tax Officer, there is *pro tanto* an escape of that slice of income from the tax that it has to bear in accordance with the rates applicable to the total income of the assessee under the annual Finance Act. It was therefore held by the Courts in the cases cited that section 34 of the Income-tax Act applied not only to cases where there had been no previous assessment because the assessee had not come under the notice of the Income-tax Officer at all, but also to cases where the assessee after having been brought to his notice, had either not been assessed or not assessed at the proper rate applicable to his total income. Section 34 of the Income-tax Act catches a portion of a homogenous income which has not been assessed or taken into computation by inadvertance, mistake or concealment. Therefore it is that section 34 refers to income that has " escaped assessment or has been assessed at too low a rate ".

The scheme of taxation under the City Municipal Act is entirely different. Section 98 of the Act authorises the levy of different kinds of taxes and fees, each of which has no relation to the other. The taxes and fees are levied for different periods and on different principles. The income-tax decisions are, therefore, not in *pari materia*.

What then is the effect of section 137-B of the City Municipal Act? This section should not be read *in vacuo* but must be interpreted and applied with due regard to the rules in Part I-A of Schedule IV of the Act. A conflict between the enacting part and the Rules should be avoided if possible. Under rules 1-C and 1-D the Commissioner is required to keep assessment books with the prescribed particulars among which are included the description and name of each item of land or building in the City, its annual value and the amount of tax payable thereon. Rule 1-E provides that an assessment once made shall continue in force until it is revised and the revised assessment takes effect. The revision contemplated is obviously in accordance with the procedure prescribed by rule 3. This rule allows an amendment of the property tax assessment books between one general revision and anoher by altering the valuation of any property or the amount of

ax payable but provides that the amended assessment shall take effect from the rst day of the half-year in which it is made or from the next half-year, if a notice f demand had been issued before the amendment. During the relevant period here was no revision of the assessment under rule 3 in the present case. This is ot a case where a property liable to tax has not come within the notice of the evenue authorities of the Corporation at all. Nor is it a case where the property as been inadvertently omitted from the assessment books. Nor is it a case where he amount of tax has, by inadvertence, been entered at a lower figure in the ssessment books. Nor is it a case of a new building emerging into existence and ot caught within the net of taxation for a year or two. In such cases section 137-B ight apply and a retrospective assessment to property tax according to the terms f that section might be permissible. But it is not, in my opinion, a legitimate onstruction of section 137-B to hold that it allows a retrospective enhancement f property tax for 3 years even in cases where the tax has been levied and collected ccording to the rules above referred to and in strict conformity therewith, merely ecause the revenue authority of the Corporation, three years after the tax had een levied and collected is of the opinion that the annual value could or should ave been entered at a higher figure in its own assessment books during the previous eriod. The assessee in this case has not eluded the notice of the revenue authority. Ie was caught in the net of taxation. He was assessed to property tax and assessed o the full amount of the tax payable in accordance with the statutory rules in orce at the time. Three years thereafter the revenue authority happens to ntertain the opinion that the annual value might have been fixed at a higher alue than that entered in the assessment books of the previous period. Can it e said that in such a case the assessee has "escaped assessment" during the revious period within the meaning of section 137-B? I think not. There an be an "escape" only from an existing burden or liability imposed by law. There was no such burden or liability or escapement of assessment in this case.

V. S. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VISWANATHA SASTRI.

Hajee Mohomed Hussain Sait of Hajee Abdulla Hajee Abubucker and Company ... *Applicant* *

v.

The Commissioner and Council, Corporation of Madras .. *Respondent.*

Madras City Municipal Act (IV of 1919), Schedule IV, rules 15 and 17—Notice of appeal against decision of Taxation Appeals Committee—If should be given only after actual communication of the decision of the Committee.

There is nothing in rule 15 (1) (i) of the Taxation Rules in Schedule IV of the Madras City Municipal Act making it incumbent on an assessee who is aggrieved by a decision of the Taxation Appeals Committee to give notice of intention to appeal only after the communication to the assessee of the decision of the Committee. All that is material is to find out when the time limit mentioned in that rule expires. Any notice of intention to appeal given before that date would be sufficient compliance with the requirements of the rule. 'Within ten days' should be read as not beyond ten days'.

Case referred to the High Court by the Chief Judge, Small Causes Court, Madras, under rule 17 of Schedule IV of the Madras City Municipal Act (IV of 1919) in Municipal Taxation Appeals Nos. 4, 5 and 6 of 1949, respectively on its file, etc.

S. Ramachandra Aiyar and *K. Gopalaswami* for Applicant.

Messrs. John and Row for Respondent.

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* Case Referred Nos. 9, 10, 11 and 29 of 1950. 31st October, 1950.

The Judgment of the Court was delivered by

The Chief Justice: *R.C. Nos.* 9 *to* 11 *of* 1950.—These three references under rule 17, Schedule IV of the City Municipal Act raise the same question for decision formulated by the Court of Small Causes,

"Whether a notice of intention to appeal given not after, but before the decision of the Taxation Appeals Committee is communicated to the assessee, is a good notice under rule 15 (*a*) (i) of the Taxation Rules in Schedule IV of the City Municipal Act."

There were three assessments of property tax by the Commissioner of three properties belonging to the assessee and there were three appeals to the Taxation Appeals Committee against the assessment of the Commissioner. These three appeals were dismissed by the Committee on the 24th February, 1949. On 1st March, 1949, the assessee gave to the Commissioner notice of his intention to appeal against the decision of the Taxation Appeals Committee. He followed up by presenting petitions of appeal on 9th March, 1949. The decision of the Appeals Committee was communicated to the party on 7th March, 1949, by registered post. When the appeals came up for hearing before the Court of Small Causes, a preliminary objection was taken that the appeals were not maintainable, because the requirements of rule 15 (*a*) (i) had not been complied with. The objection was based on the fact that the appeals were filed before the party was served with the decision of the Appeals Committee. The learned Chief Judge of the Court of Small Causes upheld this objection and dismissed the appeals *in limine*.

Rule 15 (*a*) (i) originally ran thus :

"An appeal shall lie to the Court of Small Causes against any decision of the Taxation Appeals Committee constituted under rule 14 but no such appeal shall be heard by the said court, unless— (1) a notice of intention to appeal has been given to the Commissioner within ten days from the date of the decision."

By Notification, No. 662, Local Administration, dated 14th August, 1942, published in the *Fort St. George Gazette*, for the words "from the date of the decision" the following words were substituted, *viz.*, "from the date on which such decision was communicated by registered post". It may be mentioned that a similar substitution was made in sub-clause (ii) of section 15 (*o*) providing for the presentation of appeals. The learned Judge thought that the language of the rule strictly construed supported the objection on behalf of the Corporation, because the rule contemplated a notice only after the communication of the decision of the Appeals Committee. We fail to see anything in the language which compels us to agree with the learned Judge. There is nothing in that provision which makes it incumbent on the assessee who is aggrieved by the decision of the Taxation Appeals Committee to give notice only after the communication of the decision of the Committee. The only relevant words as regards the time limit are "within ten days from the date on which the decision was communicated by registered post". All that is material is to find out when the ten days expire. Any notice of intention to appeal given before that date would be sufficient compliance with the requirement of the rule. "Within ten days" should be read as "not beyond ten days".

The learned Judge referred to cases decided on a construction of Order 41, rule 22, Civil Procedure Code, which contains the words "within one month from the date when he (the respondent) receives notice of the hearing of the appeal". A Division Bench of the Lahore High Court in *Mst. Koshalia* v. *Riazuddin*[1] (the learned Judge was wrong in thinking it was the decision of a single Judge) took the view that a memorandum of cross-objections filed by a respondent before he was served with notice of the appeal would not be a valid memorandum. The reasoning of the learned Judges can be best stated in their own words,

"The use of the word 'within' would fix two limits, an interior limit starting from the date of receipt of the notice and a posterior limit of one month after that date. The 'cross-objections' filed before that date would not be cross-objections at all in the strict legal sense of the word."

1. A.I.R. 1936 Lah. 362.

It appears from the report that this position was conceded by learned counsel. s view, however, did not prevail in that order. In *Labhu Ram* v. *Ram Partap*[1], vas *inter alia* decided by a Full Bench of that Court that a respondent could mit a memorandum of cross-objections as soon as an order was made issuing ice of the date of appeal though service was not actually effected on him. At e 41 of the report Din Mohammad, J., who delivered the leading judgment r referring to the case in *Mst. Koshalia* v. *Riazuddin*[2] said :

" The only question is whether the right of a respondent to file his cross-objections is so restricted adumbrated in *Mst. Koshalia* v. *Riazuddin*[2]. In other words, could it be the intention of the lature in enacting Order 41, rule 22, to specify the point of time in which such cross-objections d be filed at both ends ? "

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

P. Venkateswara Rao .. *Petitioner**

v.

K. Satyanarayana and others .. *Respondents.*

Madras Devadasis (Prevention of Dedication) Act (XXXI of 1947), sections 3 (3) and 4—What is prohibited by section 3 (3)—Dancing before coloured pictures of Gods installed in a temporary pandal in the course of celebration of Sri Rama Navami festival—If a contravention of section 3 (3) and an offence.

What section 3 (3) of the Madras Devadasis (Prevention of Dedication) Act says is, if a woman dances either within the precincts of the temple in front of the deity, or in front of the idol or other object of worship in the temple or in a procession where the deity, idol or other object of worship is carried out, then such an act is unlawful. It may also be that a festival or a ceremony held elsewhere in honour of such a deity or idol or object of worship is equated to what happens in the temple itself. But if a private individual, out of devotion and orthodoxy, celebrates a festival like the Sri Rama Navami festival either in his own office or in any public place in a temporarily put up pandal and does pooja to coloured pictures of these Gods, it cannot be said that his action can be called a festival or a ceremony held in respect of a deity or idol or object of worship installed in a temple. Accordingly, where unmarried ladies belonging to the Kalavantula community (who are said to have dedicated their lives to the profession of dancing) are found to have danced in the night before such coloured pictures installed in a temporary pandal in the course of the celebration of Sri Rama Navami festival, they cannot be said to have contravened the provisions of section 3 (3) of the Act and thereby committed an offence under section 4 of the Act.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Additional First Class Magistrate, Bandar, dated 13th September, 1949, in C. C. No. 80 of 1949.

N. V. B. Sankar Rao for Petitioner.

N. Subramaniam, J. V. Krishna Sarma and *G. Venkatarama Sastri* for Respondents.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

The Court made the following

ORDER.—The petitioner one P. Venkateswara Rao of Gudiwada who styles himself as the Secretary of the Town Kalavantula Sankarana Sangam of Gudivada, moves this Court under sections 435 and 439, Criminal Procedure Code, for setting aside the order of acquittal passed by the Additional First Class Magistrate of Bandar in C. C. No. 80 of 1949. It has to be stated at the outset that the Public Prosecutor has not moved this Court under section 417, Criminal Procedure Code, by filing an appeal to set aside the order of acquittal. The questions to be decided are firstly whether there are sufficient grounds for interference by me ; and secondly even if there are sufficient grounds, whether the order of acquittal should be set aside at the instance of a private individual, however public spirited he might be and however meritorious his act might be, so that he might act as a *pro bono publico* in the interests, weal and welfare of the general community at large.

The complaint against the six respondents in the Court below was that they in contravention of sections 3 and 4 of the Madras Devadasis (Prevention of Dedication) Act (XXXI of 1947), conducted a dancing in a specially erected pandal in front of the office of the first respondent at Gudivada, on the night of 13th April, 1949, between 9 and 12 P.M. The first respondent is the proprietor of Sri Venkateswara Motor Service Co., Gudivada, with an office in the town. Respondents 2 and 3 are unmarried ladies aged 30 and 20 years respectively belonging to Kalavantula community and are said to have dedicated their lives to the profession of dancing. Respondents 4, 5 and 6 are said to have taken part in the dance performance by playing tabela, harmonium and clarionette respectively. What happened was that on the night in question, during the course of the celebration of the Sri Rama Navami festival, a pandal was erected in front of the motor press office of the first respondent and in that pandal were installed coloured pictures of the deities of Sri Rama, Lakshmana, and Sita and it is stated that

*Cr.R.C. No. 1559 of 1949. 8th December, 1950.
(Cr.R.P. No. 1476 of 1949.)

there was a celebration of the festival on that night. Respondents 2 and 3 are said to have danced before the pictures of deities between the times abovementioned. The complainant alleges that by dancing before the coloured pictures of the deities temporarily installed for the celebration of the festival in this pandal, the respondents 2 and 3 have committed an offence under section 4 of Madras Act XXXI of 1947 and the other respondents have abetted the commission of that offence. The learned Additional First Class Magistrate, on a construction of section 3 (3) of the Act, came to the conclusion that the coloured pictures temporarily installed before which the dancing took place were not idols of deities as contemplated by section 3 (3) of the Act, installed in a temple or a religious institution, and therefore the dancing before such pictures did not contravene the prohibition contained in section 3 (3) of the Act. On this ground the respondents were acquitted.

The question is what is the proper construction of section 3 (3) of Madras Act XXXI of 1947 which Act, it may be premised, was enacted for the purpose of the welfare of the Kalavantula community so that its members may be weaned from prostitution and be compelled to lead a chaste and pure life. Section 3 (3) of the Act runs as follows :

"Dancing by a woman, with or without *kumbharathy*, in the precincts of any temple or other religious institution, or in any procession of a Hindu deity, idol or object of worship installed in any such temple or institution or at any festival or ceremony held in respect of such deity, idol or object of worship, is hereby declared unlawful."

Analysing this section in its various component parts, it comes to this :

(1) Dancing by a woman with or without *kumbharathy* in the precincts of any temple or other religious institution is hereby declared unlawful ;

(2) Dancing by a woman with or without *kumbharathy* in any procession of a Hindu deity, idol or object of worship installed in such temple or institution is declared unlawful ;

(3) Dancing by a woman with or without *kumbharathy* at any festival or ceremony held in respect of such a deity, idol or object of worship is declared un-

learned Additional First Class Magistrate was perfectly justified in acquitting the respondents of any offence whatever.

However laudatory the action of the petitioner might be in trying to bring to the notice of Court instances which, according to him, are prohibited by law, I am afraid Courts cannot countenance prosecution for actions which cannot be held to be illegal. In the view which I take that the order of the learned Magistrate is perfectly justified, the second question whether I should interfere at the instance of a private party does not arise.

The Criminal Revision Petition is dismissed,

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AYYAR.

Raju's Cafe, Coimbatore and others .. *Petitioners**

v.

The Industrial Tribunal, Coimbatore and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947), section 10 (1) (c)—Single reference in respect of several managements and their workers—Validity—Conditions—Procedure for conciliation indicated in section 12—If prerequisite to making a valid reference—Reference to same Tribunal which supplied information called for by Government before making reference—Legality.

As a reference to the Industrial Tribunal was incompetent as it was in general terms the Government made to the same Tribunal a second reference in which it gave a list of 85 hotels situated in various places in the district and a list of 11 items of dispute. On a question as to the validity of such a reference,

Held : If the Government had before them material to conclude that in respect of each of the 85 hotels there were disputes as regards each of the 11 items of disputes between the management and the workers, it cannot be said that a single reference would be incompetent. It will be a joinder of several references into one comprehensive reference to the same Tribunal. There can be a single reference of disputes common to several hotels and the workmen employed therein. However, if it is found that the reference was made, not on the subjective satisfaction of the Government of the existence or apprehension of an industrial dispute, but merely on the representation of one of the interested parties (in this case the employees' union) and that too on unverified information which subsequently proved to be substantially incorrect, because out of 85 hotels over 60 hotels were omitted from the enquiry, the reference must be held to be invalid.

The new sub-section (2-A) to section 10 inserted by the Madras Amendment Act (XII of 1949) in the Industrial Disputes Act provides for the reference of disputes straightaway by the employer or the majority of workmen concerned to the Tribunal constituted for adjudication of disputes in any specified industry or industries.

By a mere communication of resolutions passed at a conference of members of a Workers' Union to the Employers' Union it cannot be said that an industrial dispute has arisen or is apprehended calling for an adjudication by a Tribunal.

It cannot be said that before the Government could make a reference under section 10 (1) of the Act the procedure indicated in section 12 of the Act (for conciliation) should be followed.

The mere fact that the Tribunal supplied the information called for before Government made the reference would not amount to prejudging the case and a subsequent reference to the very same Tribunal is not illegal.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order calling for the records in old industrial dispute No. 12 of 1948 and new industrial dispute No. 14 of 1949 on the file of the Industrial Tribunal, Coimbatore, and quash the reference and awards therein.

K. Bhashyam and *T. R. Srinivasan* for Petitioners.

The Advocate-General (*K. Kuttikrishna Menon*) for the Government Pleader (*P. Satyanarayana Raju*) and *C. K. Viswanatha Aiyar* for Respondents.

* C.M.P. No. 4409 of 1950. 1st December, 1950.

The Order of the Court was made by

The Chief Justice.—On 9th April, 1948, the Government of Madras by G.O. No. 1791, Development, made a reference under section 10 (1) (*c*) of the Industrial Disputes Act, 1947, to the Industrial Tribunal having its place of sitting at Coimbatore, of an industrial dispute, which had arisen between the workers and managements of hotels in the whole of the Coimbatore district in respect of certain matters, for adjudication. The Notification did not mention the hotels by name; nor did it specify the matters in respect of which an industrial dispute had arisen. The introductory part of the Government Order referred to a report from the Commissioner of Labour, but no further light is thrown on the matter, because that report is stated to be only to the effect that an industrial dispute had arisen between the workers and managements of the hotels in the whole of the Coimbatore district in respect of certain matters and that the parties to the dispute were unable to arrive at an amicable settlement. The industrial tribunal sent notices *inter alia* to the hotel owners' *sangam*, Coimbatore, and the Coimbatore district hotel workers' union. On 10th August, 1948 the workers' union addressed a letter to the Tribunal praying for time to prepare their demands. On 14th August, 1948 the union filed a preliminary statement setting out the history of the alleged dispute and the demands to be adjudicated upon. The hotel owners' *sangam*, Coimbatore, filed a counter-statement attacking the validity of the reference, the representative character of the workers' union, and denying that the Tribunal had jurisdiction to proceed with the enquiry. Apparently because of the decision of this Court in *Ramayya Pantulu* v. *Kutty and Rao* (*Engineer*), *Ltd.*[1], the Government considered it advisable to issue a fresh reference. How and on what material they acted will be set out later. On 15th March, 1949 the Government issued another notification which runs thus:

"Whereas industrial disputes have arisen between the workers and managements of the hotels in Coimbatore district mentioned in Annexure I to this order in respect of matters mentioned in Annexure II to this order:

And whereas in the opinion of His Excellency the Governor of Madras it is necessary to refer the said disputes for adjudication:

Now, therefore, in exercise of the powers conferred by section 10 (1) (*c*) of the Industrial Disputes Act, 1947 (Central Act XIV of 1947), and in supersession of the orders issued in Development Department's Notification, No. 363, dated the 9th April, 1948, published on page 322 of Part I of the *Fort St. George Gazette*, dated the 20th April, 1948, His Excellency the Governor of Madras hereby directs that the said industrial disputes be referred for adjudication to the industrial tribunal having its place of sitting at Coimbatore.

2. The Commissioner of Labour is requested to send copies of this order to the managemen ts and workers' unions concerned.

(By order of His Excellency the Governor) . . . . . ."

Annexure No. 1 contained a list of 85 hotels situated in Erode, Coimbatore, Pollachi, Udumalpet, Tiruppur and Puliampatti divided into three classes, A, B and C, and Annexure II contained 11 items of matters in dispute, namely,

1. Wages.
2. Dearness allowance.
3. Bonus.
4. Provident fund.
5. Gratuity.
6. House rent.
7. Holidays.
8. Medical facilities.
9. Rest room.
10. Appointment through employment exchange.
11. Dismissal.

Thereupon the prior reference was treated as closed, and there were fresh statements filed before the Tribunal by the Hotel-owners' *sangam* and the Hotel-workers' Union. The Tribunal, after an enquiry, passed its award on 17th March, 1950, which contained the following provisions: (1) the basic wages of all the hotel workers were to be revised from 1st January, 1949 as stated in paragraph 22 of the award. The hotels were divided into three classes, namely, Class A comprising hotels with a daily turnover of Rs. 250 and more, Class B of hotels with a daily

1. (1949) 1 M.L.J. 231.

turnover of Rs. 100 and more but less than Rs. 250, and class C of hotels with a daily turnover of less than Rs. 100. The employees were divided into four classes namely, skilled A, skilled B, unskilled A and unskilled B and different rates of wages were fixed for each class, (2) a wife and children's allowance was to be paid to all married workers as from 1st January, 1949, namely, every married worker was to get an allowance in the three classes of hotels of Rs. 10, and, further, in class A hotels only, there was to be an allowance of Rs. 5 for each child (for two children), (3) bonus was to be paid to the workers according to the length of their service as specified in paragraph 24 of the award. The arrears of wages, allowance and bonus should be paid in three equal monthly instalments, the first instalment becoming payable in three weeks from the publication of the award. The method of classification was indicated. By Order No. 1390, (Development), dated 6th April, 1950 the Government declared the award to be binding on the managements of the hotels in Coimbatore district and the workers employed therein and that the award shall remain in force for a period of one year. The award was also duly published in the *Fort St. George Gazette*. This application is by the proprietors of 18 hotels in Coimbatore to quash the reference and the award as being *ultra vires* and illegal. Mr. K. Bhashyam Aiyangar, who appeared for the applicants, challenged the validity of the reference on several grounds. He also contended that, in view of the events which led up to the second reference, the particular Industrial Tribunal should not have adjudicated on the dispute. He also urged that the award went beyond the reference in certain particulars.

The first ground on which he contended that the reference was invalid was that an omnibus reference of alleged industrial disputes between several managements and the workers employed by them is not contemplated and warranted by the provisions of section 10 of the Industrial Disputes Act. Closely related to this contention is the other contention that the reference is vague and general in that it does not specify the nature of the disputes between the employers and the workmen in each hotel.

Section 10 (1) of the Act runs thus :—

"If any industrial dispute exists or is apprehended, the appropriate Government may, by order in writing ;

(*a*) refer the dispute to a Board for promoting a settlement thereof ; or

(*b*) refer any matter appearing to be connected with or relevant to the dispute to a Court for inquiry ; or

(*c*) refer the dispute to a Tribunal for adjudication :

Provided that where the dispute relates to a public utility service and a notice under section 22 has been given, the appropriate Government shall, unless it considers that the notice has been frivolously or vexatiously given or that it would be inexpedient so to do, make a reference under this sub-section notwithstanding that any other proceedings under this Act in respect of the dispute may have commenced".

Learned counsel relied on the words "*any* industrial dispute" and the words "refer *the* dispute" in support of his contentions. In *Ramayya Pantulu* v. *Kutty and Rao* (*Engineer*), *Ltd.*[1], there was a general reference of industrial disputes which had arisen between the workers and managements of certain engineering firms and type foundries and of industrial disputes which were apprehended in the rest of the engineering firms and type foundries in respect of certain matters. There was no reference to any specific disputes between any group of workers and managements ; nor was there any specification of the firms in which disputes between the management and workers existed. Such a reference was held to be invalid on the ground that the result of such a reference may be to foster disputes where there were none and also on the ground that before making a reference under section 10 (1) the Government must have reason to believe that in a particular business a definite dispute is known to exist or is apprehended. The learned Judges observed :

"... before concluding that a dispute is apprehended, the Government must necessarily have known that certain demands were being made by workers in a particular firm and that the

1. (1949) 1 M.L.J. 231.

management of that firm were not inclined to comply with those demands and that an industrial dispute was therefore likely to arise . . . . . .

". . . . when a notification is issued and a reference made to a Tribunal, the Government must have in mind some dispute that has actually happened or one that is likely to arise from circumstances known to the Government".

The learned Judges were also of the opinion that the nature of the dispute between the management and the workers must be set out just as it would be set out if a reference were made to an arbitration in an ordinary civil dispute. There should be sufficient specification for the Tribunal to know what the matter was into which it was necessary to enquire. They said,

"If that is not done, the Government is inviting workers and managements to put forward claims which have never been in dispute and which were not in the contemplation of the Government when they issued the notification. It seems to us from the general purport of the Act that a responsibility lies upon the Government of considering the existence and the nature of a dispute and to exercise their mind and decide whether it is necessary to refer that dispute to a Tribunal for an award".

In *The Calicut Hosieries, Calicut*, In re[1], one of us followed this ruling and held that a reference of certain disputes between certain hosiery factories in the Province of Madras and the workmen employed therein was illegal. In *The Kandan Textiles, Ltd.* v. *The Industrial Tribunal, Madras*[2], though the reference was not a general reference in respect of several managements, the Division Bench of which one of us was a party agreed with the observations of the learned Judges in *Ramayya Pantulu* v. *Kutty and Rao (Engineer), Ltd.*[3], cited above. In *Lakshmanan Chettiar, In re*[4], another Division Bench of which one of us was a party held a similar reference to be invalid.

There can be no doubt that the first reference by Government on 9th April 1948 was a totally incompetent reference according to the decisions above mentioned, but the second reference was an improvement on the first in that it gave a list of 85 hotels and a list of items of dispute. The question is whether this fact takes it out of the scope of these decisions. If the Government had before them material to conclude that in respect of each of the 85 hotels there were disputes as regards each of the 11 items mentioned in Annexure II to the reference between the management and the workers, we do not think that a single reference would be incompetent. It will be a case of joinder of several references into one comprehensive reference to the same Tribunal. Even if separate references had been made in respect of each firm to the same Tribunal, obviously all the references would have been heard and diposed of together as certain common points would arise for determination.

Reference was made by the learned Advocate-General to the decision of the Federal Court in *India Paper Pulp Co., Ltd.* v. *India Paper Pulp Workers' Union and another*[5], and it was contended that the decisions above mentioned should not be followed as they were inconsistent with the decision of the Federal Court. The reference in that case was not a general reference, but reference of an industrial dispute which had arisen between a company and certain discharged workmen whose names were mentioned in a list annexed and who were represented by the Workers' Union. That decision therefore was not even remotely concerned with the question whether a general omnibus reference of a series of disputes between several firms and their workmen was valid. But it was said that the decision is authority for the position that the particular dispute referred to the Tribunal need not be mentioned in the reference. We have again carefully considered the ruling and we are convinced that it is not an authority for the position that there could be a reference by the Government under section 10 (1) of the Act without specifying the dispute referred. A Division Bench consisting of Govinda Menon and Basheer Ahmed Sayeed, JJ., had occasion to deal with the effect of this decision in a recent judgment (not yet reported) in Crl. M. P. No. 1278 of 1950 and they

1. (1949) 2 M.L.J. 806.
2. (1949) 2 M.L.J. 789.
3. (1949) 1 M.L.J. 231.
4. (1950) 1 M.L.J. 219.
5. (1949) F.L.J. 367 : 11 F.C.R. 348.

came to the conclusion that the trend of decisions of this Court had not been overruled by their Lordships of the Federal Court. We do not propose to deal elaborately with this question as we are in entire agreement with the reasoning in that judgment. We wish, however, to add that a reference to the report of the arguments of the counsel for the appellants in that case as found in the authorised Federal Court Reports (Vol. XI) at page 349 makes it quite clear that the contention pressed before the Federal Court was a wholly technical one and not substantial. The argument was that as the order meaning thereby the operative words of the order, excluding the preamble, only purported to appoint a Tribunal and did not refer any dispute to that Tribunal, there was no valid reference. The preamble portion of the order in clearest terms referred to the nature of the dispute and the parties to the dispute, but it was contended that this was only the preamble and it was not the operative part of the order. It is this contention of the appellants that is summarised thus by the learned Chief Justice of India at page 355 :

" On behalf of the appellants it was contended that there was no jurisdiction in the Industrial Tribunal to decide anything because, firstly, no dispute was referred to the Tribunal. This is admittedly a technical defence and is based on the wording of the order of the Government of West Bengal dated the 3rd January, 1948. In this connection it was pointed out that the order of the 3rd January, 1948, of the Government of West Bengal did not mention any industrial dispute. Secondly, the order, as worded, was only an order of appointment and there were no words of reference to the Tribunal. It was argued that the words 'and it is expedient that the said dispute should be referred to a Tribunal' did not constitute a reference ; they were in the preamble and did not form an operative part of the order ".

After remarking that the order was far from satisfactory, and was not carefully drafted, the learned Chief Justice held that it was sufficient if the existence of a dispute and the fact that the dispute was referred to the Trinunal are clear from the order, and the Court has to read the order as a whole and determine whether in effect the order makes such a reference. It will therefore be seen that the decision of the Federal Court has no bearing whatever on the questions arising before us in this application, nor on the questions decided in the four cases in this Court mentioned above.

The first reference therefore must be held to be an invalid reference. Otherwise it is very doubtful if the Government would have the power to supersede that reference and make a fresh reference in respect of the same subject-matter. As the first reference is invalid, the position is as if there had been no such reference and the second reference was in effect the first and only reference. The question which now falls for decision is whether the reference of the 15th March, 1949 is bad for any reason. It is not certainly such a general and indefinite reference as the references which came up for consideration in *Ramayya Pantulu* v. *Kutty and Rao (Engineer), Ltd.*[1], the *Calicut Hoiseries, Calicut*, In re[2]., *Lakshmanan Chettiar*, In re[3]. and Crl. M.P. No. 1278 of 1950. In those references the names of the firms were not mentioned ; nor was there a list of the disputes between the employments and the workers. That is not the case with the reference in question. It does give a list of the hotels and it does give a list of the disputes. What Mr. Bhashyam Aiyangar contends is that there cannot be a wholesale clubbing of several hotels and mention of every conceivable kind of dispute as if in respect of each of the hotels in regard to every one of the items mentioned in Annexure II there were disputes between the employment and the workers. We do not agree with Mr. Bhashyam Aiyangar that there is anything inherently wrong in such a clubbing if there is substantial justification for such a course. Supposing there are disputes in several hotels between the management and the workmen as to the number of hours of work, we see no reason why there should not be a single reference of this dispute which is common to several hotels and the workmen employed therein.

The question therefore resolves itself to an examination of the facts of this case to ascertain if there was material on which the Government could have

1. (1949) 1 M.L.J. 231.
2. (1949) 2 M.L.J. 800.
3. (1950) 1 M.L.J. 219.

He appears to have addressed a similar letter to the Secretary of the Coimbatore District Hotel-workers' Union. On the 15th, nothing happened, and the matter was adjourned to the 22nd on which date the Secretary of the Workers' Union furnished lists of hotels. The Secretary of the *Sangam* did not file any list. The lists filed on behalf of the Workers' Union included hotels from different parts of the district. Thereupon, on 2nd March, 1949, the Industrial Tribunal addressed a communication to the Government in which he stated that the Coimbatore District Hotel-workers' Union had given him a list but the representative of the Hotel-owners' *Sangam* had not furnished any list of his own, and that it would be enough to include the hotels mentioned in the accompanying list in the Notification to be published by Government. He also gave a list of 11 points in dispute. He also sent a copy of the demands given to him by the Workers' Union. The

1. (1949) 2 M.L.J. 789.

2. (1949) 1 M.L.J. 231.

list of hotels given by the Workers' union was also sent as an enclosure to this letter. On receipt of this communication the Government passed the order of 15th March, 1949 making the reference. The list of the hotels in Annexure I is the list supplied to the Industrial Tribunal by the Workers' Union, and the points in dispute set out in Annexure II are the points mentioned by the Industrial Tribunal in his letter of the 2nd March.

At the outset we cannot help expressing our surprise at the proceedure followed by the Government. One would have thought that in the normal course of things the Government would have called for full information which they desired to obtain from their officers in the Labour Department and not from a Judicial Tribunal like the Industrial Tribunal. The Industrial Tribunal in its turn who could not be expected to go about making enquiries from each hotel proprietor all over the district contented himself with issuing notices to the Secretaries of the Workers' Union and the Hotel-owners' *Sangam*, Coimbatore. The Workers' Union supplied a list, but the Hotel-owners' *Sangam* did not supply any list. The Industrial Tribunal did not himself verify correctness of the list supplied by the Workers' Union in the sense that on enquiry he found that there was a dispute which had arisen between the management and the workers in each of the hotels mentioned in the list. There is no need to speculate on this matter, because the Industrial Tribunal explains his conduct at length in his award. This is what he says,

"A number of general references had been made by Government and one of these was taken to the High Court in *Kutty and Rao's case*[1], and the High Court held that such references were invalid in law . . . . Government naturally asked the Tribunals to furnish the information required for the issue of a fresh order of reference in compliance with the decision of the High Court in *Kutty and Rao's case*[1]. I called upon both the parties to file lists of hotels in which disputes were admitted or alleged to exist. The Union filed a list but the Secretary of the Sangam did not. He could have said that no disputes existed in any hotel or that the list submitted by the Union was not correct. But he did nothing and when the Sangam knew that a list had been filed by the Union and they did not choose to contradict what was stated in the list, I assumed that they agreed that the list was correct and so I supplied the information to Government on which this reference is based".

It is therefore clear that the reference made by the Government on 15th March, 1949, was entirely based on information supplied by one of the contesting parties, namely, the Workers' Union. There was no attempt to verify the lists. The Government never applied their mind to the truth or otherwise of the assertion on behalf of one of the parties. How utterly unreliable was the information supplied to the Government, on the basis of which alone they made the reference, became clear at the enquiry. Here again we shall give an extract from the award,

"I asked the parties to state definitely whether there were disputes or not in the hotels specified in the Annexure I to the Government notification. Both parties produced statements signed by the workers, one set to say that there were no disputes and another set that there were disputes. The Union agreed that out of the 85 hotels mentioned in the Annexure, they were not in a position to prove that disputes existed in 41 and so these 41 may be excluded from the scope of the enquiry."

Further on we find the following :

"At the time of the argument, therefore, Sri Balagangadhara Menon, who appeared for the workers, said that the hotels in Pollachi and Erode may be left out of the scope of the enquiry because he had no satisfactory evidence that demands were served on the proprietors in those places. So at present only 25 hotels in Coimbatore remain and even out of these Venkatesa Lodge (A class, item 1), Subramania Vilas (B Class item 8), and Hotel Vasantham (B Class, item 5) have to be eliminated. The other 22 hotels to whom the award applies are shown in the annexure to this award".

We cannot help remarking that the issue of the notification and the scope of the enquiry appear to have been determined by the Workers' Union rather than by the Government or by the Industrial Tribunal.

It is obvious from the above statement of facts that the Government in making the reference, though it purported to act under section 10 (1) of the Act, were really making the reference on the application of the workers only. Now a special provision has been made in regard to a reference on such application by one of the parties to a dispute and that is section 10 (2), but the Government could not have made

1. (1919) 1 M.L.J. 231.

a valid reference under this provision unless they were satisfied that the persons applying represent the majority of the particular party. It was conceded before us by learned counsel appearing for the Workers' Union that he could not say that the Workers' Union represented the majority of the workers in the hotels in the district. In fact we do not have any information as to how many workers in the several hotels mentioned in Annexure I of the reference are members of the Union. The Government must be therefore held to have done something which they could not have done directly in an indirect way. The reference in question was not made on the subjective satisaction of the Government of the existence or apprehension of an Industrial dispute, but merely on the representation of one of the interested parties and that too on unverified information which subsequently proved to be substantially incorrect, because out of 85 hotels over 60 hotels were omitted from the enquiry.

The new sub-section (2-A to Section 10) inserted by the Industrial Disputes (Madras Amendment Act, 1949) (Act XII of 1949) is based on the principle laid down in the several decisions of this court above mentioned that there should not be a wholesale reference in respect of several concerns without a specification of particular disputes in particular establishments. The new sub-section runs thus :

"Notwithstanding anything contained in sub-section 1 and 2 where a Tribunal has been constituted under this Act for the adjudication of disputes in any specified industry or industries and a dispute exists or is apprehended in any such industry, the employer or the majority of workmen concerned may refer the dispute to that Tribunal."

If this procedure had been followed, what would have happened is this. There would have been a Tribunal constituted for the adjudication of disputes in the hotel industry. Then, if a dispute arises or is apprehended in any hotel or if there is a general collective dispute between the workers on the one hand and the employers on the other, either the employers or a majority of the workmen would have straightaway referred that particular dispute to the Tribunal.

On behalf of the Workers' Union Mr. Viswanatha Aiyar relied upon certain resolutions passed at a Conference of Hotel-workers on 26th October, 1947 which according to him were forwarded to the Hotel-owners' *Sangam*. Assuming this was so, we do not think that by a mere communication of resolutions passed at a conference it can be said that an industrial dispute has arisen or is apprehended calling for an adjudication by a Tribunal. It may be that if the workmen in a particular hotel actually make demands on the management concerned in accordance with these resolutions, an amicable settlement may be arrived at, or it may be that

to the dispute together with full statement of facts and circumstances and the reasons on account of which a settlement could not be arrived at. If on a consideration of the report the Government is satisfied that there is a case for reference to a Board or Tribunal, it may make such reference. The argument of the learned counsel was that such a report from the conciliation officer is a condition precedent for the Government to take power to make a reference under section 10 (1) of the Act. Admittedly there was no such report in this case. Though there is much to be said in support of this procedure on grounds of policy, we are of opinion that the language of the enactment does not support the contention. Under section 12, in the case of disputes in non-utility concerns the conciliation officer may take steps but may not. The position then would be that, in spite of the existence of a real dispute, the Government would be powerless to make a reference under section 10 (1). If the intention of the Legislature had been that before the Government could make a reference under section 10 (1), the conciliation procedure should be compulsorily resorted to, then the provisions would have run differently. The conciliation officer would then have been compelled to make attempts to settle the matter and send his report within a prescribed time and it would have been specifically mentioned in section 10 (1) that the Government may, after considering the report of the conciliation officer make a reference. In the absence of such provisions, we cannot place any restriction on the power undoubtedly conferred on the Government under section 10 (1) of the Act to make a reference whenever in its opinion there is a dispute or an apprehension of a dispute.

Nor is it necessary to deal with the other contention of Mr. Bhashyam Aiyangar for the petitioners, that the Government acted illegally in making the reference to the very same Tribunal which had reported to the Government about the alleged existence of disputes, as such a course was opposed to the principles of natural justice. A different Tribunal must have been constituted, because the present Tribunal was practically the complainant and the informant and therefore could not act as the adjudicator. In the award there is a reference to this argument and the following opinion of the Tribunal :

"I do not think that the supply of information as regards the parties arrayed before the Tribunal or to be arrayed would in any sense amount to prejudging the case."

We are inclined to agree with the Industrial Tribunal on this point.

It is also unnecessary to deal with the minor contention on behalf of the petitioners that the award exceeded the terms of the reference in two or three particulars, *e. g.*, in providing for a marriage allowance and an allowance for children.

As we have held that the reference itself was bad, it follows that the award is equally invalid. Both are accordingly quashed.

K. S. *Reference and award quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

Timmalapalli Virabhadra Rao .. *Petitioner**

v.

Sokalchand Chunnilal and others .. *Respondents.*

Judgment—Accidental error—Affidavits of parties as to error—Proper procedure to be followed.

A statement in a judgment or order as to what had taken place in court is conclusive and cannot be allowed to be controverted by an affidavit or otherwise and a party, who is aggrieved by what he considers a wrong statement in the judgment, should apply to the very same judge by way of review.

But if it is found that in reality there is no controversy at all between the parties and it is apparent from the affidavits of advocates on both sides, as in the present case, that the learned Judge who wrote the judgment fell into an accidental error and if that judge has been also transferred in the meanwhile, the matter may be set right in revision.

*C.R.P. Nos. 1521 and 1619 of 1949. 4th August, 1950.

Petitions under section 75 (1) of the Provincial Insolvency Act, praying the High Court to revise the order of the District Court, West Godavari in C.M.A. Nos. 23 of 1947 and 25 of 1948 respectively (I.A. No. 320 of 1946 and 44 of 1947 in I.P. Nos. 21 and 23 of 1933, Sub Court, Eluru).

D. Narasaraju and *K. B. Krishnamurthi* for Appellant.

M. S. Ramachandra Rao and *M. Krishna Rao* for Respondents.

The Court delivered the following

JUDGMENT :—These are two petitions to revise the order of the District Judge, Eluru, in C.M.A. No. 123 of 1947 and C.M.A. No. 25 of 1948, on his file.

The more material facts are these. On 11th March, 1946, the Official Receiver sold the properties of the insolvent in I.P. Nos. 21 and 22 of 1933, on the file of the Subordinate Judge, Eluru. One Virabadra Rao the petitioner before me was the successful auction-purchaser, the amount of his bid being Rs. 15,500. On 19th March, 1946, two creditors of the insolvent, named Bapiraju and Virasami filed I. A. No. 320 of 1946, before the Subordinate Judge, Eluru, praying that the sale be set aside. One Chunilal, another creditor of the insolvent, probably entertained fears that Bapiraju and Viraswami might not prosecute their petition diligently and so on 22nd December, 1946, he applied to be added as the third petitioner in I. A. No. 320 of 1946. The petition which Chunilal so filed was numbered as I. A. No. 44 of 1947. On 11th February, 1947, this I.A. No. 44 of 1947 was dismissed because even though his vakil was present the petitioner was absent and no evidence was adduced in support of the allegation that the petitioners in I. A. No. 320 of 1946 were not prosecuting their petition with diligence. On 8th April, 1947, I. A. No. 320 of 1946 was withdrawn and dismissed. Chunilal thereupon filed two appeals before the District Court. One numbered as C.M.A. No. 123 of 1947 was against the order dismissing I. A. No. 320 of 1946 and the second numbered as C.M.A. No. 25 of 1948 was against the order dismissing his own application, I. A. No. 44 of 1947.

There is a certain amount of apparent—but as finally appears over apparent—controversy about what happened in the District Court. Nevertheless certain facts are not disputed. The learned District Judge heard arguments in the appeals on 22nd June, 1949, and reserved judgment. Either on the 24th or on the 25th June, the difference between these dates is immaterial—the appeals were taken up in order to ascertain whether the appellant or anyone else was willing to deposit Rs. 25,000 as his initial bid. Time was extended once again till 12th August, 1949, when one Vagu Venkataswami stated to be the son-in-law of one of the insolvents deposited a sum of Rs. 6,250. The learned District Judge made an order on 12th August, 1949, of which the first paragraph rules runs as follows :

" In view of the deposit made here to prove the *bona fides* of the contention of the appellant that the sale of the property in question was not for proper price both sides agree that the appellant should be allowed to be added as a party and given an opportunity to convince the lower court that the sale is liable to be set aside on this ground. Both sides further agree that I. A. No. 320 of 1946 on the file of the lower court should be restored to the file of the lower court for disposal on merits. In dealing with it the lower court will take into consideration that fact that there is a bidder who is prepared to start his bid with Rs. 25,000 as the upset price. Both these appeals are allowed ".

On behalf of Virabhadra Rao, the petitioner before me, it was strenuously contended that on neither of the two points set out in the order of the learned District Judge now complained of was there the agreement that he asserts there was. An affidavit of the learned vakil who appeared for the petitioner in the District Court was filed in support of the contention. It is stated that it was only because this affidavit was filed that these civil revision petitions were admitted at all. When notices was issued to the opposite side after the admission of these two revision petitions another affidavit from the advocate who had been appearing for Chunilal in the District Court was also filed. Reading these two affidavits together it appears to me to be reasonably clear that both the parties agreed before the learned District Judge that I. A. No. 320 of 1946 on the file of the Sub-Court should be remanded

to that court for disposal on the merits, but, it was certainly not agreed that Chunilal should be added as a party.

Mr. Ramachandra Rao for the respondent, however, took the objection that a statement in a judgment or order as to what had taken place in Court is conclusive and cannot be allowed to be controverted by an affidavit or otherwise and that a party who is aggrieved by what he considers a wrong statement in a judgment should apply to the very same Judge by way of review. In support of this position a number of decisions were cited and I shall briefly examine them. The earliest of these is the case reported in *Reg* v. *Pestanji Dinsha*[1]. In that case there was a controversy whether the learned Judge who presided at the Criminal Sessions of the Bombay High Court instructed the Jury in a particular manner. The learned Judge positively stated that he had not so instructed the Jury. Dealing with the question whether such a statement could be canvassed Westropp, C. J., observed as follows :

" The statement of the Judge, who presides at a trial, whether it be a in a criminal or civil case, is, as to what has taken place at the trial conclusive. Neither the affidavits of bystanders, nor of jurors, nor the notes of counsel, nor of short-hand writers are admissible to controvert the notes or statement of the Judge : *Rex* v. *Grant*[2], *Everett* v. *Youells*[3], *Gibbs* v. *Pike*[4]. And in *Reg* v. *Aaron Mellor*[5], Coleridge, J., at page 131, says : 'I apprehend that we are bound to give credence to the statement of the Judge, and to take what the Judge so states to be incontrovertibly the fact. It is suggested this is not a record, but we have no more power of contradicting the statement of a learned Judge reserved for our consideration, than we have the power of contradicting any allegation upon a record ; and Martin B (p. 137) says : 'We must consider the statement of the Judge as absolute verity, and we ought to take his statement precisely as a record and act on it in the same manner as on a record of court, which of itself imports absolute verity ".

This judgment puts the law in the strongest possible terms in favour of the contention urged by Mr. Ramachandra Rao. It has long been in our reports and does not appear to have been dissented from.

The second decision in point of time is the one reported in *Mirza Shamsher Bahadur* v. *Munshi Kunj Behari Lal*[6]. At page 215 the learned Judges stated :

" As to the *factum* of the admission it is not open to the defendants to challenge the accuracy of the statement contained in the judgment of the District Judge. If the admission was not as a matter of fact made, or if it was substantially different from what it was taken by the District Judge to be, the proper course for the defendants was to apply for a review of judgment because the District Judge and he alone was competent to state with any approach to accuracy, what was the precise admission which had been made before him. "

To the same effect is the decision in *Nagabhushanam* v. *Jagannaikulu*[7] the headnote to which runs as below :

" Where a judgment contains a damaging statement against a party, a statement of an admission purporting to have been made by him, and practically conclusive of the case against him, the proper course for him to adopt, if his case is that the statement is erroneous, is to apply for a review of judgment, when the matter is fresh in the mind to both of the learned Judge who pronounced the judgment and of the practitioners who appeared in the case. He ought to do as soon as he finds out the mistake, and ought not to wait and make the error the ground of an appeal filed long afterwards. "

The decision next cited is that of the Privy Council in *Madhusudan Chowdhari* v. *Chandrabati Chowdrain*[8]. At page 442 their Lordships commented on the suggestion that the learned Judges who tried the case might have misunderstood the action of the pleader in the conduct of the case in these terms :

" Their Lordships are quite unable to accept this contention ; had there been any mistake in this respect it would have been incumbent upon the appellants, while the matter was still fresh in the minds of the Judges, to have caused their pleader to call the attention of the court to the fact that the statement made with regard to his conduct was a statement that had been made in error. No such step was taken, and, apart from the argument of counsel, there is nothing before their Lordships to make them think that any such mistake occurred ; an affidavit has indeed been filed by a person who said he was present at the trial, that he would certainly have noticed any such admission, that such admission was not made, and that the learned pleader is now unable to recall whether in fact it did or did not occur. After such a lapse of time this is wholly insufficient..... "

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1. (1873) 10 Bom.H.C.R. 75.
2. (1834) 110 E.R. 1092 : 5 B. & Ad. 1081 : S.C. 3 N. & M. 106.
3. (1833) 110 E.R. 612 : 4 B. & Ad. 683, 684.
4. (1842) 9 M. & W. 351 : 152 E.R. 149.
5. 27 L.J. N.S. 121.
6. (1907) 3 M.L.T. 212 at p. 215.
7. (1925) 49 M.L.J. 671.
8. (1917) 6 L.W. 437 : 21 C.W.N. 897 (P.C).

The last of the decisions read by Mr. Ramachandra Rao is the one reported in *Venkataseyya and another* v. *Mahammad Ghouse Sahib*[1], it merely follows the earliest *Bombay case*[2] without much discussion.

Mr. Narasaraju the learned advocate for the petitioner however argued that the law has been stated too rigidly and inflexibly in *Reg* v. *Pestanji Dinshaw*[3], and that whatever may be the position according to the English decisions which were relied on in *Reg* v. *Pestanji Dinshaw*[3], an exception to the rule has been recognised in Indian Courts. He first referred to *Hur Dyal Singh* v. *Heera Lall*[3], a Calcutta case where this law is stated in these terms ;

"The rule of law is that a judgment deliberately recording the admission of a pleader must be taken as correct, unless it is contradicted by an affidavit or the judge's own admission that the record he made was wrong."

On the strength of this observation he contended that it was open to a party to show by affidavit that a statement of fact in a judgment as to what took place in court was wrong.

Nellavadivu Ammal v. *Subramania Pillai*[4], is the second case cited by Mr. Narasaraju. In that case Sadasiva Aiyar, J., remarked :

"A statement in a judgment as to an admission made before the Court of first instance should not be doubted lightly by the Appellate Court, especially *in the absence of an affidavit by the vakil who appeared in the court of first instance*".

The words italicised are those on which Mr. Narasaraju placed special emphasis. The third is an unreported case in A. S. No. 567 of 1947 on the file of this court. What happened there was that in view of certain allegations in an affidavit of the concerned advocate in the court below Subba Rao and Somasundaram, JJ., called for a report from the Sub-Judge about what had happened and after considering his report remanded the suit for fresh disposal according to law.

Now, if we examine its *raison d'etre* the rule that a statement in a judgment as to what happened in court should not be allowed to be controverted is seen to rest on a number of salutary reasons. One is that to depart from it and to allow such statements when they are deliberately made in judgments to be challenged would be to draw the presiding officers of courts into the controversy between the parties, a process which must inevitably and in the long run lead to embarrassment, if not demoralization all round. Especially when the parties are rich and obstinate, vakils appearing for them would be subjected to a degree of pressure to swear to affidavits which is not to be encouraged. Confidence in the impartiality of the officers presiding in the courts of Justice is the very foundation of our judicial system and indeed of any civilised system and if such officers are dragged into the battle of allegations and counter-allegations that is appropriate only to the role of litigants, their detachment and the confidence which such detachment inspires will be seriously impaired. Mr. Narasaraju, however, contended that to lay down the rule in the hard form in which it has been done in the Bombay case *Reg* v. *Pestanji Dinshaw*[2] would be to set a premium on carelessness and inexactitude. But when we realise that the number of litigants runs into hundreds of thousands while judicial officers are relatively a handful that as a rule a judicial officer has no interest in a case beyond seeing that it is terminated and that they receive a training and are subject to a discipline from which litigants are immune, the evil which Mr. Narasaraju apprehends is surely much the smaller one.

I think that when there is any controversy between the parties the statement made by the Judge should be accepted as final and conclusive. The procedure which Subba Rao and Somasundaram, JJ., adopted in App. No. 567 of 1947 does not, as I understand their order, involve a deviation from the old established rule. In that case there was an affidavit by the advocate on one side which by implication stood unchallenged indicating that there had been some misapprehen-

1. (1944) 1 M.L.J. 396.
2. (1873) 10 Bom.H.C.R. 75.
3. (1871) 16 W.R. 107.
4. (1916) 31 M.L.J. 269.

sion in the mind of the learned Subordinate Judge. A report was called for from the Subordinate Judge and it was essentially on what was stated in that report that the learned Judges rested their final order. The observations of Sadasiva Aiyar, J., in *Nellavadivu Ammal* v. *Subramania Pillai*[1], are not to be understood as deliberately intended to introduce a proviso to the rule laid down in the earliest case. The learned Judge was merely making a comment in passing and I do not think it was his intention to discuss the rule or express any considered opinion on it. Somewhat similar remarks apply to the decision in *Hur Dyal Singh* v. *Heera Lall*[2].

It is however easy to visualise situations to which the rule laid down in the *Bombay Case*[3] would have no application. One would be where there is an enquiry into an accusation of misconduct against a judicial officer in relationship to a particular case. Another would be where there is in reality no controversy at all between the parties and it is apparent from the affidavits of the advocates on both sides that the learned Judge fell into an accidental error. The present case falls into the latter category. The parties agreed only as to what should be done in C.M.A. No. 123 of 1947, but the learned District Judge who had at the same time C.M.A. No. 25 of 1947 before him thought that the agreement extended to both appeals. It is true and the authorities also leave no room for doubt on this point that the most appropriate remedy in such a situation is to apply by way of review to the very same Judge. That is what the parties here should have done. They probably failed to do so because the learned Judge was transferred about a month afterwards and the docket to the copy of the order of the lower court shows that the copy was obtained only on 28th September, 1949, *i.e.*, after the learned Judge had been transferred.

In the circumstances, I dismiss C.R.P. No. 1521 of 1949 with costs and direct that I.A. No. 320 of 1946 be restored to the file of the Subordinate Judge for disposal according to law on the merits since that was what the parties agreed to before the District Judge. I allow C.R.P. No. 1619 of 1949 with costs and direct the District Court to dispose of C.M.A. No. 25 of 1948 on its merits.

K. C. *C. R. P. No.* 1521 *of* 1949 *dismissed.*
C.R.P. No. 1619 *of* 1949 *allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON, AND MR. JUSTICE BASHEER AHMED SAYEED.

Baya G. Gopalaswami Mudaliar .. *Appellant**

v.

V. S. Thyagaraja Mudaliar and others .. *Respondents.*

The Madras Hindu Religious Endowments Act (II of 1927, as amended by Act IV of 1930 and X of 1946) —Section 84 (1) (b)—Jurisdiction of Board to decide a dispute regarding trusteeship of an endowment.

Though what is contemplated by clause (*b*) of section 84 (1) of the Act is the determination by the Board only of the hereditary trusteeship of an endowment, if in finding out whether a person who claims to be a hereditary trustee is such a one, if the preliminary question regarding his rights of trusteeship itself has to be decided, the Act does not oust the jurisdiction of the Board for that purpose.

Case-law discussed.

Appeals against the order of the District Court, East Tanjore, Nagapattinam, dated 4th September, 1948, in O. P. No. 27 of 1948.

R. Sundaralingam, B. G. Chokkappa and *M. Seshachalapathi*, for Appellant.

K. Soundararajulu Naidu and *M. Chockalingam*, for Respondents.

The Judgment of the Court was delivered by

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1. (1916) 31 M.L.J. 269.
2. (1871) 16 W. R. 107.
3. (1873) 10 Bom.H.C.R. 75.

* A.A.O. Nos. 118 and 223 of 1949. 28th November, 1950.

Govinda Menon, J.—These two appeals arise out of O. P. No. 27 of 1948 in the District Court of East Tanjore, which was a petition under section 84 (2) of the Madras Hindu Religious Endowments Act, to set aside the decision of the Hindu Religious Endowments Board, in O.A. No. 279 of 1946.

Sri Thiagarajaswami Devasthanam, Tiruvarur, in Tanjore district, is a famous Hindu religious institution and in the Ulthurai kattalai attached to that temple, it is common ground, that the hereditary trusteeship vested in two families, *viz.*, the Bava family and the Vadapathimangalam family. Bava Vaithilinga Mudaliar and V. S. Thyagaraja Mudaliar were the two trustees of this kattalai, each of whom representing his own family, before the death of Vaithilinga Mudaliar on 6th April, 1943, leaving him surviving a widow a daughter, a daughter's son and two brothers, *viz.*, Bava G. Gopalaswami Mudaliar and Bava Panchapakesa Mudaliar. On account of disputes as to who should succeed to the hereditary trusteeship of the Ulthurai kattalai in the place of the deceased Vaithilinga Mudaliar, one of his undivided brothers Bava Gopalaswami Mudaliar, filed O.S. No. 117 of 1946 on 3rd April, 1946, in the court of the District Munsiff of Tiruvarur, praying for a decree that he is the hereditary trustee of the Ulthurai kattalai of Sri Thyagarajaswami Temple at Tiruvarur and for possession of the said office with such further and other reliefs as were necessary. To that suit the Hindu Religious Endowments Board was impleaded as the first defendant, the Executive Officer of the Sri Thyagarayaswami Devasthanam as the second defendant, the widow of the deceased Vaithilinga Mudaliar as the third defendant and the other divided brother of the said Vaithilinga Mudaliar, Bava Panchapakesa Mudaliar, as the fourth defendant and the co-trustee representing the Vadapathimangalam family, V. S. Thyagaraja Mudaliar as the 5th defendant. The widow, the 3rd defendant, contended that she was the lawful trustee was succeeded to the office of trusteeship on the death of her husband Vaithilinga Mudaliar. After this suit was filed, on 5th April, 1946, the Madras Act, X of 1946, which amended the Hindu Religious Endowments Act came into force whereby section 84 of the Act was changed in material respects. After the suit had been pending for over a year, the plaintiff applied to the District Munsif's Court for permission to withdraw the suit on the ground that the necessary parties had not been impleaded in the suit and therefore the suit would fail for a technical reason. By I.A. No. 249 of 1947, the District Munsif permitted the plaintiff to withdraw the suit with liberty to file a fresh suit. On the 11th April, 1946, prior to the withdrawal of the suit, Bava Gopalaswami Mudaliar applied to the Endowments Board by O.A. No. 279 of 1946 praying that he may be declared as the hereditary trustee of the Ulthurai kattalai in succession to Bava C. Vaithilinga Mudaliar. This petition was also contested by the widow of Vaithilinga Mudaliar as well as by V. S. Thyagaraja Mudaliar who contended that Bava Vaithilinga Mudaliar was not a hereditary trustee of the kattalai and that even assuming that he was a hereditary trustee, Bava Gopalaswami Mudaliar, who was a divided brother of the deceased cannot succeed to the office in preference to Vaithilinga Mudaliar's heirs. The Endowments Board enquired into the matter fully and passed a considered order on 24th September, 1947, holding that the petitioner Bava Gopalaswami Mudaliar has proved his case and was entitled to be declared as one of the hereditary trustees of the Ulthurai kattalai. The order of the Endowments Board, after stating the facts and circumstances which led up to the petition, concluded that as Vaithilinga had left no male issue, his next brother Gopalaswami Mudaliar, the petitioner was entitled to claim the hereditary trusteeship and in the face of the documents filed by him and the admission of Thyagaraja Mudaliar's father to the effect that the Bava family was one of the hereditary trustees and particularly in view of the documentary evidence filed on behalf of Bava Gopalaswami Mudaliar, there can be no doubt whatever that the hereditary trusteeship vested in the petitioner Bava Gopalaswami Mudaliar. As a result of this declaration, the other trustee V. S. Thyagaraja Mudaliar applied to the District Court of East Tanjore under section 84 (2) of the Hindu Religious Endowments Act to set aside the order declaring Bava Gopalaswami Mudaliar as the hereditary trustee of the Ulthurai kattalai. The learned District Judge held on a construction

of section 84 (1) (*b*) that the Endowments Board had no jurisdiction to decide a dispute regarding succession to the trusteeship and therefore set aside the order of the Board declaring Bava Gopalaswami Mudaliar as a hereditary trustee. Against the order of the District Judge, Bava Gopalaswami Mudaliar who was the first respondent has preferred C.M.A. No. 118 of 1949 and the Hindu Religious Endowments Board which was the second respondent has preferred C.M.A. No. 223 of 1949. To the appeal filed by Bava Gopalaswami Mudaliar, his brother's widow Pappu Ammal as well as the divided brother Panchapakesa Mudaliar are impleaded as respondents in addition to V. S. Thiagaraja Mudaliar and the Hindu Religious Endowments Board. In the other appeal by the Board, the respondents are V. S. Thyagaraja Mudaliar and Bava Gopalaswami Mudaliar. At the hearing of these appeals before us, nobody appeared on behalf of the widow of Vaithilinga Mudaliar or on the side of the divided brother Panchapakesa Mudaliar; but it was represented to us by the advocate appearing for Gopalaswami Mudaliar that at present there is no dispute *inter se* between the members of the Bava family as regards the person to succeed to the hereditary trusteeship on the death of Vaithilinga Mudaliar and that all of them have recognised Gopalaswami Mudaliar as the rightful claimant and the hereditary trustee. The point in controversy centres round as already stated, the interpretation of section 84 (1) (*b*) of the Act. Section 84 has undergone transformation since its first enactment by Act II of 1927. It was amended by Act IV of 1930 in the first instance and later on by Act X of 1946. It will be useful to set out the section as it stood originally and as it has been subsequently amended :—

Act II of 1927.	Act IV of 1930.	Act X of 1946.
1. If any dispute arises as to whether a math or temple is one to which this Act applies or as to whether a temple is an excepted temple such dispute shall be decided by the board.	1. If any dispute arises as to whether an institution is a math or temple as defined in this Act or whether a temple is an excepted temple, such dispute shall be decided by the Board.	1. If any dispute arises as to— (*a*) Whether an institution is math or temple as defined in this Act. (*b*) Whether a trustee is a hereditary trustee as defined in this Act, or not, or (*c*) whether any property or money endowed is a specific endowment as defined in this Act or no, such dispute shall be decided by the Board and no Court in the exercise of its original jurisdiction shall take cognizance of any such dispute.
2. A trustee affected by a decision under sub-sec. (1) may within one year apply to the court to modify or set aside such decision but, subject to the result of such application, the order of the Board shall be final.	2. Any person affected by a decision under sub-sec. (1) may within one year, apply to the court to modify or set aside such decision; but subject to the result of such application, the order of the Board shall be final. (by reason of the omission of S. 4 re: excepted temples).	2. Any person affected by a decision under sub-sec. (1), may within six months, apply to the court to modify or set aside such decision.
		3. From every order of a District Judge on an application under sub-section (2), an appeal shall lie to the High Court within 3 months from the date of the order.
		4. Subject to the result of an application under sub-sec. (2) or of an appeal under sub-sec. (3) the decision of the Board shall be final. (by reason of the omission of clause (5) of S. 9 classifying certain temples as 'excepted temples').

The learned District Judge has held that all that the Board is permitted to decide under the Act is whether a person who admittedly is a trustee holds it as a hereditary trustee, that is, if a trustee is functioning with respect to a temple or a math as defined in the Act all that the Board is empowered by section 84 (1) (*b*) is to find out whether he is a hereditary trustee or not; or in other words, what the section means is a decision as to whether the trusteeship is a hereditary one and nothing more. The distinction between an excepted temple and a non-excepted temple was abolished by the Amending Act of 1946 by which sub-section (5) of section 9 was repealed and the definition of hereditary trustee in sub-section (6) was altered and a new definition was substituted. Under the section as it stood before the amendment of 1946, if any dispute had arisen as to whether a temple as defined in the Act is an excepted temple or not, such a dispute shall be decided by the Board and therefore, in the view of the lower Court, what is contemplated by section 84 (1) (*b*) is only the finding out of the hereditary nature of the trusteeship. Here the right of Gopalaswami Mudaliar as a trustee has been questioned by the other heirs of the deceased Vaithilinga Mudaliar. So he is not admittedly a trustee and that being the case, the Board had no jurisdiction to find out whether he is a hereditary trustee and declare him as such. The learned District Judge expressed the opinion that the right given to the Board is limited and can be exercised only when the trustee happens to be the son of the last hereditary trustee or if the last hereditary trustee has appointed him as his successor. But the Board has no jurisdiction to find out the relative merits of competing claimants for the trusteeship, each one of whom claiming to be first of all a trustee and secondly a hereditary trustee. The question of trusteeship can therefore be decided only under the common law by a Civil Court and if the Civil Court decides any one of the parties as a trustee, then it is open to the Board to find out whether such a trusteeship is hereditary in the family or not. After the words "or not" in clause (*b*), for the word "or" the phrase "a hereditary trustee as defined in this Act" should be added and if that is done, the clause would read thus:

"Whether a trustee is a hereditary trustee as defined in this Act, or not a hereditary trustee as defined in this Act."

The learned District Judge relied upon a passage in Halsbury's Laws of England, Vol. 27, at p. 154, section 292, to the following effect:

"Statutory provisions giving jurisdiction to inferior courts, to Government departments, or to bodies created *ad hoc*, must be strictly construed and the procedure prescribed must be exactly followed."

Reliance was also placed upon passages at pages 235 and 241 of Maxwell's Interpretation of Statutes, laying down that a Legislature would not make an important innovation without a very explicit expression of its intention and therefore it would not oust the jurisdiction of a superior Court without a distinct expression of its intention or by necessary implication. We agree with the learned District Judge that what is contemplated by clause (*b*) is the determination by the Endowments Board only of the hereditary trusteeship but what the lower Court has overlooked is that, in finding out whether a person who claims to be a hereditary trustee is such a hereditary trustee, if a preliminary question regarding his rights to trusteeship itself has to be decided, the Act does not oust the jurisdiction of the Board for that purpose. The conclusion arrived at by the learned District Judge involves the anomalous situation that where there is a dispute between two individuals regarding the hereditary trusteeship of an institution, in the first instance resort must be made to a Civil Court which would decide as to who is to be the trustee and then the successful party must apply to the Endowments Board to declare him as a hereditary trustee; because it is not open to a Court in the exercise of its original jurisdiction, to take cognizance of any dispute regarding the hereditary trusteeship at all as such a dispute can be decided only by the Board. The situation thus created cannot be considered to be a happy one. It is well known that a statute made for the public good ought to be liberally construed—*Statuta pro*

publico commodo lata interpretantur. We do not think that the framers of the amended clause intended such a result to arise. In our opinion what was sought to be done by the amendment is that the Board had the power to determine, as a preliminary point in considering the question of hereditary trusteeship, whether the person who claims that right is a trustee at all or that he fulfils the requisite initial qualification of being a trustee. As the preamble of the Act itself says it was intended to provide for better administration and governance of certain Hindu religious endowments. Therefore, if in deciding whether a person is a hereditary trustee or not, the initial point regarding his trusteeship has to be considered and concluded, it cannot be said that such an enquiry and conclusion are taken out of the scope of the powers of the Board.

The learned counsel for the contesting respondent V. S. Thyagaraja Mudaliar, stoutly defended the decision of the District Judge and strenuously contended that all that the Board could do in the circumstances is to find out whether an admitted trustee fulfils any one of the three requirements laid down in the definition of a hereditary trustee in section 9, sub-section (6), these three requirements being, firstly whether the succession devolves by hereditary right; secondly whether it is regulated by usage; and thirdly whether it is specifically provided for by the founder. He also invited our attention to various sections of the Act where a hereditary trustee is given greater rights than a non-hereditary trustee; for example under section 53 of the Act an Assistant Commissioner can suspend, remove or dismiss any non-hereditary trustee whereas he has no such power as regards a hereditary trustee. Under section 53-A the Endowments Board alone can suspend, remove or dismiss a hereditary trustee. The disqualifications which would bring about a cessation in the holding of non-hereditary trusteeship are not the same for hereditary trusteeship; for example, under section 34, if a person applies to be adjudicated or is adjudicated a bankrupt or insolvent, or if he is sentenced by a criminal court to transportation or to imprisonment for a period of more than six months and such a disqualification has not been cancelled by the Government, he cannot be a non-hereditary trustee. The only disqualification so far as a hereditary trustee is concerned, is that he should not be a person who has ceased to profess the Hindu religion. He also invited our attention to the proviso to section 57, sub-section (1), clause (*c*), which lays down that where provision is made in the scheme for the removal of a hereditary trustee, provision shall also be made therein for the appointment as a trustee, of the person next in succession who is qualified.

In order to compare and contrast the rights and obligations of a hereditary trustee, the learned counsel also invited our attention to sections 42 and 58. He further contended that if there is a dispute regarding a right of succession to the office of a hereditary trustee, wherein questions regarding the genuineness of a will or the existence of an adoption or matters like that have to be decided, the Board, even in the initial stage, as a preliminary step to find out whether a person can fulfil the status of a hereditary trustee, has no power to decide that question. On the other hand learned counsel for the Endowments Board referred us to section 25 of the Indian Income-tax Act wherein power is given to the Income-tax authorities to find out initially whether a family which has to be assessed to income-tax is divided or not. Similarly powers are given in the Madras Hereditary Village Offices Act to the revenue authorities to find out whether a person who claims to succeed to a hereditary village office is entitled to do so and in deciding that question, points regarding validity of adoption or genuineness of a will would have to be decided. It seems to us that the Legislature, in giving the power to the Board to decide the question of hereditary trusteeship, has impliedly conferred the right to decide the question of trusteeship also as a preliminary point. In this context it is useful to refer to the observations of Lord Esher, M.R., in *The Queen* v. *Commissioners for Special Purposes of the Income-tax*[1],

1. (1888) 21 Q.B.D. 331, 319.

"When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shewn to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none."

This passage shows that if a statutory body, unlike a Court exercising functions in common law, is vested under the law to decide a question, it has power impliedly and implicitly given, to decide a preliminary issue which would be the root of the main question that has to be decided. Reference may also be made to the observations in *Admiralty Commissioners* v. *S. S. Volute*[1]. The decision in the *Queen* v. *Commissioners for Special Purposes of the Income-tax*[2], was cited with approval by Lord Reading C.J. in *Rex* v. *Bloomsbury Income-tax Commissioners*[3]. Two of these three English cases, *The Queen* v. *Commissioners for Special Purposes of the Income-tax*[2] and *Rex* v. *Bloomsbury Income-tax Commissioners*[3] were considered by our learned brother Viswanatha Sastri, J., in *Ramaswami* v. *The Board of Commissioners, Hindu Religious Endowments, Madras*[4]. Learned counsel for the Board relying upon various cases, viz., *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs and Trade Marks*[5], *Attorney-General* v. *Brown*[6], *Narendra Nath Sircar* v. *Kamal Basini Dasi*[7] and *Nilmani Kar* v. *Sati Prosad Carga*[8], contended that the effect of an amending statute is not to deprive the rights which already existed unless there is specific provision to that effect. According to him, the section, as it stood before the amendment, conferred upon the Endowments Board the right to decide whether a temple is an excepted temple or not. That is, whether the trustee of such a temple is a hereditary trustee or not and in doing so, the Board had the power to find out whether he was a trustee or not. We do not think that these decisions can be of much help. In our opinion, following the dictum of law set out by Lord Esher, M. R. in the *Queen* v. *Commissioners for Special Purposes of the Incometax*[2], it is open to the Endowments Board in finding out whether a person is a hereditary trustee, to decide whether he is, in the first instance, a trustee at all. No serious consequence can follow from such a decision for, under sub-section (2) of section 84, any person affected by a decision under sub-section (1), can apply to the Court to modify or set aside such decision. It has been held in *Iswarananda Bharati Swami* v. *Hindu Religious Endowment Board, Madras*[9], that the Court, in dealing with such a original application, has all the powers and shall follow the procedure in trying a original suit. That means that all the oral and documentary evidence which the parties possess and which are relevant can be let in and the decision of the Court has now been made subject to an appeal which right was not in existence prior to 1946. The Legislature would, therefore, not have prohibited the Board from embarking upon an enquiry preliminary in nature to find out whether a person who claims to be a hereditary trustee is really a trustee or not.

Learned counsel for the Endowments Board, the appellant in C.M.A. No. 223 of 1949, and for the appellant in C.M.A. No. 118 of 1949, contended that V. S. Thiagaraja Mudaliar, who applied to the District Court, was not a person affected by a decision of the Board. The contention is that the joint right of trusteeship which is hereditary in his family is in no way affected by declaring Bava C. Gopalaswami Mudaliar as the person entitled to be the hereditary trustee from the

1. (1922) 1 A.C. 129 at 153, 154.
2. (1888) 21 Q.B.D. 313 at page 319.
3. (1915) 3 K.B. 768 at 782.
4. (1950) 2 M.L.J. 511 : I.L.R. (1950) Mad. 799, 834.
5. (1898) A.C. 571, 575.
6. (1920) 1 K.B. 773, 791.
7. (1896) I.L.R. 23 Cal. 563.
8. (1920) I.L.R. 48 Cal. 556 (F.B.).
9. (1932) 63 M.L.J. 254 : I.L.R. 56 Mad. 40.

Bava family. Mr. Seshachalapathi wanted the Court to draw a distinction between the words "interested" and "affected" and invited our attention to various sections of the Act wherein the word "interested" occurs as well as other sections where the word "affected" occurs. In addition we were also asked to consider the meaning of the term "aggrieved" in relation to these words. The places where the word "interested" occurs and which were brought to our notice are: sections 9 (9), 55 (4), 57 (7), 63 (7), 64, 65, 65A (5) (*b*), 67 (4), 73 (1) and 76 (2). From these sections, it was sought to be argued that where the Legislature intended rights of a public character to be considered, the word "interest" was used and where the rights of private character are in contemplation, the word used was "affected" as in section 77 (2), 79-A (3) and 84 (2); and the word "aggrieved" was used in section 44-B. It was sought to be impressed that because the Legislature has not used the word "interested" in section 84 (2) and because Thiagaraja Mudaliar's private rights are not in any way concerned in the decision by the Endowments Board, he had no right of a petition to the lower Court. On the other hand the respondents' counsel invited our attention to a decision in *Kumaraswami Chettiar* v. *Board of Commissioners for the Hindu Religious Endowments, Madras*[1], where the word "affected" was considered. In our opinion the nice distinction that is sought to be drawn between the words "interested" and "affected" need not be finally decided in these appeals. By the declaration of the appellant Bava C. Gopalaswami Mudaliar as a hereditary trustee, the other hereditary trustees' rights are certainly affected because if the Board had declared a person who has no legal right to function as a hereditary trustee, then the admitted hereditary joint trustee certainly stands to lose by being associated with a person who had no business to function as a hereditary trustee. We have no doubt whatever that the petition to the lower Court was justified in the circumstances of the case.

The respondents' counsel next contended, relying upon *Janaki Ammal* v. *Sanjeevi*[2] and passages in Mayne's Hindu Law, sections 809 and 810, that since sex is no disqualification for succession to trusteeship Vaithilinga Mudaliar's widow is the next hereditary trustee. As the lower Court has not adjudicated between the claims of the appellant Bava C. Gopalaswami Mudaliar and the other heirs of Vaithilinga Mudaliar, we do not wish to express any opinion on this question.

The appeals are therefore allowed. The decision of the lower Court is set aside, and O.P. No. 27 of 1948 is remanded to the District Court of East Tanjore for fresh hearing and disposal. The District Judge, will, in the enquiry that would ensue, decide between the competing claims of the heirs of Vaithilinga Mudaliar as to who is to be the hereditary trustee. The parties are at liberty to adduce such evidence as they desire. Costs of these appeals will abide and follow the result of the fresh hearing by the District Judge.

V.P.S. ——— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

The Province of Madras, represented by the Collector of Ramanathapuram at Mathurai .. *Appellant* *

v.

Rao Bahadur O. A. P. RM. Arunachalam Chettiar and others .. *Respondents.*

Madras Estates Land Act (I of 1908), sections 20 A (1) (b) (ii) and 189—Suit site withdrawn from Municipal control by notification of Government—Collector's orders converting the suit site into ryotwari land—Suit claiming title to the property—Maintainability.

Where Government issued a notification under section 61 (2) of the District Municipalities Act withdrawing a site from control of the Municipal Council and later the Collector of the District passed an order under section 20 A (1) (*b*) (*ii*) of the Estates Land Act transferring the same as ryotwari land and the plaintiffs filed a suit for a declaration of title to and for possession of the property on the ground it formed part of their Zamindari, on the question of maintainability of the suit

1. (1937) M.W.N. 1117. 2. (1941) 1 M.L.J. 510.

* Appeal No. 412 of 1947. 28th November, 1950.

Held: Disputes *inter se* between landlord and Government in respect of title to the property is not expected to be decided by the Collector. Such questions are within the exclusive jurisdiction of Civil Courts and there is nothing in the Act which ousts the jurisdiction of the Civil Courts in respect of such matters.

Further, in view of the fact that the land after withdrawal from control of the Municipality could be either an ordinary waste or a puntha poramboke, section 20-A has no application and therefore section 189 of the Act cannot be a bar to the maintainability of the suit.

Held further, that as the suit site ceased to be used as a street the plaintiffs will be entitled to recover possession of the same.

Maharaja of Pithapuram v. *The Chairman, Municipal Council, Kakinada*, (1936) 71 M.L.J. 749 and *Province of Madras* v. *Vedaranyeswaraswami Devasthanam*, (1949) 2 M.L.J. 454 followed.

Appeal against the decree of the Court of the Subordinate Judge, Devakottai, dated 24th December, 1946 in O.S. No. 61 of 1945.

The Government Pleader (*P. Satyanarayana Raju*) and *K. N. Karunakaran* for Appellants.

V. Ramaswami Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit for a declaration of the title of the plaintiffs and the third defendant to the suit property. The plaintiffs are the proprietors of the village of Karaikudi, which formed part of the Zamindari of Sivaganga. The suit site is within the Geographical limits of the said Zamindari. In 1918 in the survey plan it was shown as part of Koppudayanayagi Amman Sannadhi Street. In 1935 on re-survey also it was demarcated as a public street. On 24th January, 1940 the Government issued a notification under section 61 (2) of the District Municipalities Act, 1920, withdrawing the site from the control of the Municipal Council. On 29th January 1944 the Collector of Ramanadhapuram made an order under section 20-A (1) (*a*) of the Madras Estates Land Act declaring that the suit site was no longer required for street purposes. On 30th May, 1944, the District Collector passed another order under section 20-A (1) (*b*) (ii) of the Act transferring the same as ryotwari land. The plaintiffs did not prefer appeals against either of those orders. The first defendant herein constructed a Birth and Death Register office on the site. On 26th July, 1945 the plaintiff filed O.S. No. 61 of 1945 on the file of the Court of the Suboridnate Judge of Devakottai for a declaration of title to and for possession of the suit property on the ground that the said site formed part of the Zamindari of Sivaganga and that therefore the reversion vested in them. The first defendant is the Karaikudi Municipal Council. The second defendant is the Province of Madras. The defendants contended that the suit property was a pre-settlement communal poramboke, and that it never vested in the Zamindar. They also pleaded that the order of the Collector under section 20-A was a bar to the maintainability of the suit. The learned Subordinate Judge rejected the contentions of the defendants and gave to the plaintiffs a decree as prayed for. The second defendant, the Province of Madras, preferred the above appeal.

The learned Government Pleader contended that section 20-A was a bar to the maintainability of the suit. The relevant provisions of the Madras Estates Land Act read :

"20-A Subject to such rules as the Provincial Government may prescribe in this behalf, the District Collector may on the application of the landholder, a ryot or any other person interested—

(*a*) declare that any land or any portion of any land which is set apart for any of the purposes referred to in sub-clauses (*a*) and (*b*) of clause (16) of section 3 is no longer required for its original purpose; and

(*b*) by order in writing direct

(i) that any such land or portion in respect of which such declaration is made be used for any other specified communal purpose; or

(ii) if such land or portion is not required for any communal purpose, that it be converted into ryotwari land or landholder's ryoti land according as the reversionary rights in such land vest under the terms, express or implied, of the land, title deed or other grant in the Crown or in the landholder; ".

Under part B to the Schedule of the Act an appeal lies to the Board of Revenue against a declaration that the land is not required for its original purpose, or an order directing that the land be used for any other communal purpose, and to the District Court, against an order directing the conversion of the land into Government ryotwari or landholder's ryoti land.

Section 189 (1) says :

"A District Collector or Collector hearing suits or applications of the nature specified in Parts A and B of the Schedule and the Board of Revenue or the District Collector exercising appellate or revisional jurisdiction therefrom shall hear and determine such suits or applications or exercise such jurisdiction as a Revenue Court. No civil court in the exercise of its original jurisdiction shall take cognizance of any dispute or matter in respect of which such suit or application might be brought or made".

The learned Government Pleader contends that a combined reading of these provisions indicates that a suit for a declaration of the plaintiffs' right is barred by reason of section 189 of the Act. Before I proceed to consider his argument, it is as well that I notice some of the cases cited before me, which throw some light on the construction of the section. In *Secretary of State for India* v. *Mask & Co.*[1], the Judicial Committee observed :

"It is settled law that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well-settled that even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure".

In *Rajah of Sivaganga* v. *Venkatachalam Chetti*[2], Jackson, J., expresses the view on the construction of section 189 (3) as follows :

"Under section 189 (3) of the Madras Estates Land Act, the decision of a Revenue Court on a matter within its exclusive jurisdiction shall be binding in any civil suit. That is to say that the Legislature has provided a cheap and speedy final settlement of such rent disputes as are within the exclusive jurisdiction of the Revenue Court, but of course never intended that larger questions of title and so forth should be summarily settled in this fashion."

In *Chakrapani Rao* v. *Venkatadri Apparao*[3], Venkataramana Rao, J., adopts the same view. The learned Judge says :

"Section 189, Madras Estates Land Act can be a bar on a matter which is exclusively within the jurisdiction of the revenue court. The question of title is never within the exclusive cognizance of the revenue court..... It is always open to a landlord to bring a suit in a civil court that he is entitled to melwaram or agitate a similar question."

In *Province of Madras* v. *Sri Vedaranayeswaraswami Devasthanam*[4], Raghava Rao, J., had an occasion to deal with a question similar to the one that falls to be considered by me. In that case, the Collector made an order under section 20-A (1) (*b*) (ii) of the Madras Estates Land Act assigning a street poramboke as a ryotwari land. The learned Judge held that as the reversion in that land vested in the Zamindar the order of the Collector was without jurisdiction, as the provisions of the Act were not complied with. The learned Judge also held that a road poramboke was not communal property.

Bearing the aforesaid principles in mind I shall now proceed to construe the provisions of the relevant sections. Under section 189 a Civil Court's jurisdiction in regard to a dispute or matter is ousted only, if in respect of such dispute or matter a suit or an application specified in Parts A and B of the Schedule is maintainable in a revenue Court. The general scheme of the Act indicates that the Legislature conferred jurisdiction on revenue officers for speedy disposals of specified matters, as being men on the spot they were assumed to be better qualified to dispose of them expeditiously. But it cannot be the intention of the Legislature to confer on the revenue officers a jurisdiction to decide questions affecting title to properties. Under section 20-A of the Act the Collector can declare that a land which is set apart for any of the purposes referred to in sub-clauses (*a*) and (*b*) of clause (16) of section

1. (1940) 2 M.L.J. 140 : L.R. 67 I.A. 222 : I.L.R. 1940 Mad. 590 (P.C.).
2. (1934) 67 M.L.J. 268.
3. A.I.R. 1937 Mad. 303.
4. (1949) 2 M.L.J. 454.

is no longer required for its original purpose. He may also assign such a land for any other specified communal purpose. If such a land is not required for any communal purpose, he may convert the said land into ryotwari or ryoti as the case may be. As the Collector is the person who is expected to know whether such a land is required for a purpose for which it is set apart or for any different purpose of a communal nature or whether it is not required at all for that purpose, he jurisdiction to decide that question is conferred on him. If he decides that the and in question is not required for any communal purpose, he is empowered to land it over to the owner. For the purpose of ascertaining the ownership of the and he may incidentally look into the title deeds, but it is not intended, nor is to be expected of him, that he should decide any dispute *inter se* between the landholder and the Government in respect of the title to the property. Such questions are within the exclusive jurisdiction of the Civil Courts, and I do not find any provision in the Madras Estates Land Act which expressly, or by necessary implication, ousts the jurisdiction of Civil Courts.

Another aspect of the case may also be adverted to section 20-A (1) presupposes the existence of a land set apart under sub-clauses (*a*) and (*b*) of clause (16) of section 3 of the Act. Before the Collector can exercise jurisdiction under section 20-A the land must be of one of the categories mentioned in the said sub-clauses. In this case the site was demarcated as a street in the Survey Register, but the Collector withdrew the same from the control of the Municipal Council on 24th January, 1940. Thereafter it may be assumed that it was either ordinary waste land or puntha poramboke. In either case it was not a land coming either under sub-clause (*a*) or sub-clause (*b*) of clause (16) of section 3 of the Act, as it cannot be said that it was set apart for the common use of the villagers. In this view also section 20-A has no application, and therefore section 189 cannot bar the suit.

The next question is whether the reversionary interest in the puntha vests in the Zamindar or in the Government. Varadachariar, J. held in *Maharajah of Pithapuram* v. *The Chairman, Municipal Council, Kakinada*[1], that the title to such a street vested in the landholder. The learned Judge held that in the case of a puntha within a Zamindari, whether the puntha was in existence prior to the permanent settlement or came into existence after the permanent settlement, the Zamindar as the owner of the adjoining land will also be the owner of the soil of the puntha and of the trees spontaneously growing upon it, subject to the right of the public to use it as a highway. I respectfully agree with the view expressed by the learned Judge. This view was accepted and followed by Raghava Rao, J., in the *Province of Madras* v. *Vedaranyaswami Devasthanam*[2]. As the suit site ceased to be used as a street, following the aforesaid two decisions I hold that the plaintiff will be entitled to recover possession of the same.

The learned Government Pleader contends that in view of Madras Act XXVI of 1948 the question to be decided in this case is academic as the village in which the suit site is situated has been or will be taken by the Government. I am not in this appeal concerned with the rights of the parties under Act XXVI of 1948. My decision in this case will not in any way affect the respective rights of the parties under that Act.

In the result, the appeal is dismissed with costs.

K.C. *Appeal dismissed.*

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1. (1936) 71 M.L.J. 749. 2. (1949) 2. M.L.J. 454.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE BASHEER AHMED SAYEED.

R. Chatterjee .. *Petitioner* *

v.

Sub-Area Commander H. Q. Madras, Fort St. George .. *Respondent.*

Army Act (VIII of 1911)—Applicability to commissioned officers—If automatically discharged on expiry of term of commission—Arrest and detention after such period for purpose of trial by Court-martial—Legality—Army Act (XLVI of 1950)—Effect of.

Under the Army Act of 1911 and the rules made thereunder an emergency commissioned officer even though recruited for a definite period cannot leave the force without being discharged or released or his resignation accepted even though he has tendered his registration at the end of the period. Till his discharge is completed, he remains subject to Military law and under the rules. A person awaiting trial or investigation of a serious charge against him will not be released from service until the investigation or trial has been completed. Unless an army officer who is due to be discharged is released by the army authorities, he cannot be considered as not subject to Military law and discipline.

After 22nd June, 1950 an officer who is charged with offences committed prior to that date will be subject to the provisions of the Army Act, XLVI of 1950, and for any offence committed by him while he was so subject he can be arrested and tried and the detention of such person for bringing him to trial before a Court-martial is legal.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue directions in the nature of a *habeas corpus* to direct the respondent to produce the petitioner before the High Court and to set him at liberty, *etc.*

E. C. Padmanabhan for *Messrs. Short Bowes and Co.* for petitioner.

Vepa P. Sarathy for *Messrs. John and Row,* State Counsel on behalf of the Respondent.

Dy. Judge Advocate-General, Southern Command, Poona and the Public Prosecutor, Madras (*V. T. Rangaswami Aiyangar*).

The Order of the Court was made by

Govinda Menon, J.—During the Second World War, the petitioner was an emergency commissioned officer holding the rank of a Captain in the Indian Army between the years 1943 to 1946. In September 1946, he was released from service and reverted to civilian occupation; but in pursuance to the policy later on adopted by the Government of India of instituting short service commissions to fill up vacancies caused in the Army by the retirement of British Army Officers, applications were called for from ex-army men and the petitioner was one of the applicants who was entertained on short service commission. He was appointed to the rank of a lieutenant on 6th July, 1948 and the condition of his service was that he was bound to serve for one year in the first instance which period may be extended for a specific period at the discretion of the Government of India with the consent of the officer concerned. Before the expiry of the period of one year, in pursuance to the direction from the Army Headquarters to the headquarters of the Southern command, the petitioner's term of service was extended for a further period of one year from 6th July, 1949 to 5th July, 1950. He was informed of this extension which he accepted. This is evident from the memorandum dated 7th July, 1949 submitted by the petitioner which is as follows :

"Ref. Your No. 04069/M.I.C. of 1st July, 1949. Lieut. R. Chatterjee (Sx. 9884) Madras R. accepts the grant of extension of SSRC for a further period of one year as stated in your A/q. ref."

On the 1st June 1950 the petitioner was arrested and was intimated that he had committed various offences for which he would have to take up his trial before a Court-martial. The petitioner's contention is that since the extended period of his service expired on 5th July, 1950, his detention thereafter by the Military authorities is illegal and he therefore invokes the jurisdiction of this Court for an order directing that he should be forthwith released.

* Cr.M.P. Nos. 2478, 2479 and 2638 of 1950. 4th January, 1951.

From the counter-affidavit filed by Major K. C. Govindan, DAA and QMG of the Madras Sub-area, it is found that at the time the petitioner was arrested he was alleged to have committed various offences for which he had to stand his trial before a Court-martial. The petitioner, in his affidavit in support of the application, states that the only charge levelled against him was that he absented himself from the station without proper authorisation from the 4th May, 1950 till 1st June, 1950 when he was arrested at Waltair station on his return journey from Calcutta. He tries to justify his action in availing himself of leave without the permission of the Headquarters, Madras, Sub-area, as well as the overstaying on leave by reasons of which details are given in various passages in the affidavit. Finally he contends that the Military authorities have no jurisdiction to arrest or keep him in detention because he is not subject to the Military law, but only to the terms and conditions of service set out in the contract of service and the punishment for any non-observance of the conditions of service can be only dismissal and not detention. The counter-affidavit filed on behalf of the Sub-Area Commander of Madras sets forth six charges against the petitioner of which the fifth one was absenting without leave from 4th May to the 1st of June, 1950. The others are misuse of Government transport between 22nd and 24th May, 1949; misappropriation of Government stores between July and October, 1949; omission to exercise proper supervision over the operation of his office thereby incurring loss of military stores between November 1948 to June 1950; and lastly non-maintenance of accounts pertaining to vehicles in the petitioner's charge. The counter-affidavit states that though the extension of one year of his service terminated on 5th July 1950, his detention under paragraph 6 of the Special Indian Army Order No. 74/1945 is justified. The Special Indian Army Order No. 74/1945, paragraph 6, reads as follows :—

"Personnel due for release who are awaiting trial on serious offences or who are essential witnesses will, with the approval of the G.O.C.-in-chief of the Army Command concerned, be compulsorily deferred on the grounds that maintenance of discipline is a military necessity".

It is also alleged that the petitioner's consent is not required for detaining him after the 5th July, 1950, since his detention is covered under paragraph 6 of the Special Indian Army Order No. 74 of 1945. In his reply affidavit, the petitioner admitted that his earlier contention that he did not give his consent for extension of term till 5th July, 1950 was wrong and was the result of a mistake but still he maintained that after the 6th July, 1950 he was no longer in service or subject to Military law and that he was a free man on the 6th July 1950 and should therefore be set free. With regard to the Special Indian Army Order, No. 74 of 1945, the petitioner stated that departmental rules have no binding effect or force of law and cannot override the provisions of law or the terms of the contract. He stoutly maintains that there is no law by which the Army authorities can detain him after the expiry of his term, on the 5th July 1950 and that there is no law which permits the Army authorities to try him for an offence after that period.

In this state of conflicting contentions, it is necessary to find out whether the petitioner had expressed his consent for a further extension of service subsequent to the 5th July, 1950. We have already referred to the acceptance by the petitioner on the 7th July, 1949 of an extension of service for a further period of one year after the expiry of the initial period of one year, that is upto 5th July, 1950. The respondent has filed a certified and true copy of an application by the petitioner to the Headquarters, Madras Sub-Area on the 19th April, 1950, which reads as follows :

"To Headquarters, Madras Sub area. Subject : Extension of SSRC Lieut. R. Chatterjee. Ref. ! this HQ No. 1963 A, dated 4th April, 1950. Lieut. R. Chatterjee will be completing his term by 6th June, 1950. The officer in question wishes to continue his service for a further period of one year. Hence may this HQ please be informed if his case has been recommended for extension.

Sd. R. Chatterjee Lieut.
SSO, Viraq & Coconada".

In addition to this Memorandum, dated 19th April, 1950, the petitioner has applied on 3rd July, 1950 to the Sub-Area Command, Headquarters Madras

asking for a recommendation that for compassionate grounds he may be posted to Calcutta or to the suburbs of Calcutta so that he may be able to take care of his family affairs during his spare time and if that request cannot be complied with to release him as early as possible as he would be completing his term of service for which he was engaged for by the 6th July, 1950. Both these documents show, that far from intending to leave the Army on the completion of the first extension of service on the 5th July, 1950, the petitioner was anxious that he should have a further extension from the expiry of the first extension and therefore it cannot be said that he was unwilling to continue in service after the 5th July, 1950. The one thing that becomes evident from the correspondence and the records filed is that the Army Headquarters, or the Sub-area Command, did not act upon the petitioner's request and give him an extension as prayed for.

With this background we have to consider the question as to whether the petitioner can be detained by the Military authorities even though they have not agreed to his request for an extension of service from the 6th July 1950, because the petitioner was alleged to have committed offences during th period he was in service and was subject to the Military law. On behalf of the applicant it is strenuously contended that in the absence of any positive order of the Military authorities extending the period of his service for any term after the 5th July, 1950, it should be deemed as if the contractual term expired on 5th July, 1950 with the result that the petitioner can no longer be held to be subject to any Military law or discipline.

Our attention was invited to the notification inviting applications for the Short Service Commission which has been placed before us as annexure A to the petitioner's affidavit. Paragraph 3 relating to the length of commission, paragraph 7 relating to applications and paragraph 9 relating to the period of probation, especially that which relates to the termination of commissions, were all brought to our notice. Paragraph 9 of Annexure to Special Army Instrument (India), No. 3/S of 1948 is to the following effect :—

"Termination of commission. (*a*) An officer granted a short service commission will be liable to serve for the full period of his contract, but his commission may be terminated at any time by the Government of India,

(i) for misconduct, or if services are found to be unsatisfactory,

(ii) on account of medical unfitness,

(iii) if his services are no longer required.

(*b*) An officer may, on giving three months' notice, be permitted to resign his commission on compassionate grounds, of which the Government of India will be the sole judge. An officer who is permitted to resign his Commission on compassionate grounds will not be eligible for proportionate terminal gratuity.".

From this paragraph we are invited to hold that as soon as the period of short service commission expired, without any kind of release or discharge, it is open to the short service commissioned officer to walk out and to be a free man not subject to any rules of Military discipline.

Therefore two cardinal questions arise for consideration :

(1) Whether the provisions of the Indian Army Act and the Rules made thereunder as well as the Army orders, regulations and directives apply to the petitioner generally or whether he is bound only by what is termed the contract of service and nothing more ; and

(2) whether, even if the rules, regulations, directives, etc., under the Indian Army Act apply to him, there can be an automatic discharge the moment the term of commission expired.

We shall take up the first question and in doing so it need hardly be reiterated that if the petitioner's request contained in the memorandum, dated 19th April, 1950 and the application, dated 3rd July 1950, had been accepted, there could

no room whatever for him to contend that during the time he was in detention was not subject to the Military law and discipline as his service had been extended nsequent on a request made by him. But does the non-acceptance of this request ike any difference in the matter of his being subject to the Military law and cipline until he is properly released and discharged?

Mr. C. E. Padmanabhan for the petitioner relied upon a passage at page 6 of Halsbury's Laws of England, 2nd Edition, Vol. 28, entitled "Enlistment" ere the learned author says that

"enlistment is the acceptance of an engagement in the Military service of the Crown, and is in the ure of a contract between the person enlisted and the Crown."

e footnote says that this need not apply when there is compulsory Military service. is further pointed out that the terms upon which a person enlists cannot be altered thout his consent. We have no hesitation in holding that this passage has no levancy to the facts of the present case. First of all the passage referred to deals th enlistment, *i.e.*, the recruitment by joining Military personnel as ordinary ldiers and not as Commissioned officers of the Crown in England. With regard Commissioned officers, the Law is very different as will be shown later on. iat it is the Indian Army Act, 1911, that is applicable even to short service commissions and not the terms of contract as alleged by the petitioner is evident from perusal of various sections of the Army Act. It has also to be noted that the so-lled contract as contained in annexure A is only an advertisement calling for -Army people to rejoin the army and cannot be called a contract of service in the ature of there being an offer and an acceptance as known to the Indian Contract ct. Section 7 (2) of the Indian Army Act, 1911, defines an Indian Commissioned ficer as a person commissioned, gazetted or in pay as an officer holding a commission in the regular Army, and includes, in relation to a person subject to the ct, when serving under such conditions as may be prescribed, a person holding commission in the Indian Air Force. According to section 2 (1) (*a*) Indian ommissioned officers are subject to the provisions of the Act. It is therefore ear that even a short service commissioned officer, as soon as he takes up the mmission, will become subject to the provisions of the Indian Army Act. Section sub-section (2) says that every person subject to the Act under sub-section (1), ause (*a*), (Indian Commissioned Officers) shall remain so subject until duly retired, scharged, cashiered, removed, or dismissed from the service. The only meaning at can be given to sub-section (2) is that after a person has become subject to e provisions of the Act, he will remain so subject until he is duly discharged. need hardly be stated that the provisions of the Indian Army Act, 1911, are to very large extent modelled and founded upon the English Army Act and therefore e rules and regulations by which the Army in England are subject to can very ell be usefully referred to in considering cases arising out of the Indian Army Act 1911. In parenthesis it may be stated that Act No. XLVI of 1950 designated ie Army Act, 1950, which came into force on the 22nd June, 1950, though it has o direct application to the present case, can also be usefully looked into for the rpose of elucidation of points that arise. What is the law and procedure regarding the dismissal or discharge of an officer or a soldier in England is contained in ragraph 5 of Chapter VIII of Manual of Military Law, p. 137. Chapter VIII als with the Courts of Law in relation to officers and Courts-martial, and paraaph 5 is to the following effect:

"An officer holds his commission at the pleasure of the Sovereign, who can at any time dismiss n without assigning a reason, *no contract* to the contrary unless sanctioned by statute has any legal fect."

1 paragraph 74 at page 96 of the Military forces of the Crown by C. M. Clode, ol. II, it is stated as follows:

"It is clear that no officer has the right to resign, and therefore, until his resignation is accepted the Crown, the continues amenable to all the consequences of omitting to discharge the duty of an icer under his commission."

'e find similar observations regarding the liability of members of the regluar forces the Armed Forces of the Crown at page 208 of Anson's Laws and Custom of the

Constitution, Vol. II, Part II, 4th Edition. It is stated therein that an officer in the Army or Navy is appointed by the receipt of his commission ; he thereupon places himself at the disposal of the Crown ; he cannot resign his commission without leave, and he is liable to be discharged at pleasure. Various cases are quoted by the learned author in support of this proposition of which it will be useful to refer to *Hearson* v. *Churchill*[1] and *The Queen* v. *Cuming*: Ex parte *Hall*[2]. In the latter case, a certain Lieutenant Hall, a Lieutenant in the Navy, serving on one of the Queen's ships in commission, having asked leave of the Admiralty to resign his commission which having been refused, left his ship, sent his commission to his captain with an announcement of his intention to retire and took a passage home in a mail steamer. On his arrival in England he was arrested by Captain Cuming, and detained as a prisoner with a view to his being tried before a Court-martial under the Naval Discipline Act. Thereupon, on an application for a writ of *habeas corpus* before the Court of Queen's Bench Division, Captain Cuming was called on to show cause why a writ of *habeas corpus* should not issue and Hall be discharged. The Court held that Lieutenant Hall could not resign his commission in the mode which he attempted and that he was rightly in custody. At page 19, A. L. Smith, J., makes the following observation :

"We are clearly of opinion that, where a Commissioned officer accepts an appointment to service in one of Her Majesty's ships in commission, and enters upon the performance of his duties, he subjects himself to the provisions of the Navy Discipline Act, and at his own will and pleasure cannot resign his appointment, and may be tried by Court-martial for any of the offences specified in the Act."

The case in *Hearson* v. *Churchill*[1] is also similar where the Court of Appeal held, confirming the judgment of Denman, J., that an Engineer Officer in the Royal Navy who has accepted a commission, and is borne on the books of a ship in commission, cannot resign without consent of the Lords Commissioners of the Admiralty, and that under no circumstances is a naval officer entitled to resign his commission except by permission of Her Majesty. The rule that all engagements between those in the Military service of the Crown and the Crown are voluntary *only on the part of* the Crown applies as well to private soldiers as to officers. See *Leaman* v. *The King*[3]. An interesting discussion on this subject is found in the Law Quarterly Review, Vol. 66, October 1950 Part, in an article under the heading "The Armed Forces of the Crown" by Zelman Cowen, where he quotes an observation of Lord Esher, M.R., in *Mitchell* v. *R*[4]. The law as laid down not only in England but also by the Australian High Court is considered *in extenso*. For the decision of the question before us, it is not necessary to elaborate more on this aspect except to refer to the judgment of McCardie, J., in *Heddon* v. *Evans*[5] (contains a summarised report) where the entire subject of the Military law and the supremacy of the Civil Courts is exhaustively discussed. *See* Military Law and the Supremacy of the Civil Court by O'Sullivan, Introduction page 13. In view of the above discussion we have no hesitation in coming to the conclusion that what is applicable in England is also in force so far as the Indian Army is concerned under the Indian Army Act, 1911, and therefore the petitioner cannot, for a moment contend that he is governed solely by the terms of an alleged agreement and not by the provisions of the statute and the rules made thereunder.

The next question is also interlinked with the previous one and in the earlier discussion reference has already been made to this circumstance that in England, a commissioned officer cannot leave the Force without being discharged or released or his resignation accepted, even though he has tendered his resignation. Section 16 of the Indian Army Act deals with discharges and is in the following term :

"The prescribed authority may, in conformity with any rules prescribed in this behalf, discharge from the service any person subject to this Act."

The prescribed authority is the authority prescribed by the rules under the Act. Note 2 contained at page 48 of the Manual of Indian Military Law issued by the

1. (1892) 2 Q.B. 144 at 148.
2. (1887) 19 Q.B.D. 13.
3. (1920) 3 K.B.D. 663.
4. (1896) 1 Q.B. 121 at 122.
5. 35 Times Law Rep. 642.

he result of the trial. It must be remembered that it was conductor Beedham's intention if permitted o do so, to remain in the service after his then current year of employment : and I can see no reason vhy, if his trial had resulted in his acquittal, his services should not have been obtained with his onsent."

In this case, serious charges are pending against the petitioner and therefore he cannot be released.

But it is contended before us that in pursuance to paragraphs 3 and 4 the engagement rules set forth in annexure A on the 6th July, 1950, the petitioner occupies the position of a reserve officer not subject to any of the rules and regulations. This argument can be summarily disposed of because in our view, unless an Army officer who is due to be discharged is released by the Army authorities, he cannot be considered as not subject to the Military law and discipline. Any other decision will result in a piquant situation ; for example, if a temporary commissioned officer, the moment the term of his service expires, runs away with the equipment that is given to him, according to the petitioner, he cannot be subject to the Military law and discipline and cannot be arrested and produced before a Court-martial but the Military authorities should avail themselves of the ordinary remedies before

of the State and do not lend any assistance to the argument put forward on behalf of the petitioner. There are observations in that judgment which go to show that once the officer is relieved of his duties from the Army and does not receive any pay from the Crown, he is no longer subject to the Military law and cannot be tried by Courts-martial for offences committed while he was on the active list and serving. If in the present case, the petitioner had been relieved of his duties on the 6th July, 1950, we would have no hesitation in following the authoritative pronouncement of the learned Lord Chief Justice and holding that he cannot later on be arrested and put up for trial before a Court-martial. The judgment of the learned Lord Chief Justice is interesting and instructive and is entitled to the greatest respect from us, but the point that arose for decision there is not similar to the one before us.

But it is contended that the Indian Army Act and the Rules made thereunder were in force prior to the declaration of India as a Sovereign Republic and that the provisions of the Act and the Rules which are repugnant to the Articles of the Indian Constitution should be deemed to have been automatically repealed by the Constitution with the result that the petitioner's detention cannot be declared to be legal. Reliance was placed on Articles 20, 21 and 22. It is therefore necessary to consider the question as to how far until the enactment of Act XLVI of 1950, subsequent to the inauguration of the Republic, the provisions of the Indian Army Act and Rules have any validity and force. A brief resume of the Ordinances and Rules relating to this subject would be of material help. On the 23rd January, 1950 the Governor promulgated The Armed Forces (Miscellaneous Provisions) Ordinance, 1950. The Ordinance was intended to make additional provisions respecting the Armed Forces for ensuring the proper discharge of their duties and for the maintenance of discipline among them. Section 4, clause (*e*) of the Ordinance is relevant and is to the effect that subject to the provisions of any law for the time being in force relating to the Armed Forces or to any branch thereof, the Central Government may, by notification in the official Gazette make rules prescribing the procedure to be observed at the trial of offences committed by persons belonging to the Armed Forces by any competent military, naval or air force authority. Section 5 reads thus :—

"All rules, regulations, orders, directions and instructions relating to members of the Armed Forces or any branch thereof made or issued before the commencement of this Ordinance by or under the authority of the Central Government or of any of the Commanders-in-Chief of the Army, Navy or Air Force, as the case may be, or by any other competent authority, shall, in so far as they relate to any of the matters dealt with in this Ordinance, have effect as if they were rules made under this Ordinance."

Though Article 33 of the Constitution gave power to the Parliament to modify the rights conferred by Part III relating to fundamental rights in their application to the forces of the Crown by making law, still unless the Parliament determines to what extent such rights can be modified, the law which stood before the conferment of the fundamental rights will apply so far as the Armed Personnel are concerned. Therefore on the 26th January, 1950, when the Republic came into existence, the existing law was in force. *See* Article 35-B. Article 372 may also be usefully referred to in this connection. It seems to us therefore that there is no force in the contention that after the inauguration of the Republic till the passing of Act XLVI of 1950, the Indian Army Act, 1911, and the rules and orders made thereunder have no effective applicability at all. Section 123 of Act XLVI of 1950 relates to the liability of an offender who ceases to be subject to the Act and it is useful to refer to sub-sections (1) and (2). If those sections are applicable, and they are applicable after the Act has come into force, where an offence has been committed by any person when he was subject to the Act and he ceases to be so subject he may be taken into and kept in military custody and tried and punished for such offence as if he continued to be so subject; but the period of limitation for the trial of such an offence is six months after he has ceased to be subject to the Act. Therefore after the 22nd June, 1950, the petitioner would be subject to the provisions of Act XLVI of 1950 and for any offence committed by him while he was so subject he can be arrested and tried.

For the foregoing reasons we are of opinion that until and unless the petitioner s released by the Military authorities he continues to be in their service, entitled o receive the pay and subject to the rules and regulations and therefore his detention for the purpose of bringing him to trial before Court-martial cannot be held o be illegal. This petition is therefore dismissed.

Criminal Miscellaneous Petition Nos. 2479 *and* 2633 *of* 1950.—Since we have held hat the detention is legal it is not necessary to express any opinion on these petitions.

V.P.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VISWANATHA SASTRI.

Palaniappa Goundan .. *Appellant* (*1st Defendant*).

v.

Nallappa Goundan, Pichai Goundan and Balammal .. *Respondents* (*Plaintiff*) *2nd and 3rd Defendants.*

Limitation Act (*IX of* 1908), *Article* 44—*Applicability*—"*Guardian*"—*If includes* de facto *guardian f Hindu minor—Alienation by* de facto *guardian—Suit to set aside—Limitation—Right of minor to set aside lienation—If a mere right to sue or right in property which can be transferred—Transfer of Property Act* (*IV of* 882), *section* 6 (*c*)—*Scope.*

The word "guardian" in Article 44 of the Limitation Act must be interpreted as meaning nly a lawful or *de jure* guardian and not as including a *de facto* manager of the property of a Hindu inor, whatever may be the effect of an alienation by a *de facto* guardian or manager under the Hindu Law. The law regards the minor as being a party to the alienation through his guardian nd Article 44 allows only a period of three years for setting aside the transfer on attaining majority

May, 1943, ignoring the previous alienation by Vyapuri under Exhibit D-6. On 7th February, 1944, the plaintiff filed the present suit for redemption of the mortgage, Exhibit P-1 and the suit has been decreed by the Courts below. Hence this second appeal by the first defendant, the disappointed purchaser from Vyapuri.

The Courts below held that the mortgage, Exhibit D-5, dated 22nd August, 1927, and the sale, Exhibit D-6, dated 7th June, 1939, executed by Vyapuri as the *de facto* guardian of the minor second defendant were neither supported by necessity nor beneficial to the minor second defendant and therefore not binding on him. Mr. Venkatadri, the learned Advocate for the appellant, could not successfully challenge this finding on second appeal. His legal contention is that Exhibit D-6, the sale by Vyapuri as *de facto* guardian of the minor, was not void but merely voidable and as it had not been set aside by the second defendant within three years of his attainment of majority, it was not open to his purchaser, the plaintiff, to sue for recovery of possession of the property, or for redemption of the mortgage, Exhibit P-1, which has become extinguished as a result of the sale, Exhibit D-6, dated 7th June, 1939. In other words he argues that Article 44 of the Limitation Act applies to transfers of the property of a Hindu minor effected by his *de facto guardian.*

The expression "*de facto*" guardian, however unscientific and inappropriate from the point of view of an orthodox jurist, has become part of the vocabulary of lawyers and judges. It is now a settled rule of Hindu law that a sale or a mortgage of a Hindu Minor's property by his *de facto* guardian is effective to convey a valid title to the transferee if the latter establishes that the transfer was for legal necessity or for the benefit of the minor or that he took the sale or mortgage after proper enquiries and with a *bona fide* belief in the existence of pressing necessity. It is needless at this time of the day to enquire the textual origin of this rule or to investigate whether it has any real foundation in *Hunooman Persad's case*[1], which is the usual starting point of discussions on this topic. The whole subject has been exhaustively and authoritatively dealt with and the entire case-law has been reviewed in the judgments of the Federal Court (now the Supreme Court) reported in *Sree Ramulu* v. *Pundarikakshayya*[2] and *Bapayya* v. *Pundarikakshayya*[3] Suffice it to say that, in the opinion of the learned Judges of the Federal Court, the dealing of a *de facto* guardian with the estate of a Hindu minor by way of sale or mortgage would be regarded not as void altogether but voidable at the instance of the minor, and the same tests would have to be applied to determine the validity of such sale or mortgage as are applied in the case of a *de jure* guardian's sale or mortgage. We are, however, concerned in this case with the interpretation of Article 44 of the Limitation Act, though the rules of Hindu law may also have a bearing on the point.

If there is a trespass on a minor's property, he has 12 years from the date of dispossession or three years after attaining majority, whichever is the longer period to sue for recovery of possession under Article 142. If the father in a joint Hindu family alienates the interest of his minor son in the family property or the manager alienates the interest of a minor co-parcener, the co-parcener aggrieved by the alienation can sue to set it aside within 12 years from the date when the alienee takes possession of the property or three years after attaining majority, whichever period is longer, under Article 126 or 144, of the Limitation Act; if, however, a guardian transfers his ward's property for purposes not binding on the minor or at a gross undervalue, the minor has only three years after attaining majority for setting aside the alienation under Article 44 of the Limitation Act. If an improper alienation of the ward's property is made by a guardian, say, a year before the ward attains majority, the ward will not have 12 years from the date of the alienation but only four years therefrom, within which time he must sue to set aside the alienation. The alienation is only voidable and requires to be set aside by the ward before he could recover possession of the property. He cannot disaffirm

1. (1856) 6 Moore's I.A. 393.
2. (1950) 1 M.L.J. 586 : (1949) Fed. L.J. 288.
3. (1950) 1 M.L.J. 612 : (1949) Fed. L.J. 218.

it by a mere notice of his intention to repudiate but must sue and obtain a judicial rescission of the sale by his guardian within the time prescribed by Article 44. His right to recover possession of the property improperly alienated by his guardian will be lost and his title thereto will be extinguished under section 28 of the Limitation Act on the expiry of the three years' period prescribed by Article 44, if he does not sue to set aside the alienation within that period. The view of Venkatasubba Rao, J. in *Ramiah* v. *Brahmaiah*[1] and Abdur Rahim and Sadasiva Ayyar, JJ., in *Doraiswami* v. *Nondiswami*[2] that Article 44 is merely an illustration of the combined effect of Article 144 and section 6 of the Limitation Act, that Article 44 is controlled by the principle of section 6 and that even if Article 44 had not been there, the result would be the same, seems to me, with all respect, unsustainable, and I would prefer the view of Sundara Ayyar, J. in *Doraiswami* v. *Nondiswami*[2] and

Mahajan, J., also remarked that the expression '*de facto* guardian' was a loose phrase and the words '*de facto* manager' used in *Hunooman Persaud's case*[1] would be more appropriate to denote the position of a person who assumes the management of a minor's estate without legal warrant.

Most systems of law recognise a guardianship by nature or nurture. Under the Mohamedan Law, the father, and under the Hindu Law, the father and, in his absence, the mother, but no others, are the natural guardians of a minor (see *Channappa* v. *Onkarappa*[2]. The Guardians and Wards Act makes provision for the appointment of a guardian for a minor, to whichever community he may belong. In these cases the status of a guardian and the consequential right to deal with the property of a minor arise from the legal relationship between the parties, or the order of Court. Ties of natural affection or the vigilance of the Court, as the case may be, would be a sufficient safeguard against an improper alienation of the estate of a minor by his natural or certificated guardian and on this basis a shorter period of limitation for questioning their alienations as provided in Article 44 of the Limitation Act is intelligible. But a *de facto* guardian is a creature improvised by judicial decisions out of the necessities of the situation and in the interests of the minor's estate. His powers of alienation may be analogous to those of a natural guardian but he is not a guardian properly so called. In *Matadin* v. *Ahmad Ali*[3], the Judicial Committee observed :—

"It is difficult to see how the situation of an unauthorised guardian is bettered by describing him as a '*de facto*' guardian".

The case related to a Mohamedan minor. With respect to Hindus, Beaumont, C.J., in *Tulasidas* v. *Baghela Rai Singji*[4] held that a so-called *de facto* guardian was no guardian at all but was a mere intermeddler. Kumaraswami Sastri, J. in *Ramaswami* v. *Kasinatha*[5] was inclined to accept the description of the position of a *de facto* guardian in *Matadin* v. *Ahmad Ali*[3] as equally applicable to Hindus. It is only as the result of a long course of decisions and on the principle of *stare decisis* that a *de facto* guardian's power, in case of necessity or benefit to the minor, to charge, mortgage or sell the minor's property has been recognised under the Hindu law (see *Seetharamanna* v. *Appiah*[6] and *Sree Ramulu* v. *Pundarikakshayya*[7].) But this is not to say that a *de facto* guardian is a 'guardian' for all purposes or a guardian within the contemplation of a statute-law which applies to all communities.

The expression '*de facto* guardian' is further not capable of a precise definition. It is not possible to say precisely what conditions and circumstances must exist before a person can be described as a *de facto* guardian (see *Chinna Alagumperumal* v. *Vinayakathammal*[8].) It was observed by Mahajan, J. in *Bapayya* v. *Pundarikakshayya*[9] that

"a person who is not attached to the minor by ties of affection or other reasons of affinity and remains in charge of his estate is, in truth, a mere intermeddler with his estate."

as distinguished from a relation of a minor who assumes management of his estate in his interests, who alone could according to the learned Judge, be properly described as a *de facto* guardian. In the case of natural guardians, the law ascribes the guardianship to a definite and intimate natural and legal relationship existing between the guardian and ward. Is it to be said that precisely the same status can be acquired on the basis of any remote relationship? The existence of any particular degree or kind of relationship between the *de facto* guardian and the minor is not required as an indispensable legal requisite of *de facto* guardianship. Nor is it practicable to embark upon an enquiry into the motives actuating the *de facto* guardian in assuming the management of the minor's estate, whether it was the protection of the minor's estate or a less laudable purpose. In many

1. (1856) 6 Moore's I.A. 393.
2. (1939) 2 M.L.J. 884 : I.L.R. 1940 Mad. 358 (F.B.).
3. (1911) 23 M.L.J. 6 : L.R. 39 I.A. 49 : I.L.R. 34 All. 213 (P.C.).
4. (1932) I.L.R. 57 Bom. 40.
5. A.I.R. 1928 Mad. 226.
6. (1925) 50 M.L.J. 689 : I.L.R. 49 Mad. 768.
7. (1950) 1 M.L.J. 586 : (1949) Fed. L.J. 288.
8. (1928) 55 M.L.J. 861.
9. (1950) 1 M.L.J. 612 : (1949) Fed. L.J. 318, 337.

gment the alienation is stated to be merely voidable. An alienation by the *facto* guardian of a Christian minor was held not to be governed by Article 44 *Sundara Nadan* v. *Annamalai*[5]). Mr. Venkatadri, the learned advocate for the ellant, contends that these decisions are no longer law in view of the recognition he validity of a transfer by the *de facto* guardian of a Hindu minor by the Federal rt in *Sree Ramulu* v. *Pundarikakshayya*[9]. He also placed reliance on the decisions *Bangarammal* v. *Lydia Kent*[10] and *Karri Adayya* v. *Tammalampudi Govindu*[11] and the ments on Article 44 by the learned editors of Mitra's Limitation Act (7th

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(1949) 2 M.L.J. 171, 187.
(1939) 2 M.L.J. 884 : I.L.R. (1940) d. 358 (F.B.).
(1921) 26 C.W.N. 369 (P.C.).
(1914) 27 M.L.J. 285 : I.L.R. 38 Mad. 5.
A.I.R. 1928 Mad. 226.
(1931) 33 L.W. 664.
(1928) 55 M.L.J. 861.
(1931) 60 M.L.J. 695.
(1950) 1 M.L.J. 586: (1949) Fed. L.J. 288.
(1931) 67 M.L.J. 322 : I.L.R. 57 Mad. 1062.
(1929) 58 M.L.J. 417.

edition), Vol. 1, at pages 434 and 435. The argument runs as follows : Under the Hindu Law, the powers of a *de facto* and a *de jure* guardian to alienate the minor's property are the same. An alienation in excess of such powers is only voidable at the instance of the minor and not void. A voidable transfer must be set aside before possession of the property can be recovered. Article 44 provides only a period of three years for a suit to set aside the transfer and the residuary provision in Article 144 does not apply to the case. If the ex-minor does not bring a suit for possession within three years of attaining his majority, his title to the properties is lost and extinguished and the transferee's title becomes absolute and unimpeachable. A subsequent transferee of the property from the ex-minor is in the same position as this transferer. This last proposition rests on the principle that a person who claims under another, whether as his legal representative or transferee, should in such character be governed by the same rule as would apply to the person from whom he derives his title, the only limitation being that he is not entitled to any privileges or exemptions from limitation which the latter had. There is some authority for this view (see *Laxmana* v. *Rachappa*[1] and *Raja Ramaswami* v. *Govindammal*[2].). But the rest of the argument is open to question though it is supported by the decision of Curgenven, J., in *Karri Adeyya* v. *Tamnalampudi Govindu*[3]. I am unable, with all respect, to accept the reasoning of the learned Judge.

The expressions 'void' and 'voidable' are loosely and indiscriminately used in discussions on this topic. An alienation by a Hindu widow without legal necessity is not void, but voidable, in the sense that the transfer has a qualified operation even after the death of the widow and it is only the reversioner and nobody, else, that has a right to disaffirm or impugn the transfer. In this sense, the transfer is voidable. The reversioner, however, need not sue to set aside the alienation, but can disaffirm it or treat it as a nullity and sue for possession of the property within 12 years of the widow's death. In this sense, it is void as against the reversioner (*Bejoy Gopal Mukherjee* v. *Krishna Mahishi Debi*[4], In re *Appavu Naicken*[5].). Similarly, an alienation by a father or manager of a joint Hindu family in excess of his powers is voidable in this sense that only the junior members of the family can disaffirm it and no others, but it is void so far as the junior members are concerned, for, they need not sue to set aside the alienation, but can straightaway sue for recovery of possession within the period limited by Article 126 or 144, of the Limitation Act. In this context, the expression 'voidable' is not used in the sense in which it is used in the Contract Act, *Amirthalinga* v. *Arumuga*[6]. I am aware that in *Muthukumara Chetti* v. *Anthony Udayar*[7], the learned Judges, in dealing with an improper alienation of a minor's property by a duly appointed guardian, observed as follows :—

> "We cannot uphold Mr. Rangachariar's contention that wherever a transaction is voidable, it can be avoided only by getting a decree of Court setting it aside. The party who is entitled to avoid may do so by an unequivocal act repudiating the transaction (see *Mata Din* v. *Ahmad Ali*[8] and *Bejoy Gopal Mukerjee* v. *Krishna Mahishi Debi*[4]) If Rajagopalan (the minor) after attaining majority should wish to repudiate the lease, there can be no doubt he can do so without a suit. But can anyone else do so ? The right to avoid appears to be a personal privilege."

The reference in this context to *Mata Din* v. *Ahmad Ali*[8] which was a case of an alienation of the property of a Mohamedan minor by a *de facto* guardian, and to *Bijoy Gopal Mukherjee* v. *Krishna Mahishi Debi*[4] which was a case of an improper alienation by a Hindu widow, is unhappy. In these cases, the Mohamedan minor or the Hindu reversioner was not a party to the transaction directly or in contemplation of law on any theory of representation and a suit for setting aside the alienation was not therefore necessary, a mere repudiation being sufficient. In these two cases, Articles 144 and 141 would govern a suit for recovery of possession of the property by the minor or the reversioner. The learned Judges themselves in another part

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1. (1918) I.L.R. 42 Bom. 626.
2. (1928) 56 M.L.J. 332.
3. (1929) 58 M.L.J. 417.
4. (1907) L.R. 34 I.A. 87 : 17 M.L.J. 154 : I.L.R. 34 Cal. 329 (P.C.).
5. A.I.R. 1931 Mad. 377.
6. (1934) 28 L.W. 684.
7. (1914) 29 M.L.J. 617 : I.L.R. 38 Mad. 867, 877.
8. (1911) 23 M.L.J. 6 : L.R. 39 I.A. 49 34 All. 213 (P.C.).

of their judgment held that Article 44 of the Limitation Act applied to the case of an improper alienation by the guardian of a minor.

If a transfer by a guardian is only voidable, then as decided in *Raja Rajeswara Dorai* v. *Arunachalam Chettiar*[1], a unilateral repudiation by him or rescission *in pais* would not be sufficient. In *Satgurprasad* v. *Hanwanyan Das*[2], the Judicial Committee, while setting aside a conveyance of property as having been obtained by fraud and undue influence, observed :—

"Their Lordships are unable to regard the deed of the 25th November, 1904, merely as a contract voidable at the option of the plaintiff, but good until avoided. It was, in effect, a conveyance, under which the title to the properties passed to the defendant, and *which had to be formally set aside.*"

Their Lordships also held that the plaintiff, exercising his option to rescind the transfer, was entitled to the rents and profits of the property "from the date of the transfer and not merely from the date of the suit."

An alienation by a *de jure* or lawful guardian of the property of the ward in excess of his powers as a guardian is treated differently from an improper alienation by a Hindu widow or the manager of a joint Hindu family for purposes of the Limitation Act. The transfer by the guardian is not void as against the minor, but only voidable at his instance and the minor must sue to set aside the unauthorised transfer within the three years limited by Article 44 or lose his title to the property. As I have already stated, the law regards the minor as being a party to the alienation through his guardian, and Article 44 allows only a period of three years for setting aside the transfer, the same period being allowed under Article 91 for a man who seeks to set aside his own deed. But, if a *de facto* manager of a minor's estate improperly alienates his property, the alienation is one to which the minor is not a party through his legally authorised representative and does not require to be set aside within the period limited by Article 44. The minor can sue for recovery of possession within the period of 12 years allowed by Article 142 or Article 144. The word 'guardian' in Article 44 must be interpreted as meaning only a lawful or *de jure* guardian and not as including a *de facto* manager of the property of a Hindu minor, whatever be the effect of an alienation by a *de facto* guardian or manager under the Hindu law.

is an earlier decision of the Bombay High Court (Macleod, C.J. and Coyajee, J.,) in *Narasinga Charya* v. *Tulsa Bai*[1] that till an unauthorised sale by his guardian was set aside by the minor, he had no transferable interest in the property. I am unable to accept these decisions as embodying a correct statement of the law. There was here a sale of property by the ex-minor and not an assignment of a mere right to sue. No doubt, the vendee from the minor had to sue the previous purchaser from the guardian for recovery of possession of the property, but, in my opinion, that did not render the sale by the minor a transfer of a mere right to sue. A unilateral disaffirmance or rescission *in pais* of the guardian's improper alienation by the minor might not be sufficient to revest title to the property in the minor and enable him to sue for recovery of possession of property within 12 years of such repudiation under Article 144 of the Limitation Act. A judicial rescission may be necessary as held in cases decided under Article 91 of the Limitation Act (see *Janki Kunwar* v. *Ajit Singh*[2], *Raja Rajeswara Dorai* v. *Arunachalam Chettiar*[3] and *Someshwar Dutt* v. *Tribhawan Dutt*[4]). I have already referred to the decisions of this Court taking the same view of the effect of Article 44 of the Limitation Act. It does not, however, follow that the right to obtain a judicial rescission of an unauthorised and therefore voidable transfer by a guardian, is a mere personal privilege of the minor as observed in *Muthukumara Chetty* v. *Anthony Udayar*[5] in the passage already cited. It is a right annexed to the ownership of property or an interest in property and is available to the legal representatives of a minor who dies without avoiding the transfer. Where an ex-minor transfers property unauthorisedly sold by his guardian during his minority, he transfers not a mere right to sue but his interest in the property, though a suit may be necessary to avoid the transfer by the guardian and possession of the property from his alienee. Conversely, the liability of the transferee from the guardian is not a liability to pay damages for the unauthorised act of the guardian, but is a liability to restore the property to the rightful owner or his transferee (compare sections 86, 94 and 96 of the Trusts Act). If, as held by Sadasiva Ayyar, J., in *Muthukumara Chetty* v. *Anthony Udayar*[5], a mere repudiation by the minor on attaining majority is sufficient to avoid the transfer, then the transfer by the ex-minor of the property previously alienated by the guardian is a sufficient repudiation of the guardian's act.

It is significant that section 60 (*e*) of the Civil Procedure Code, which is in *pari materia* with section 6 (*e*) of the Transfer of Property Act exempts from attachment and sale " a mere right to sue for damages ". The right to get a re-conveyance of property through Court or otherwise, is a valuable right in the nature of a right of property and can be validly transferred. The Transfer of Property Act itself recognises transfers of actionable claims as defined in the Act. The transferee as the representative of the transferor can sue for specific performance of a contract to re-convey land. (See *Venkateswara Ayyar* v. *Raman Nambudiri*[6] and *Sakalaguna Naydu* v. *Chinna Munuswami Naicker*[7]). The prohibition of a transfer of a mere right to sue in section 6 (*e*) of the Transfer of Property Act is an adaptation for India of the English equitable doctrine that a right to complain of a fraud is not a " marketable commodity". (*See* Turner, L.J., in *De Hoghton* v. *Money*[8]). The English Courts of Equity held that the transfer of such a right savoured of champerty and maintenance and refused relief on that ground. But the Judicial Committee held as early as *Ramcoomar* v. *Chunder Canto*[9] that the English doctrines as to champerty and maintenance were not in force as specific laws in India (see also *Achalram* v. *Kazim Hussain*[10] and *Bhagwat Dayal Singh* v. *Debi Dayal Sahu*[11]). Even in England, the rigour

1. (1925) 27 Bom. L.R. 483.
2. (1887) I.R. 14 I.A. 148 : I.L.R. 15 Cal. 58 (P.C.).
3. (1913) 24 M.L.J. 592: I.L.R. 38 Mad.321.
4. (1934) 67 M.L.J. 7 : L.R. 61 I.A. 224 : I.L.R. 9 Luck. 178 (P.C.).
5. (1914) 29 M.L.J. 617 : I.L.R. 38 Mad. 867, 877.
6. (1916) 3 L.W. 435.
7. (1928) 55 M.L.J. 198: L.R. 53 I.A. 243 : I.L.R. 51 Mad. 533 (P.C.).
8. (1866) 2 Ch. Ap. 164.
9. (1876) L.R. 4 I.A. 23 : I.L.R. 2 Cal. 233 (P.C.).
10. (1905) 15 M.L.J. 197 : L.R. 32 I.A. 113 : I.L.R. 27 All. 271 (P.C.).
11. (1908) 18 M.L.J. 100 : L.R. 35 I.A. 48 : I.L.R. 35 Cal. 420 (P.C.).

of a mere right to sue. For these reasons, I respectfully dissent from the decision of Sen, J., in *Mon Mohan* v. *Bidhu Bhusan*[3] and the observations of Macleod, C.J., in *Narasingachari* v. *Tulsa Bai*[4] and of Patkar and Murphy, JJ., in *Jhaverbhai Hathibhai* v. *Kabhai Becher*[5]. The decision in *Hanmant Gurunath* v. *Ramappa Lagamappa*[6] points out the difficulty of applying the language of Article 44 of the Limitation Act to a suit by a transferee from the ward and though there is a passing reference to section 6 (*e*) of the Transfer of Property Act in the judmgent, there is no decision on the point whether a transfer by the ward on attaining majority is hit at by section 6 (*e*) of the Transfer of Property Act. In that case, both the ward and his transferee were plaintiffs and the Court held that the transferee would get the benefit of an adjudication setting aside the improper alienation of the ward's property by his guardian. In *Kamaraju* v. *Gunnayya*[7] and *Raja Ramaswami* v. *Govindammal*[8], two Division Benches of this Court and in *Laxmappa* v. *Rachappa*[9], a Division Bench of the Bombay High Court recognised though without discussion of the point, the right of a transferee of property from the ex-minor to sue to set aside an improper alienation of that property by the guardian of the minor. The Bombay High Court itself has, in a later case, held that where the manager of a joint Hindu family, acting in excess of his powers, alienates the joint family property for himself and his minor brother, the latter continues to have an interest in the property alienated, which he can transfer so as to clothe the transferee with a right to avoid the manager's alienation and recover possession of interest of this transferor (see *Hanumanthappa* v. *Dyndappa*[10]). The same view is implicit, though not expressly stated, in *Iburamsa Rowthan* v. *Thiruvenkataswami Naick*[11]. In *Raja Ramaswami* v. *Govindammal*[8], Article 44 of the Limitation Act was applied to a suit by the transferee from the ward and in *Ramaiah* v. *Brahmaiah*[12], the same article was applied to a suit by the legal representative of a ward who died a minor. As pointed out in *Hanumant Gurunath* v. *Ramappa Lagamappa*[6], it is difficult to bring a suit by the transferee or legal representative of a deceased minor within the language of columns 1 and 3 of Article 44 of the Limitation Act. In the view I have taken that Article 44 does not apply to transfers by *de facto* managers or *de facto* guardians of a Hindu minor, a decision on this point is unnecessary. If it were, I would, sitting singly,

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1. (1912) 3 K.B. 474 at 489, 490.
2. (1924) 47 M.L.J. 93 : L.R. 52 I.A. 1, 19 : I.L.R. 48 Mad. 230 (P.C.).
3. A.I.R. 1939 Cal. 460.
4. (1925) 27 Bom. L.R. 483.
5. (1932) 34 Bom.L.R. 1512.
6. (1924) I.L.R. 49 Bom. 309.
7. (1923) 45 M.L.J. 240.
8. (1928) 56 M.L.J. 332.
9. (1918) I.L.R. 42 Bom. 626.
10. A.I.R. 1934 Bom. 234.
11. (1910) 20 M.L.J. 743 : I.L.R. 34 Mad. 269.
12. (1930) 59 M.L.J. 196.

be bound by the decision in *Raja Ramaswami* v. *Govindammal*[1] to hold that Article 44 applies even to suits by transferees from an ex-minor for recovery of possession of property improperly alienated by the minor's guardian. For the foregoing reasons, I dismiss this second appeal, but, having regard to the fact that the transferee, the plaintiff, is no other than those of the *de facto* guardian and that there is more than a suspicion that the first defendant is sought to be deprived of the fruits of his purchase by the concerted action of the ward, the *de facto* guardian and the plaintiff, I disallow the plaintiff his costs throughout.

No leave.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE CHANDRA REDDI.

Chekuri Narayana Raju .. *Petitioner**

v.

The Chief Secretary to the Government of Madras and another .. *Respondents.*

Preventive Detention Act (IV of 1950)—Grounds of detention—Sufficiency of—Constitution of India (1950), Article 22 (5) and (6).

The petitioner was originally detained in 1948 under the Madras Maintenance of Public Order Act, and when that Act was considered to be inconsistent with the Constitution, was directed to be detained by the State under the Preventive Detention Act, 1950, passed by Parliament. The grounds of detention which were served on the petitioner were attacked on three grounds, *viz.*, (i) that the grounds were vague and indefinite as no particulars were given; (ii) there was no present connection between the order of detention and past activities of the petitioner; and (iii) they had no relation either to the security of the State or the maintenance of public safety.

Held : (i) The satisfaction contemplated in section 3 of the Act is that of the detaining authority and since the section only provided for a subjective standard and not an objective standard of satisfaction, the particulars of the reasons for detention need not be furnished, though if the grounds of detention are very vague and indefinite so as to render the object of furnishing the grounds nugatory the order may be set aside.

(ii) No doubt a person cannot be deprived of his liberty merely because he belongs to a political organization whose ideologis differ from the party in power, but when the aims and objects of the party are to create confusion and to threaten injury to society which the Government has a right to protect and they are sought to be achieved by resorting to violence and terror, the Government would well be justified in detaining a person who is instrumental in carrying out such a programme and who is likely to resort to activities calculated to prejudice the security of the State and the maintenance of the public order in pursuance of the aims of such a party.

(ii) In judging a likelihood of a person or his propensities to indulge in activities prejudicial to the security of the State or maintenance of public order, regard can be had to the antecedents of the person.

Case-law discussed.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *habeas corpus* directing the 2nd respondent to produce the petitioner before the High Court and set him at liberty.

A. Ramachandran for *Messrs. Row and Reddy* for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

The Order of the Court was made by

Chandra Reddi, J.—This petition is presented by one Chekuri Narayana Raju under Article 226 of the Constitution challenging the validity of an order passed by the Government of Madras under section 3 (1) of the Preventive Detention Act (IV of 1950). The petitioner herein was originally detained on 13th March, 1948, by an order passed under the Madras Maintenance of Public Order Act. Subsequently when the latter Act was considered to be inconsistent with the Articles of the Constitution and when Act IV of 1950 was passed by the

1. (1928) 56 M.L.J. 332.

*Cri.M.P. No. 2700 of 1950. 1st February, 1951.

Parliament, the State of Madras passed an order directing the detention of the petitioner under Act IV of 1950 with a view to prevent him from acting in a manner prejudicial to the security of the State and the maintenance of public order and this was communicated to him immediately. A few days later, the petitioner was furnished with the following grounds of detention :

" 1. He started the Communist Volunteer Corps at Palacole during the last week of November 1947 and was training about 30 members in drill, parade and lathi exercises, holding classes, spreading revolutionary ideas and creating class hatred.

He underwent training as an instructor in drill, parade, lathi exercises, etc., along with 29 others at Ellore in the 'Officers' Training Centre' organised by the West Godavari District Communist party from 6th to 18th January, 1948.

2. He is a member of the Communist party which has been banned by the Government of Madras under the Criminal Law Amendment Act from 26th September, 1949. The underground Communists all over the State still indulge a subversive activities such as loot, arson, murder, throwing of bombs, etc. The general situation is therefore unsettled and the recent underground circulars and wall-posters by the communists indicate their determination to take advantage of the prevailing conditions and incite the labourers, working classes and kisans to cause damage to public institutions to attack police stations, prisons, etc., and to try to obtain power by violence. Recent literature seized from the communists also indicate that they are collecting weapons including bombs and revolvers for use on these occasions.

3. The grounds set forth in paragraph 1 will show that Sri Chekuru Narayana Raju is likely to indulge in engineering and executing the violent programme of the communists. An order of detention has therefore been passed with a view to preventing him from acting in a manner prejudicial to the security of the State and the maintenance of public order."

He was also informed by this communication that if he wished to make any representation he could do so within fifteen days of the receipt of the memorandum of grounds. The petitioner submitted his written representation denying the correctness of the grounds and challenging the validity of that order. The State Government after reviewing his case passed an order, dated 7th June, 1950, continuing his detention. Hence the petitioner has approached this Court for the issue of a writ of *habeas corpus* directing the State Government to release him from detention.

The main grounds upon which this petition is founded are that the grounds of detention furnished to him are vague and indefinite, that they have no relation either to the security of the State or to the maintenance of public safety, either of which grounds alone would entitle a State Government to detain a citizen under section 3 of the Preventive Detention Act and that neither of the two grounds mentioned in the memorandum communicated to him indicate how the petitioner's being at large would affect either the security of the State or maintenance of public safety, and that lastly, the grounds do not disclose any present connection between the order of detention now impugned and the materials on which this order is based. The argument on behalf of the petitioner is that since he has been in detention ever since 13th March, 1948, he could not have indulged in any activity calculated either to affect the security of the State or the maintenance of public order, and that the detaining authority in 1950 could not fall back upon the grounds that are said to have existed prior to 13th March, 1948, and therefore there could be no valid ground to continue his detention.

Section 3 (1) of the Preventive Detention Act lays down that :

" the Central Government or the State Government may (*a*) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to, ... (ii) the security of the State or the maintenance of public order . . . . . it is necessary so to do, make an order directing that such person be detained."

Under section 7 of the Act the Government concerned is required to communicate to the detenu the grounds on which the order has been made and afford him the earliest opportunity to make a representation to that Government. Under sub-section (2) of section 7 the detaining authority is not bound to disclose facts which it considers to be against the public interest to disclose.

It must be mentioned that section 7 of the Act is in consonance with Article 22 clause (5) of the Constitution. Clause (5) of Article 22 is in the following words :

"When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order."

It is manifest that the object of these two provisions is to enable the detenu to know the basis upon which he is detained and to make a representation to the concerned authority refuting the charges if they are unfounded.

On the first point the contention urgued on behalf of the petitioner by Mr. Ramachandran, his learned counsel, is that inasmuch as the particulars of the grounds of his detention were not communicated by the detaining authority, that order should be quashed. In support of his argument, he relied upon a decision of the Calcutta High Court in *Safatulla Khan* v. *Chief Secretary, West Bengal Government*[1], a decision of a Division Bench of the Orissa High Court in *Kulamoni* v. *The State*[2], a decision of the same Bench in *Ananta Charan* v. *The State*[3], and on a ruling of a single Judge of the Allahabad High Court in *Asha Ram* v. *The State*[4].

In *Safatulla Khan* v. *Chief Secretary, West Bengal Government*[1], it was held that the Court can order the release of a detenu if the grounds of detention served on him are vague and indefinite and not precise enough to enable him to make an effective representation to the appropriate authority. At page 197, Harries, C.J., observes :

"The authorities are bound to disclose the grounds and they cannot suggest that it is agains public interest not to disclose the grounds. It appears to me that there is a clear difference between grounds and facts. The grounds are the bases of the allegations. The facts really are the evidence upon which the bases of the allegations are to be established, *e.g.*, in pleading a party must give particulars of allegations, but he is not required to give his evidence. If he makes an allegation he must state the basis of that allegation, but he need not state how he is going to prove such basis."

In that case it was found that the grounds were very vague and the detenu was not furnished with sufficient information which placed him in a position to send an effective reply, and therefore there was no sufficient compliance with the provisions of clause (5) of Article 22.

Though we agree that if the grounds of detention are very vague and indefinite so as to render the object of furnishing the grounds nugatory the order may bet set aside, we cannot subscribe to the view that the detaining authority is under an obligation to disclose to the detenu the basis of the allegation, *i.e.*, the particulars of the allegations on which the detention is made. We do not think the detaining authority is bound to state the facts on which the grounds or the allegations are based. If the detaining authority is required to give the particulars of the grounds, the effect of clause (6) of Article 22 will be reduced to a zero. We do not consider that what clause (6) of the Article entitles the detaining authority is only to refrain from disclosing to the detenu the evidence of the allegations as postulated by the learned Judges in that case. One can understand the force of the contention if the Courts are empowerd to scrutinise the grounds so as to determine the reasonableness or otherwise of these grounds. It is now well settled that the satisfaction contemplated in section 3 of the Preventive Detention Act is that of the detaining authority and since that section has provided only for a subjective standard and not an objective standard of satisfaction we do not see why the particulars of the reasons for detention should be furnished to the detenu.

Dealing with the argument in *Gopalan* v. *State of Madras*[5], that section 3 of the Preventive Detention Act does not provide an objective standard to enable a Court to see whether the requirements of law have been complied with or not, the Chief Justice of India observed at page 191 :

"It is clear that no such objective standard of conduct can be prescribed, except as laying down conduct tending to achieve or to avoid a particular object. For preventive detention action must be taken on good suspicion. It is a subjective test based on the cumulative effect of different actions,

1. (1950) 55 C.W.N. 27 : A.I.R. 1951 Cal. 194.
2. A.I.R. 1951 Orissa 20 : I.L.R. (1950) Cut. 540.
3. A.I.R. 1951 Orissa 27.
4. A.I.R. 1950 All. 709.
5. (1950) 2 M.L.J. 42 ; 1950 S.C.J. 174.

perhaps spread over a considerable period. As observed by Lord Finlay in *The King* v. *Halliday*[1], a Court is the least appropriate tribunal to investigate the question whether circumstances of suspicion exist warranting the restraint on a person. The contention is urged in respect of preventive detention and not punitive detention. Before a person can be held liable for an offence it is obvious that he should be in a position to know what he may do or not do and an omission to do or not to do will result in the State considering him guilty according to the penal enactment. When it comes however to preventive detention, the very purpose is to prevent the individual not merely from acting in a particular way but, as the sub-heads summarized above, show, from achieving a particular object. It will not be humanly possible to tabulate exhaustively all actions which may lead to a particular object."

In the same case with reference to the argument advanced on behalf of the petitioner therein that section 3 of the Act is unreasonable in that it places a citizen at the mercy of the executive authority, Fazl Ali, J., says at page 226 as follows :

"The administrative authorities who have to discharge their responsibilities have to come to quick decisions and must necessarily be left to act on their own judgment. This principle is by no means unreasonable and it underlies all the preventive or quasi-administrative measures which are to be found in the Criminal Procedure Code. . . . . Therefore I do not find anything wrong or unconstitutional in section 3 of the Act."

Repelling the argument based on section 12 of the Preventive Detention Act not complying with the requirements of clause (7) of Article 22. Patanjali Sastri, J., observes in the same case at page 243 :

"The argument loses sight of the fact that clause (7) deals with preventive detention which is a purely precautionary measure which 'must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof'. The remarks I have already made with reference to the absence of any objective rules of conduct in section 3 of the impugned Act apply also to this criticism of section 12. It would be difficult, if not impracticable, to mention the various circumstances, or to enumerate the various classes of cases exhaustively in which a person should be detained for more than three months for preventive purposes, except in broad outline. Suppose a person belongs to an organisation pledged to violent and subversive activity as its policy. Beyond his membership of the party the person might have done nothing until he was arrested and detained. But if released he might indulge in anything from the mildest form of prejudicial activity, like sticking an objectionable handbill on a hoarding, to the most outrageous acts of sabotage. How could the insertion in section 12 of a long series of categories of aggravated forms of prejudicial activities, or the enumeration of the various circumstances in which such activities are likely to be indulged in, be of any assistance to the detaining authority in determining whether the person concerned should be detained for three months or for a longer period ? All that would be necessary and sufficient for him to know for coming to a decision on the point is that the person is a member of such an organization and will probably engage in subversive activities prejudicial to the security of the State or the maintenance of public order or, in other words, he belongs to clause (b) in section 12."

In *Dr. N. B. Khare* v. *The State of Delhi*[2], one of the questions that fell to be considered by the Supreme Court was whether the grounds for externing the petitioner therein were insufficient or incomplete so as to render the order of externment unsustainable. The grounds stated in that case were as follows :

"Your activities generally and particularly since the recent trouble in East and West Bengal have been of a communal nature tending to excite hatred between communities and whereas in the present composition of the population of Delhi and the recent communal disturbances of Delhi feelings are roused between the majority and minority communities, your presence and activities in Delhi are likely to prove prejudicial to the maintenance of law and order, it is considered necessary to order you to leave Delhi."

Meeting the argument advanced on behalf of Dr. Khare based on the insufficiency or the incompleteness of the grounds, the learned Chief Justice of India remarked :

"Apart from being vague, I think that these grounds are specific and if honestly believed can support the order."

In *Ashutosh Lahiry* v. *State of Delhi*[3], the Supreme Court held that the only condition under which the detaining authority could exercise its powers of detention is its satisfaction as to the matter specified in the Preventive Detention Act and a Court cannot substitute its own satisfaction for that of the authority making the order of detention.

On these authorities and on a careful examination of the provisions of sections 3 and 7 of the Preventive Detention Act and clauses (5) and (6) of the Article 22 of

1. (1917) A.C. 260 at 269.
2. (1950) S.C.J. 328.
3. (1950) 2 M.L.J. 555 : 1950 S.C.J. 433.

the Constitution, we have come to the conclusion that grounds of detention cannot be said to be vague and indefinite for the reason that they do not contain the basis of those grounds. It will be reading too much into section 7 of the Preventive Detention Act, or clause (5) of Article 22 of the Constitution to hold that the detaining authority is bound to disclose the basis of the allegations. As already stated by us the intendment of the provisions of law contained in section 7 as well as in Article 22 of the Constitution is to provide the affected person with an opportunity to make a representation and the rule of law enacted in these two provisions is complied with when the grounds are communicated.

As regards the ruling in *Kularoni* v. *The State*[1], we think it has no application to the facts of this case. There the detenu was first arrested under section 107 of the Criminal Procedure Code, but no proceedings were started under that section. He was next detained for three months by the District Magistrate, but before that period expired, the Chief Secretary revoked that order and passed an order of detention making it effective from an earlier period. The complaint of the detenu was that the State Government of Orissa did not act *bona fide* in taking him into detention. Having regard to the circumstances and the background, the learned Judges agreed with the contention put forward on behalf of the petitioner and directed his release.

The other decision of the same Bench, *Ananta Charan* v. *The State*[2], has absolutely no bearing on this part of the case but we shall refer to it later in connection with another branch of the argument advanced on behalf of the petitioner.

Asha Ram v. *State*[3] does not help the petitioner very much. There the main question to be considered by the learned Judge was whether the ground, *viz.*, that the activities of the detenu were calculated to lead to a breach of the peace was sufficient to bring his case under section 3 of the Preventive Detention Act. It was held there that the ground for detention did not relate either to the security of the State or to the maintenance of public order as it could not be said that a breach of the peace is necessarily connected with either the security of the State or maintenance of public order. The learned Judge observed that the words "breach of the peace" are very vague and it could not be necessarily inferred from these words that the detaining authority had in mind a breach of the public order, and that even an attempt to commit an affray or an assault would constitute breach of the peace. No doubt there are some observations in that case regarding the particulars to be furnished to the detenu which might lend some colour to the argument of the counsel, but for the reasons already mentioned we cannot agree with them. We may also state here that in the representation made to the appropriate authority by the petitioner herein, he did not complain of the grounds being vague or indefinite or not being precise to enable him to send an effective representation. We are not mentioning this as materially affecting the decision on the question before us, but only to show that he was not really prejudiced by the so-called vagueness or indefiniteness of the grounds and there is not much force in that contention.

We come next to the contention that it was not open to the State Government for detaining the petitioner herein in 1950 to fall back upon the grounds that existed prior to his original detention in March 1948. In support of this contention reliance was placed on a ruling of the Bombay High Court in In re *S. V. Ghate*[4]. In that case the petitioner was detained by an order passed by the Commissioner of Police in 1948. After the Preventive Detention Act (IV of 1950) came into force, an order was passed under the provisions of the latter Act with a view to prevent him from acting in a manner prejudicial to the security of the State of Bombay and the maintenance of public order. A question was raised whether in view of the fact that no new grounds were alleged for the continuance of the detention of the petitioner therein and that during the period he

1. A.I.R. 1951 Orissa 20 : I.L.R. (1950) Cut. 540.
2. A.I.R. 1951 Orissa 27.
3. A.I.R. 1950 All. 709 at 710.
4. A.I.R. 1951 Bom. 161.

was incarcerated he could not have indulged or could indulge in any prejudicial activity, the detaining authority could proceed on the material which it had prior to his detention in 1948. Learned Chief Justice Chagla who delivered the judgment on behalf of the Bench answered it in the negative and observed as follows (at p. 165).

"It is not sufficient that some other authority in 1948 thought that the detention of the petitioners was necessary. There must be a reasonable apprehension in the mind of the detaining authority that if the petitioner was not detained on 26th February, 1950, he would act in a prejudicial manner. Therefore in that sense the materials which were present before the detaining authority in 1948 may not be sufficient to lead the detaining authority in 1950 to the same conclusion as arrived at by the other detaining authority. The detaining authority must examine the materials afresh and although the past activities of the detenu may afford a ground for detention to the detaining authority examining the materials he must review those past activities in the context of the time at which he is making the order."

Further down it is stated that :

"It is not open to the detaining authority in 1950 to fall back upon the satisfaction of the detaining authority in 1948."

We feel that we cannot accept the proposition that the past acts of a man would not furnish safe criteria of the likely future activities of a person. The learned Judge himself expresses at page 165 that :

"It would be very difficult to lay down at what point of time a particular activity of a particular person ceases to furnish any connection with the subsequent order directing him to be detained and we refuse to express any opinion that necessarily a period of two years would lead the Court to come to the conclusion that there could be no connection whatever between the activities of a detained person two years prior to the making of the order and the apprehension felt by the detaining authority."

The last observations indicate that the learned Judges thought that it could not be postulated that the past acts would not offer a basis for a fresh order of detention. In our opinion, to judge the likelihood of a person or his propensities to indulge in activities prejudicial to the security of the State or maintenance of public order, regard can be had to the antecedents of the man. The executive authority which is responsible for the security of State and the maintenance of public order would

of public order, we should set aside the order of detention as neither of the grounds would bring the petitioner's case within the purview of section 3 of the Preventive Detention Act.

In support of this branch of his argument he referred us to the decision in *Lakshmi Narayana*, In re[1]. In that case on a difference of opinion between Horwill and Balakrishna Ayyar, JJ., it was referred to Satyanarayana Rao, J. The learned Judge agreeing with the view taken by Horwill, J., stated that the ground for the detention that the detenu was clandestinely purchasing and importing from outside sulphur, graphite, saltpetre and potassium and smuggling them to communists' camps in Hyderabad State would not be sufficient to constitute a danger to public safety and maintenance of public order. This ruling does not advance the case of the petitioner.

Our attention was also drawn by Mr. Ramachandran to another opinion of our learned brother Satyanarayana Rao, J., which again was expressed by him on a difference of opinion between Horill and Balakrishna Ayyar, JJ., in Crl. M. P. No. 838 of 1949 (unreported). This also does not touch the point to be decided by us. There the petitioner was released in 1949 after he presented an application under section 491, Criminal Procedure Code attacking the legality of the order of detention and notice thereof was served on the Government. Immediately thereafter the Government passed an order of detention stating that the applicant was likely to act in a manner prejudicial to public safety and maintenance of public order and with a view to preventing him from so doing. Having found that the order of detention passed in 1948 could not be justified and therefore the Government was obliged to release him, the learned Judge agreeing with the view taken by Horwill, J., observed that the subsequent order passed by the Government for the detention of the petitioner therein was not a *bona fide* one and was intended merely to circumvent the provisions of the Act and justify a detention which was illegal at its inception by this circuitous method.

On the other hand a decision of the Federal Court in *Machindar Shivaji* v. *The King*[2], would meet the argument advanced on behalf of the petitioner. Dealing with the contention that an association with the Communist party which has not been banned would not afford a ground of detention, Patanjali Sastri, J., observes as follows :

> "We cannot accede to this contention. While mere belief in or acceptance of any political ideology may not be a ground for detention under the Act, affiliation to a party which is alleged to be spreading its "doctrine of violence rendering life and property insecure and trying to seize power by violence" may, in certain circumstances, lead to an inference that the person concerned is likely to act in a manner prejudicial to the public safety, order or tranquillity. The fact that the party had not been outlawed is immaterial, that being a matter of expediency."

The point there arose in connection with the detention of a person under a different enactment. However since the question raised is the same, we think the passage quoted above is apposite to our case and the principle laid down there governs the present case.

No doubt a person cannot be deprived of his liberty merely because he belongs to a political organization whose ideologies differ from the party in power, but when the aims and objects of the party are to create confusion and to threaten injury to society which the Government has a right to protect and they are sought to be achieved by resorting to violence and terror, the Government would well be justified in detaining a person who has identified himself with that party and who is instrumental in carrying out such a programme and who is likely to resort to activities calculated to prejudice the security of the State and the maintenance of public order in pursuance of the aims of such a party. In the present case even apart from the general ground of the petitioner's affiliation to a political organisation whose avowed objects are said to be the overthrowing of Government by subversive and terroristic activities, we have no hesitation in coming to the conclusion that the activities of the petitioner mentioned in paragraph (1) of Exhibit C have a relation to the security of

1. (1949) 2 M.L.J. 711. 2. A.I.R. 1950 F. C. 129.

the State and the maintenance of public order and would therefore constitute a sufficient ground for detaining the petitioner under the Preventive Detention Act.

In these circumstances the only conclusion we can come to is that the order of detention of the petitioner is perfectly legal and justified and do not call for interference. We therefore reject this petition.

V. P. S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VISWANATHA SASTRI.

Srirangam Municipality represented by its Executive Authority, the Commissioner ... *Appellant**

v.

R. V. Palaniswami Pillai ... *Respondent.*

Civil Procedure Code (V of 1908), section 24—Scope and applicability—Application under section 24 to the High Court in matter pending in the Munsiff's Court during vacation for transfer of suit to High Court and retransfer of the case after granting petitioner a mandatory injunction—Application if should be made on the Original Side of the High Court—Power of High Court to order transfer and again to retransfer it after passing an interim order—Such procedure, if an abuse of the process of Court.

It cannot be said that every application under section 24 of the Civil Procedure Code, when made to the High Court should be made on the Original Side. The correct position is that an application under section 24, should be made to the High Court as such in the same manner as it might be made to the District Court and such an application can be validly heard and disposed of by any Judge of the High Court deputed by the Chief Justice to hear such application. An application under section 24 for transfer of a suit to the High Court and to retransfer the same to the Munsiff's Court after granting the necessary interim relief (as the Munsiff's Court was then closed for the vacation) need not be made to the Original Side of the High Court.

Section 24, Civil Procedure Code gives power to the High Court to transfer a suit to itself and afterwards retransfer it for trial to the Court in which it was originally filed after passing an interim order. Such a procedure cannot be said to be an abuse of the process and a fraud on the power conferred on the High Court.

Appeal under clause 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Satyanarayana Rao, dated the 25th day of May, 1948 and made in C. M. P. No. 31115 of 1948, petition praying for an order directing the appellant (respondent) to put back the fence in its original state and restore the *status quo ante* pending O. S. No. 250 of 1948 on the file of the Court of the District Munsiff of Tiruchirapalli.

V. V. Srinivasa Aiyangar for Appellant.

T. M. Krishnaswami Aiyar and *K. Srinivasan* for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—This is an appeal against the order made by our learned brother Satyanarayana Rao on the 25th May, 1948 as one of the vacation Judges during the summer recess of that year in the following circumstances.

The Srirangam Municipality which is the appellant before us, issued a notice to the respondent purporting to be under section 182 of the Madras District Municipalities Act directing him to deliver possession of an extent of 30 cents of land in T. S. No. 1513 on the northern and eastern side of T. S. No. 1509 and to remove the fence he had put up thereon on the ground that the respondent had encroached on land belonging to the Municipality. This notice was served on the respondent on the 25th February, 1948. He thereupon filed a suit O. S. No. 250 of 1948 in the Court of the District Munsiff of Trichinopoly against the Municipality represented by its Commissioner for a declaration of his title to and for the maintenance of his possession of the land in dispute. Along with the plaint he filed an application for an interim injunction restraining the Commissioner of the Municipality from interfering with his possession pending disposal of the suit. Notice of the applica-

* L. P. A. No. 44 of 1948. 2nd November, 1950.

tion for interim injunction was ordered by the learned District Munsiff and it was served on the Commissioner on the 24th April, 1948. The petition itself was posted for hearing on the 12th June 1948, evidently because the Court of the District Munsiff was closed meanwhile for the summer recess. After receipt of this notice from the Court, the Commissioner had the fence and the trees on the disputed land cut out and removed on the 27th April, 1948. As the District Munsiff's Court was closed, the respondent filed two applications to this Court. In C. M. P. No. 3114 of 1948, he prayed that this Court may be pleased to transfer the suit to this Court and to retransfer the same after granting him the necessary relief. In C. M. P. No. 3115 of 1948, he prayed for an order directing the Commissioner of the Municipality to put back the fence in its original state and to restore the *status quo ante* pending disposal of the suit. Both the applications were disposed of finally by Satyanarayana Rao, J., on 25th May, 1948. He ordered a transfer of the suit to the file of this Court and after hearing both sides, granted a mandatory injunction directing the Commissioner of the Municipality to restore the fence to a length of 355 feet within a period of ten days from the date of his order failing which the respondent herein was given liberty to move the Court to have the order carried out and to recover the cost of such execution from the defendant Municipality. As the petition for injunction had been disposed of and as it was unnecessary to keep the suit pending in this Court, the learned Judge retransferred it to the District Munsiff's Court for disposal. The appeal before us is against the order granting the mandatory injunction.

Mr. V. V. Srinivasa Aiyangar for the appellant before dealing with the merits, raised certain objections to the maintainability of the petitions before Satyanarayana Rao, J., and certain procedural defects in the applications. We may mention at the outset that none of these objections was raised before the learned Judge himself. Some of the objections particularly those which were procedural, could have easily been met, if they had any substance, by appropriate amendments by the respondent. We do not think it is open to the appellant to raise these objections for the first time in the appeal. However as the objections relate to matters of some general importance, especially to the practice now obtaining during the vacation of this Court, we shall briefly deal with the several points raised by him.

It was contended that the application for transfer must have been made to the Original Side of this Court by means of an Original Petition bearing the proper court-fee. The application was made under section 24 and 151, Civil Procedure Code. In the cause title the application was described as a Civil Miscellaneous Petition in this Court. Learned counsel relied on a ruling in *Srinivasa Aiyar* v. *Balakrishna Devu*[1], and certain observations of Ramesam, J., in *Jumna Bai* v. *Ramanathan Chetti*[2], in support of his contention that the application should have been made to this Court on its Original Side. In our opinion there is nothing in the language of section 24, Civil Procedure Code to indicate on which side of this Court the application should be made. In dealing with this question it is important to bear in mind that section 24, Civil Procedure Code gives the power of transfer and withdrawal not only to this Court but also to the District Court and it gives such power of transfer and withdrawal not only in respect of suits but also in respect of appeals and other proceedings pending in any Court subordinate to it. It would therefore be certainly wrong to say that every application under section 24 when made to this Court should be made on the Original Side. Obviously an application to withdraw an appeal pending before a Subordinate Court to this Court or to transfer it to any other Subordinate Court cannot be made to the Original Side of this Court. It is also obvious that an application to transfer any suit pending in a Subordinate Court to another Subordinate Court for trial cannot be made to this Court on the Original Side because the subordination of Courts can only be to this Court as such and not to the Original Side of this Court. There is nothing in section 24

1. (1911) 22 M.L.J. 187.

2. (1928) 55 M.L.J. 690 : I.L.R. 52 Mad. 52.

udge sitting in the Admission Court who deals with these applications. It may be rue, as was held in *Alla Subba Reddi* v. *Lankireddi Narayanaswami Reddi*[1]; that an pplication under section 24 is in the nature of an original proceeding to which ection 141, Civil Procedure Code may apply, but to say that, is far from saying that he application is one made on the Original Side of this Court.

In *Srinivasa Aiyar* v. *Balakrishna Thevan*[2], the learned Judges dealt with an pplication there made for the transfer of a suit from the Presidency Court of Small Causes to this Court for trial and disposal as an application falling under clause 13 of the Letters Patent. Obviously an application under that clause must be made o the High Court on the Original Side because it invokes the Extraordinary Original Civil Jurisdiction conferred on this Court by that clause. No doubt there is an bservation in the course of the judgment that section 24, Civil Procedure Code as nothing to do with the question whether the High Court should exercise the ower as a Court of original or appellate jurisdiction. That is true, but it is equally true to say that the section *viz.*, section 24 does not indicate that the High Court should exercise the power on its Original Side. The application before the earned Judges in that case clearly fell within clause 13 of the Letters Patent. t was an application *simpliciter* for the transfer of a suit from the Presidency Small

the application must be made to the Original Side of this Court. In *Krishna Mudaliar* v. *Sabapathi Mudaliar*[1], Leach, C.J., delivering the judgment of the Full Bench clearly pointed out the difference between the powers conferred on the High Court by clause 13 of the Letters Patent and those conferred by section 24, Civil Procedure Code. The learned Chief Justice disagreed with Ramesam, J., in so far as he held that clause 13 of the Letters Patent would enable an application for transfer to be made on the Original Side of the High Court along with an application for an injunction or other interlocutory relief with another application for a retransfer of the entire proceedings back to the mofussil Court. We hold that the application need not have been made to the Original Side of this Court.

Learned counsel next contended that an application for transfer of a suit pending in any Court subordinate to this Court should only be made when it is intended that the suit should be tried and disposed of in this Court and not to enable this Court to pass an interim order and to retransfer it immediately after passing of that order. It is obvious that after the ruling of the Full Bench in *Krishna Mudaliar* v. *Sabapathi Mudaliar*[1], this contention cannot prevail. In that case which was an appeal from the order of Byers, J., passed during the vacation, the learned Judge entertained applications exactly similar to the applications before our learned brother Satyanarayana Rao. There was an application for transfer of an interlocutory application for injunction and for retransfer immediately after disposal of the interim injunction application. The Full Bench held that section 24, Civil Procedure Code, gave power to the High Court to transfer a suit to this Court and afterwards retransfer it for trial to the Court in which it was originally filed after passing an interim order.

It was next urged by Mr. Srinivasa Aiyangar that such a procedure was an abuse of the process and a fraud on the power conferred on the High Court. We entirely disagree. The Courts in this land including this Court which is the highest in the State, are intended to give adequate redress to aggrieved litigants. If on account of the closure of the Subordinate Court, it becomes impossible for a litigant to obtain relief which is urgently needed, we do not see why it should be an abuse of process or fraud on the power, if the litigant approaches this Court to exercise the power certainly conferred on it by section 24, Civil Procedure Code.

There was one other minor point incidentally raised which had probably some substance at the time of the hearing of the application by Satyanarayana Rao, J., but is of mere academic interest hereafter. This related to the court-fee which would be payable on a suit withdrawn to and taken on the file of this Court. In cases where court-fee less than the minimum court-fee payable on the Original Side of this Court had been paid by the plaintiff who files an application under section 24, Civil Procedure Code, he must be made to pay the difference. That might have been so ; but after the recent amendment under which there is no difference in the court-fee charged on plaints presented to the Original Side of this Court and the plaints presented in mofussil Courts there can be no occasion when a party would have to pay an excess court-fee. We are, therefore, of opinion that the applications made to Satyanarayana Rao, J., in this case were all competent and in any event, it is not open to the appellant to urge these objections before us in appeal.

On the merits, we are emphatically of opinion that there can be no other conclusion than that arrived at by our learned brother on the facts of this case. The action of the Commissioner in destroying the fence and cutting away the trees on the land in dispute three days after receipt of the notice of the application for interim injunction was very highhanded. There was obviously no such special urgency as would justify such hasty action especially when the application itself was posted for hearing immediately after the reopening of the District Munsiff's Court. It appears to us clear that the Commissioner actually took advantage of

1. (1945) 1 M.L.J. 14 : I.L.R. 1945 Mad. 389 (F.B.).

the fact that the District Munsiff's Court was closed and acted in that arbitrary manner. In the circumstances, the least that the respondent was entitled to was a restoration of the *status quo ante* in so far as such restoration was possible and that is what our learned brother has directed. In view of the ruling in *Kandaswami Chetty* v. *Subramania Chetty*[1], learned counsel for the appellant did not challenge the jurisdiction of the learned Judge to grant a temporary mandatory injunction; but he complained that the order should not have been made when in a few days the District Munsiff's Court would reopen. This argument does not come with grace from a party who, three days after receipt of the notice from the District Munsiff's Court would not wait till the reopening and during the vacation would take such precipitate action as to destroy a fence and cut down trees on land as regards the title to which there was dispute.

We therefore see no reason to interfere with the order of Satyanarayana Rao, J., and we dismiss the appeal with costs.

We wish however to mention one thing. In dealing with the application for mandatory injunction, the learned Judge naturally had to find out whether the respondent plaintiff made out a *prima facie* case. He therefore went into such evidence as was placed before him and arrived at a finding that the plaintiff had established a *prima facie* title in him in respect of the suit land. It is obvious that this finding was only for the purpose of the application and should not have any value more than is necessary. It should not in any manner influence or embarrass the trial Court in arriving at a finding on a consideration of the entire evidence placed before it at the trial.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AYYAR.

The Panchayat Board, Kankipadu, Vijayawada, Krishna District, by its President, Sri Koneti Kutumba Rao .. *Petitioner**

v.

The Inspector of Local Boards and Municipal Councils, First Line Beach, Madras and others .. *Respondents.*

Certiorari—Supersession of Panchayat Board—Local Boards Act (XIV of 1920), section 45-A (1)—Directions from Government to Inspector in regard to matters already delegated to him—Validity of the Inspector's orders of supersession.

The Inspector of Municipal Councils and Local Boards to whom the powers of the Government under section 45-A had been delegated issued an order superseding a Panchayat Board under section 45-A (1) of the Act. Before the issue of proceedings the Government had communicated their view to the Inspector in unequivocal terms that there was sufficient reason for such supersession and even mentioned a particular individual as the Special Officer to be appointed. The order of supersession was attacked on the grounds (1) that the Inspector was not given an opportunity to form his own individual opinion on the material available and (ii) that the Inspector did not make any inquiry as regards the charges.

Held: (1) Though ordinarily not only the interference from Government would be deprecated, but an order passed after such interference would have been quashed, as it appeared however, from the file that though official orders had not been actually passed by the Inspector, he himself proposed to take steps for supersession, the mere fact that the Government set its seal of approval would not render the order invalid. Further, the Government was entrusted with the duty of supervision over Local Boards and though they cannot dictate to the Inspector what ultimately he should do, they certainly could initiate proceedings by moving the Inspector to take action.

(2) Though it was irregular to name the officer even before the Board was superseded, it would not vitiate the action of the Inspector.

(3) There must be something *ex facie* the order passed by officers with statutory powers, to show that there are reasons for the order and the conclusion is based on materials before them. But

1. (1917) I.L.R. 41 Mad. 208.

*C.M. P. No. 4558 of 1930. 13th November, 1950.

merely because the order could have been more full is not a ground for interference by way of issuing a writ, especially when an explanation was called for and submitted by the Board and presumably considered by the Inspector.

(4) It is not for a High Court to embark on an enquiry into the merits in *certiorari* proceedings.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a Writ of *Certiorari* calling for the records in R. O. C. No. 57521 of 1949-H (3) on the file of the Inspector of Local Boards, and Municipal Councils, Madras and quash the order dated 30th March, 1950, and made therein directing the supersession of the petitioner Panchayat Board for a period of one year from the date of the Notification in the *Fort St. George Gazette*.

B. Lakshminarayana for Petitioner.

The Government Pleader (*P. Satyanarayana Raju*) and Srimathi *J. Sithamaha lakshmi* for Respondents.

The Order of the Court was made by

The Chief Justice.—This is an application by the Panchayat Board of Kankipadu in the Vijayawada Taluk, Krishna district, respresented by its President, praying for the issue of a Writ of *Certiorari* to quash the order of the Inspector of Municipal Councils and Local Boards dated the 30th March, 1950, purporting to supersede the Kankipadu Panchayat Board under section 45-A (1) of the Madras Local Boards Act for a period of one year with effect from the date of publication of the notification in the *Fort St. George Gazette*. The order was passed by the Inspector of Local Boards in exercise of the powers delegated to him by Government under section 233 of the Act. The reason for his action is contained in the preamble to the order which runs thus :

" Whereas in the opinion of the Inspector of Municipal Councils and Local Boards the Kankipadu Panchayat Board in the Vijayawada Taluk of Krishna District is incompetent to perform the duties imposed on it by law."

It was not disputed by learned counsel for the petitioner that the power of the Local Government under section 45-A (1) of the Act was delegated to the Inspector of Local Boards. Among the papers filed by him in this Court, there is an order of the Government dated 19th January, 1940, under which the Government delegated to the Inspector of Municipal Councils and Local Boards, *inter alia*, the power under section 45-A of the Act to supersede a Panchayat and all the powers in connection therewith which are conferred on the Provincial Government by that section. Something was said about the effect of Madras Act XI of 1946 but nothing turns on that Act because, as the learned Government Pleader informed us, it never comes into operation and also for the reason that even if it did come into operation, it would cease to be on the statute book two years after it came into force as it was an Act made by the Governor under section 93 of the Government of India Act, 1935.

Learned Counsel for the petitioner argued that under section 45-A (1), before the Inspector could pass an order of supersession, he had to form independently an opinion that the conditions in section 45 have been fulfilled in respect of the particular Panchayat Board in question. Under section 45-A read with section 45, it is the opinion of the Provincial Government and therefore the opinion of the Inspector of Municipal Councils after delegation that really matters and in this case, the Inspector was not given an opportunity to form his own individual opinion on the material available to him without interference by any outside individual or authority. So the argument of the petitioner's counsel ran. If there is evidence, he contended, that there has been an interference with his right to form his own independent opinion, then his order cannot be said to have been made *bona fide* and such an order can be quashed by this Court. The gravamen of the charge consists in the fact that sometime before proceedings under section 45-A (1) commenced by the issue of a notice on 21st December, 1949, to show cause why the Panchayat Board should not be superseded, the Government had expressed their view in unequivocal terms

ed to the Panchayat Board had been sent, wanted further time to submit their ort. The District Panchayat Officer, Krishna, was requested by the Inspector of al Boards to offer his remarks urgently on the reply of the Panchayat Board and in evidence that the Officer offered his remarks on 12th January, 1950 and the Inspector of Local Boards endorsed his remarks. They were both obviously supersession. The Inspector forwarded the file once again to the Govern- t and the Government passed an order on 14th March, 1950, accepting the mmendation of the Inspector that the Panchayat Board should be superseded permitting the Inspector to proceed to take further action in the matter accord- y. On 30th March, 1950, the notification superseding the Panchayat Board made, and it was published on 11th April, 1950, in the *Fort St. George Gazette*.

We must confess to an impression left on us that, having delegated their power er section 45-A of the Act to the Inspector of Municipal Councils and Local rds, the Government interfered with the actual exercise of such powers by the pector in this case. There was an enquiry by the Panchayat Officer. He submitted his report and, in the ordinary course, the Inspector would have self proceeded to take necessary action under section 45-A (1) of the Act. It is rtunate that he was not, as it were, allowed to do so. The file was taken away his office by the Government and sent back with a demi-official communi- on indicating that the Government would desire the Inspector to take further s to supersede the Panchayat Board. Ordinarily, not only should such inter- nce be deprecated, but an order passed after such interference, would have also quashed as an order not made in the *bona fide* exercise of the powers con- ed on the Inspector by delegation. We, however, do not propose to do so for reasons. It appears clear from the file that though official orders had not actually passed by the Inspector, the Inspector himself proposed to take s for supersession. The report of the Panchayat Officer suggested drastic on as necessary having regard to the irregularities which he discovered after iry. The fact that the Government set its seal of approval on the action which Inspector had decided upon should not, we think, render the order eventually ed as an order not passed *bona fide* in the exercise of the powers of the Inspector. r all, the Government was the body entrusted with powers of supervision over administration of local bodies by the statute itself. No doubt, for the sake of

Another reason why we have refrained from interfering with the order is that after the preliminary notice was issued, an explanation was submitted by the Panchayat Board and presumably it was considered and both the District Panchayat Officer and the Inspector of Local Boards came to the conclusion that there was a case for supersession. The fact that finally the Government also agreed with them would not render their opinion any the less their own opinion. We are therefore unable to hold that the order of the Inspector was not an order made *bona fide* in the exercise of his powers.

We cannot, however, refrain from expressing our surprise that long before the order of supersession had been made, and in fact long before even the preliminary notice under section 45-A (1) had issued, the Government should suggest a particular individual to the Inspector to be appointed as the Special Officer after supersession, practically indicating that the supersession would follow as a matter of course. But we do not think that the order itself would be vitiated because of this action of the Government.

Learned counsel for the petitioner tried to make some point out of the fact that the Inspector did not wait for a reply from the District Board, Krishna, to which the notice under section 45-A (1) was sent in accordance with the statutory provision. The records, however, show clearly that the District Board did not send their reply within the time fixed in the notice, *viz.*, two weeks from the date of receipt of the notice. It is clear that even as late as 28th January, 1950, no communication had been received from the District Board. The Inspector is not bound to wait indefinitely for a reply from the District Board even though the time fixed under the notice had expired.

It was contended by the petitioner's learned counsel that the Inspector did not make any inquiry as regards the several charges made against the Board in the preliminary notice and therefore the order was bad. We do not see anything in the material provisions of the Act which compels the Inspector to make an inquiry. He did call for a report from the Deputy Panchayat Officer and he must have considered that report as well as other material available to him. No doubt, the order of the Inspector is very cryptic and is practically a reproduction of a part of section 45 (1) of the Act. The Officers on whom statutory powers are conferred should realise that there should be a substantial compliance with the conditions laid down by a statute before they can validly exercise the powers conferred on them. It is not sufficient merely to reproduce the section under which they are acting. There must be something *ex facie* the order passed by them to show that there are reasons for the order and that the conclusion is based on materials before them. But merely because the order of the Inspector could have been more full, we do not think it can be said that the order as it stands is without jurisdiction or that there is any error apparent on its face.

So far as merits are concerned, we have recently held that it is not for this Court in *certiorari* to embark on an enquiry and find whether particular charges have or have not been made out. The same view was taken by a learned Judge of this Court in *Muhammad Bhukari* v. *Inspector, Municipal Councils*[1].

The application is therefore dismissed.

V.P.S. *Petition dismissed.*

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1. A.I.R. 1997 Mad. 801.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

B. Revanna Basanna and others .. *Petitioners**

v.

B. Adeppa and others .. *Respondents.*

Court-fees—Suit for partition—Some of the family properties alienated, but in the possession of the family—Court-fee payable.

In a suit for partition of the family properties some of which were alienated, but were in the possession of the family, on the question whether separate court-fee is payable on the basis of a prayer for possession of the alienated properties,

Held, no separate court-fee is payable as the properties are in the possession of the family and it cannot be deemed that such possession was on behalf of the alienee.

Ramaswami v. *Rangachari*, (1940) 1 M.L.J. 32 : I.L.R. (1940) Mad. 259 (F.B.), followed.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court, Bellary, dated 31st January, 1948, in Check Slip No. 961 of 1947 in O.S. No. 47 of 1947.

B. V. Ramanarasu for Petitioners.

The Government Pleader (*P. Satyanarayana Raju*) for the State.

Respondents not represented.

The Court delivered the following

JUDGMENT.—This is a petition to revise the order of the District Judge of Bellary calling upon the petitioners to pay additional court-fee.

The suit was for partition. The plaintiffs are the sons of the first defendant. The second defendant is an alienee of some of the joint family properties from the first defendant under a sale-deed dated, 10th July, 1943. In respect of this alienation it is alleged in the plaint that the alienee, *viz.*, the second defendant is not in possession of the properties alienated to him and that they continue to be in the possession and enjoyment of the family. It is also alleged that the sale

"is not true, genuine, valid or binding on the plaintiff's share of the properties,"

that there was no legal necessity for the sale, that the family derived no benefit by the sale, that the transaction "is void, inoperative and invalid" so far as the plaintiffs are concerned, and that the document of sale is "sham, fictitious and collusive and cannot bind the share of the plaintiffs". The plaintiffs did not pay any separate court-fee in respect of this alienation. The court-fee examiner took the view that the properties sold to the second defendant must, notwithstanding the allegation in the plaint that they are in the possession of the joint family, be deemed to be in the possession of the family only on behalf of the alienee and that therefore court-fee should be paid as for recovery of possession. He purported to found his objection on the decision in *Parakala Rao* v. *Subbarao*[1]. The learned District Judge upheld this objection of the court-fee examiner and called upon the plaintiffs to pay additional court-fee. They now seek to have the order vacated.

Mr. Ramanarasu, the learned advocate for the petitioners, referred me to the Full Bench decision in *Ramaswami* v. *Rangachari*[2]. That was a case in which as many as 19 different transactions were attacked. By virtue of some of those transactions possession of the properties had been given to the alienees. To some of the other transactions the plaintiff therein was *eo nomine* a party. In some other transactions, though the alienation was by the manager of the family the plaintiff was not *eo nomine* a party, and it was alleged in the plaint that the property continued to be in the possession of the family. In respect of this third class of cases the Court held that separate court-fee was not payable. The learned Chief Justice who delivered the judgment of the majority of the Bench observed :

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* C. R. P. No. 536 of 1948. 1st November, 1950.

1. (1946) 1 M.L.J. 411.

2. (1940) 1 M.L.J. 32 : I.L.R. (1940) Mad. 259 (F.B.).

"In such cases even if the plaint contains a prayer for a declaration or cancellation, there is good reason for holding it to be one for a purely identical, but unnecessary, relief. As I have indicated there is no such prayer in the plaint and in the light of the principles explained there is no justification for implying them and then demanding a fee for it. Nor can I see any force in the argument that the position is altered by the joinder in the suit of the parties to the transactions who are interested in supporting them . . . . . I am unable therefore to appreciate the argument that, by reason of his impleading the several creditors, the plaintiff must be deemed to have asked for declarations in respect of each of the transactions impugned and must pay a separate court-fee as regards each one of them."

The case before me falls within the scope of these observations and no separate court-fee would therefore by payable.

On behalf of the learned Government Pleader it was argued that when the plaintiffs made the various allegations in respect of this alienation which have been summarised above they were albeit indirectly, in effect, and substance, asking for a declaration that the sale deed executed by their father did not bind them and that therefore they should be required to pay court-fee on it. There is a good deal to be said for this point of view. It is also the view which Abdur Rahman, J., who dissented on this point from the rest of his colleagues in the Full Bench, took in the above case ; but he was in a minority of one, and as the decision of the Full Bench holds the field, I must follow it. On behalf of the Government reliance was placed on *Parakala Rao* v. *Subbarao*[1], a decision on the strength of which the court-fee examiner raised his objection. In that case the plaintiffs sued for partition and possession of joint family properties. The alienees of some of the joint family properties were impleaded as defendants. The plaintiffs averred that that father and others had fraudulently executed deeds purporting to alienate the family properties and they also said that notwithstanding those alienations they and their father were in joint possession of the properties. Nevertheless, Happell, J., who heard that case decided that in respect of the properties which had been alienated court-fee was payable, as though the plaintiffs had asked for their possession. He gave this reason for his view :

"In the present case, however, the plaintiffs have given no particulars as to the alienations, and as the court-fee examiner has pointed out, in the absence of such particulars the first defendant must be deemed to be in possession on behalf of the alienees. That being so, the plaintiffs cannot be regarded as being in joint possession, and court-fee has to be paid under section 7 (v)."

With great respect I am unable to understand how the alienor can be or must be deemed to be in possession on behalf of the alienees. He was not their servant or their agent or their lessee. He was not a coparcener with them ; nor a co-owner. After the alienation had been effected, there was absolutely no jural bond between the first defendant and the alienees. Notwithstanding the attempt of the learned Judge to bring his decision into line with *Ramaswami* v. *Rangachariar*[2], I consider that it is really at variance with that decision. Following the Full Bench case I hold that no extra court-fee is payable in respect of the alienation in question.

The revision petition is therefore allowed with costs against the Government.

V.P.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Mundlapudi Durgaprasadarao and others ... *Petitioners**

v.

C. Sundar Bhutt and another ... *Respondents.*

Penal Code (XLV of 1860), section 183 and Criminal Procedure Code (V of 1898), section 195 (1) (a), (b), (c)—Complaint whether can be filed by Court for an offence under section 183, Penal Code.

No complaint for an offence under section 183 of the Penal Code can be filed by Court, as section 476, Criminal Procedure Code, applies only to cases falling within section 195 (1) (*b*) and (*c*) of the Criminal Procedure Code and section 183, Penal Code, does not fall under section 195 (1) (*b*) or (*c*) but only under section 195 (1) (*a*).

1. (1946) 1 M.L.J. 411.
2. (1916)-1 M.L.J. 32 : I.L.R. (1940) Mad. 259 (F.B.).
* C. R. P. No. 1809 of 1948. 7th November, 1950.

Petition under section 115 of Act V of 1908, and section 224, Government of India Act, praying that the High Court will be pleased to revise the order of the District Court of Krishna at Masulipatam, dated 26th November, 1948, in C.M.A. No. 16 of 1948 preferred against the order of the Additional Subordinate Judge's Court, Vijayawada, in C.M.P. No. 404 of 1947 in S.C.S. No. 117 of 1947.

Neti Subramaniam and *R. Sitharaman* for Petitioners.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

Respondents not represented.

The Court delivered the following

JUDGMENT.—No complaint for an offence under section 183, Indian Penal Code, can be filed by a Court, as section 476, Criminal Procedure Code, applies only to cases falling within section 195 (1), clauses (*b*) and (*c*) of the Criminal Procedure Code. This excludes cases falling under section 195 (1), clause (*a*) and section 183, Indian Penal Code, falls under section 195 (1) (*a*). The trial Court therefore cannot file this complaint as Court.

The complaint is therefore directed to be withdrawn. It is open to the Amin or the Principal Subordinate Judge as public servant to whom the Amin is subordinate to file the complaint.

K.C. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE CHANDRA REDDI.

Palaniswami Goundan .. *Accused.**

Penal Code (XLV of 1860), sections 302 and 307—Murder and attempt to murder—Accused's mind not normal—Indications of hallucination or frenzy—Reduction of sentence of death to one of transportation for life.

Where the accused murdered his wife and his father and caused injuries to his son which might have proved fatal and there was no valid plea in defence which could in any way affect the guilt, on the question whether the extreme penalty of the law should be inflicted in view of certain circumstances indicating the accused's lack of normal mentality,

[a]*Held*, that though it could not be predicated that he was unsound and did not know the nature of the act as well as the circumstances that he was committing a crime, still as it might be said that some kind of hallucination or frenzy might have been working in his mind, the ends of justice would be met if the sentence of death was reduced to one of transportation for life.

Trial referred by the Court of Session of Salem division for confirmation of the sentence of death passed upon the said prisoner in C.C. No. 112 of 1950 on 28th October, 1950 and appeal by the said prisoner.

V. N. Srinivasa Rao as *amicus curiæ* for Accused.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

The Judgment of the Court was delivered by

Govinda Menon, J.—The appellant has been convicted for having murdered his wife Pappayammal and his father Chinnappa Goundan and caused injuries to his son Perumal with the intention of causing his death. For the double murder he has been sentenced to death by the learned Sessions Judge. There can be no doubt whatever on the evidence before the lower Court, that it was due to the injuries inflicted by the appellant that both Pappayammal and Chinnappa Goundan died.

[After discussing the facts his Lordship proceeded.]

We are therefore of opinion that the learned Sessions Judge was perfectly right in convicting the appellant of the offence under section 302, Indian Penal Code, for the murder of his wife and father and under section 307 for attempting to cause the death of his child Perumal.

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*R. T. No. 123 of 1950. 8th January, 1951.
(Cri. A. No. 821 of 1950).

The only point that requires consideration is whether the extreme penalty of the law should be inflicted in the circumstances of the case. The learned Sessions Judge himself was of opinion that the acts of the appellant were hardly those of a normal and sane person. There was no motive disclosed in the evidence as to why those ghastly and brutal murders should have taken place. The evidence of the appellant's mother P.W. 5 was to the effect that the appellant and his wife were not quarrelling and they were leading normal lives. Nothing has been elicited as to why the appellant should have murdered his own father or attempted to kill his child Perumal. There is evidence elicited in the cross-examination of P.W. 5 that the appellant used to sit often with a dazed and vacant look during the period he was not working. At that time he would not talk to any one. Those things indicate that the appellant did not have the normal mentality of an ordinary and sane person and though it cannot be predicated from the evidence that he was unsound or that he did not know the nature of the act as well as the circumstance that he did not know that he was committing a crime, it may be said that some kind of hallucination or frenzy might have been working in his mind and such being the case it seems to us that the ends of justice would be met if the sentence of death is reduced to one of transportation for life. We feel that the murder must have been committed in some frenzied mood or something in the nature of an abnormal state of mind. Subject to the above modification the appeal is dismissed.

K.C. ———— *Sentence reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

T. K. Shanmugasundara Mudaliar .. *Appellant**

v.

S. C. Sivalinga Mudaliar and another .. *Respondents.*

Contract Act (IX of 1872), section 63—Suit on a promissory note—Agreement to remit in futuro pleaded in defence—Admissibility—How far a valid defence.

In a suit on a promissory note the defendants pleaded an agreement to remit *in futuro* as a bar to the suit.

Held, that though the agreement pleaded being not contemporaneous with the execution of the note but subsequent thereto and therefore capable of being proved without the provisions of section 92 (4) of the Evidence Act being offended against, such proof would be unavailing to the defendants because such an agreement to remit *in futuro* requires consideration to be a binding contract.

Balasundara Naicker v. *Ranganadha Iyer*, (1929) I.L.R. 53 Mad. 127, followed.

Appeal against the judgment and decree of the City Civil Court, Madras, in O.S. No. 1005 of 1948, dated 3rd March, 1949.

C. Narasimhachariar and *M. E. Rajagopalacharia* for Appellant.

U. S. Ramaswami Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit for the recovery of the amount due under a promissory note executed by the defendants in favour of the plaintiff on 2nd March, 1948, for Rs. 2,750 payable with interest at 9 per. cent per annum. The answer of the defendants was that although they had executed the promissory note it was unenforceable on account of an agreement in bar of the suit, which they detailed as follows in their written statement :

"(2) The plaintiff along with Rudrakoti Mudaliar, Kuppuswami Mudaliar and Arumuga Mudaliar are carrying on business in partnership under the name and style of Ganapathi Palaighat Company. They owned a casuarina tope planted on land belonging to the local temple. The first defendant is carrying on business in firewood in Madras and the second defendant is only working under him. In or about February, 1948, the plaintiff and his partners agreed to sell the tope to the first defendant for Rs. 7,750 with an advance of Rs. 500. At this time there was considerable dispute between the trustees of the temple and the villagers that land belonging to the temple was leased out for a nominal rent in the name of a son of one of the trustees and they sub-leased it to the plaintiff and his partners and made a huge secret profit. There were also control restrictions

* C. C. C. A. No. 55 of 1949. 3rd October, 1950.

bout the sale of firewood. In this state of things the plaintiff and his par eparate agreement showing that the sale of the tope was for Rs. 2,000 only s Rs. 5,000 and Rs. 2,750 making it appear that the pronotes were executed fc orrowed for business. Accordingly the second defendant herein executed a f the tope in favour of Arumuga Mudaliar. Two pronotes, one for Rs. 5,000 d 948, and the suit pronote for Rs. 2,750, dated 3rd March, 1948, were also exe lants, the former in favour of Rudrakoti Mudaliar and the latter in favour of t was then distinctly agreed and understood between the parties that in ca ustained any loss owing to relaxation of control and other causes the plaintiff an emit Rs. 2,000 out of the sale price.

(3) Within a month or two after the sale all control restrictions were efendants sustained very heavy loss. The plaintiff and his partners in the pr anchayatdars reiterated the original agreement that they would forego Rs. 2,(alance of Rs. 5,500 only. The defendants paid various amounts from time o Rs. 5,000 and the pronote for Rs. 5,000 was returned to him on 2nd Decembe he suit pronote the plaintiff agreed that on payment of Rs. 750 only he woul ronote and return the same to the defendants. As the defendants could not m mmediately there was some delay. In the meanwhile at the instigation of ot ot known the plaintiff sent a notice, dated 11th November, 1948, demanding efore the defendants had time to reply the plaintiff has instituted this suit on 1;

(4) These defendants submit that though there was a recital in the pr as agreed between parties at the time of the execution of the pronotes that n harged and the terms will not be enforced. Rs. 5,000 was paid without interest a

The issue framed on the pleadings was : " whether the agreemen nd valid." As the suit was taken up for trial, there was a preli aken on behalf of the plaintiff that no proof of such agreement c y the defendants in bar of his suit. The objection found favour elow who accordingly decreed the suit as prayed for. It is co ppeal by Mr. Narasimhachariar that the view taken by the Court

Learned counsel places strong reliance on a ruling of this n *Mathew Henry Abraham* v. *The Lodge "Good Will"*[1], in support of he judgment of the Court below. In that case the learned D ellary dismissed the suit there in question brought by Mr. He xecutor of Mathew Abraham for recovery of money due on a xecuted on the 12th November, 1891, in the latter's favour by cert f the Lodge "Good Will", No. 465, of Bellary, on the ground t locument marked as Exhibit IV in the case and executed by M n the 21st February, 1902, was not operative as a release, yet, egarded it as such, being led so to regard it by the conduct of M t the time of its execution and completed the building of the n the faith of such belief, the plaintiff was estopped from enforcin stoppel having been pleaded in the suit or raised by the issues or at y any evidence, this Court held that the District Judge was wro he suit on the ground of estoppel. The real question which there Munro and Abdur Rahim, JJ.) had to consider was whether th vas right in holding that Exhibit IV was not a good and effecti udgment of the Court was delivered by Abdur Rahim, J., who at eport sets forth the document in these words in which it ran :

"Know all men by these presents that I, Mathew Abraham, proprietor t Co., Bellary, do covenant and agree with the Worshipful Master and Ward Vill No. 465, for the time being, that if the Masonic Lodge building which ha esuscitated, I shall have no claim, whatever, upon the building or any of the Masonic Lodge."

Dealing with the argument that the document could not be treated ecause there was no mention of the promissory-note there, the vhere a deed of release was silent as to the claim released, evid dmissible under section 95 of the Evidence Act to show what cla o be released. After coming to the conclusion that the promi vas intended to be released by the document in question the Co onsider the further question of law which is the one materia

1. (1910) 20 M.L.J. 389 : I.L.R. 34 Mad. 156.

case—whether under section 63 of the Indian Cont could be regarded as invalid. The Court ruled, bearing upon the point, that it was not the intentio section 63 of the Contract Act to depart from the En contingent on the happening of a future event ar are valid under the Contract Act, the only differ and the Indian Law being that the former requi releases not under seal, while the Contract Act req case of releases.

The distinction sought to be made by Mr. of this decision between a remission *in præsenti* wh future event occurs and an agreement to remit consideration, if it is to be a binding contract is n tenuous it may be on the facts of a particular case to The distinction in my opinion is nonetheless real in this connection be made to Pollock and Mulla's C and Specific Relief Acts (7th edition) at page 339 :

"An agreement to remit *in futuro* clearly requires conside But this must be distinguished from a remission or dispensa happening of a future event. In such a case the remission is the event occurs. The holder of a promissory note from the writing to make no claim 'if the lodge building which has b cannot sue on his note after the lodge is rebuilt. It would

To turn to the agreement pleaded in the w case in order to see how far the ruling relied upon l we have first to take note of the fact that so far as graph 2 is concerned, it is something contemporar promissory note and directly offends against secti Act. So far as the agreement referred to in parag is concerned, it is said to have been a reiteration of plaintiff and his partners would forego Rs. 2,0 Rs. 5,500. Assuming that notwithstanding the r written statement to a reiteration of the original ag after the sale, the agreement referred to in paragra thing distinct and different from that referred to statement, there still remains the obstacle in the w the allegation in paragraph 3 that as regards the agreed that on payment of Rs. 750 only he woul and return the same to the defendants. The plea ment is therefore one of agreement to remit and n between the two is lucidly drawn by Ramesam, J him on behalf of the Court consisting of himself *Naicker* v. *Rangaditha Aiyar*[1]. At page 135 of the Re of the learned Judge which are relevant :

"What section 63 of the Contract Act permits is not remission. That is, when a portion of the sum is paid, the cr 'You need not pay any more.' This last thing is therefore the extinguishing a debt, though on receipt of a smaller sum tha substituting different terms for the original terms which will obligation but an extinction of the obligation itself. Though is generally effected by creditors on the importunity or the r said to amount to a contract which binds two persons and pu there is nothing more to be done, the whole thing is practically The request of the debtor is immaterial, and in law it is not in a contract, but merely a liberal act on the part of the of the Privy Council in *Firm Chhuwa Mal-Ram Nath* v. *Firm* the decision in *Abaji Sitaram* v. *Trimbak Municipality*[2] sh section 63 is not an agreement between two persons, it is rea his will and pleasure the obligation of another."

1. (1929) I.L.R. 53 Mad. 127. 2. (1928) 55 M.L.J. 1 : L.R. 55 I.A. 154 : I.L 3. (19

In view of this distinction I am clearly of opinion that although the agreement pleaded in paragraph 3 of the written statement being not contemporaneous with the execution of the promissory note but subsequent thereto is capable of being proved without the provisions of section 92 (4) of the Indian Evidence Act being offended against, such proof must of course be unavailing to the defendants.

Learned counsel has drawn my attention to a decision of Venkataramana Rao, J., reported in *Lakshminarasimha Rao* v. *Raghavamma*[1]. There in answer to a suit on a mortgage, the mortgagor pleaded an arrangement by which the mortgagee was to enjoy one item of the mortgaged property for five years in full satisfaction of the mortgage. The plaintiff mortgagee contended that the arrangement was inadmissible in evidence under section 92 (4) of the Evidence Act. It was held that the arrangement was admissible, for section 92 (4) of the Evidence Act prohibits only the admissibility of a subsequent oral agreement to rescind or modify any contract, grant or disposition of property which is by law required to be in writing or which has been registered according to the law in force for the time being as to the registration of documents, but does not preclude the admissibility of any transaction or contract in satisfaction or discharge of the obligation arising thereunder. No question as to the legal inefficacy of a mere agreement to remit as contrasted with an actual remission fell to be considered in that case.

One other decision which has been cited to me is *Krishnaswami Rao* v. *Srinivasa Desikan*[2]. That decision of Varadachariar and Horwill, JJ., is practically to the same effect as the decision in *Lakshminarasimha Rao* v. *Raghavamma*[1], already dealt with. There what the learned Judges decided appears from the head note which is as follows :

> " Section 92 of the Evidence Act does not preclude evidence being let in in proof of an oral agreement, otherwise valid and enforceable, under which the mortgagee orally agreed that the mortgage amount should be settled at a certain figure—somewhat less than the amount due on the mortgage on a proper calculation—and that in full discharge or satisfaction of the claim under the mortgage deed he would take certain properties by way of a sale for the amount. This arrangement does not contradict, vary, add to, or subtract from the mortgage document."

The words " otherwise valid and enforceable " occurring in the sentence quoted are worth noting, and if it is perfectly clear, as I have already held it is, that in view of the law as laid down in *Balasundara Naicker* v. *Ranganatha Aiyar*[3], an agreement to remit has no legal efficacy about it, no useful purpose will be served by allowing evidence to be adduced of an agreement which is bound to fail. In the case in *Krishnaswami Rao* v. *Srinivasa Desikan*[2], it is true that the question whether even if it should be found that the agreement pleaded was true and valid, the agreement could be a defence to the action, when admittedly the agreement remained executory, was left expressly open. In my opinion the evidence of the agreement sought to be adduced by the defendants was rightly ruled out by the learned Judge below.

I may add one word in conclusion with reference to the agreement referred to in paragraph 4 of the written statement, namely, that notwithstanding the recitals in the promissory notes for interest the parties at the time of their execution agreed that no interest should be charged. That clearly is an agreement contemporaneous with the execution of the promissory note which varies the terms of the original contract between the parties as reduced to writing. Clearly it is within the mischief of section 92 of the Evidence Act, and there could be no evidence in proof of it. As ruled by Lord Wright in delivering the judgment of the Judicial Committee in *Rowland* v. *Administrator-General*[4] :

> " It is necessary to distinguish a collateral agreement which alters the legal effect of the instrument from an agreement that the instrument should not be an effective instrument until some condition is fulfilled, or to put in another form, it is necessary to distinguish an agreement in defeasance of the contract from an agreement suspending the coming into force of the contract contained in the promissory note."

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1. (1936) M.W.N. 205.
2. (1936) 71 M.L.J. 850.
3. (1929) I.L.R. 53 Mad. 127.
4. (1938) 2 M.L.J. 469 : A.I.R. 1938 P.C. 198 (P.C.).

The agreement as to the non-liability for interest pleaded in paragraph 4 of the written statement is, in my opinion, one which falls under the former category and is outside the latter category of agreements referred to by Lord Wright in that case. For the reasons indicated in the foregoing I am clearly of opinion that the evidence sought to be adduced by the defendants was rightly shut out and the suit was rightly decreed by the Court below.

The appeal fails and is dismissed with costs.

V.P.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE BASHEER AHMED SAYEED.

Chunchu Narayana and others .. *Petitioners* *

v.

Karrapati Kesappa .. *Respondent.*

Constitution of India (1950), *Article* 134 (1) (c)—*Leave to appeal to Supreme Court under—When and under what conditions should be given.*

The conditions necessary to be present for the High Court to grant leave to appeal to the Supreme Court under Article 134 (1) (*c*) of the Constitution are practically the same as the conditions which ought to exist for the Supreme Court to grant special leave to appeal. Such leave can be granted only in those cases where special circumstances are shown to exist and unless it is shown that exceptional circumstances exist and that severe and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against, leave to appeal cannot be granted.

A decision by High Court that in proceedings under section 145, Criminal Procedure Code, the preliminary order should be passed immediately on the receipt of the application and that if there is any delay on the part of the Magistrate in passing such an order, such delay on the part of the Court should not affect the rights of parties, is not a point of such a general and public importance as to warrant the granting of leave to appeal to the Supreme Court against it.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to grant leave to appeal to the Supreme Court of India against the judgment of the High Court in Crl. R. C. No. 566 of 1950[1] presented to revise the order of the Court of the District Magistrate, Gooty, in M.C. No. 13 of 1950.

Mrs. J. Sithanahalakshmi and *N. Ramamohan Rao* for Petitioners.

M. S. Ramachandra Rao for Respondent.

The Public Prosecutor (*V. R. Rangaswami Aiyangar*) for the State.

The Order of the Court was made by

Govinda Menon, J.—The petitioner seeks permission to appeal to the Supreme Court against the judgment of this Court in Crl. R. C. No. 566 of 1950[1] under Article 134 (1) (*c*) of the Constitution of India, which is in the following terms :

"An appeal shall lie to the Supreme Court from any judgment or final order or sentence in a criminal proceeding of a High Court in the territory of India, if the High Court certified that the case is a fit one for appeal to the Supreme Court."

The words of this article are analogous to the provisions of section 109 (*c*), Civil Procedure Code, which says that an appeal shall lie to the Supreme Court from any decree or order if the case is certified as a fit one for appeal to the Supreme Court. Since Article 134 (*c*) has come into force only about a year ago, our attention has been invited only to one or two cases dealing with the interpretation of Article 134 (1) (*c*), but various cases on the applicability or the interpretation of section 109 (*c*), Civil Procedure Code, have been brought to our notice and in the absence of any positive authority we should be guided by what the previous decisions have laid down regarding the criterion to be adopted in granting leave.

* Crl. M. P. No. 2295 of 1950. 4th January, 1951.

1. (1951) 1 M.L.J. 102.

with powers to certify, or in other words to grant leave to appeal. The learned Chief Justice discussed the dictum of Lord Watson in In re *Abraham Mallory Dillet*[3] as well as that of Lord Dunedin in *Mohinder Singh* v. *Emperor*[4]. Reference was also made to the observations of the Judicial Committee in *Muhammad Nawaz* v. *Emperor*[5]. No argument has been advanced before us to show that we should not follow the decision of the learned judges. If that is so, the conditions necessary to be present for the High Court to grant leave are practically the same as the conditions which ought to exist for the Supreme Court to grant special leave, and if the Supreme Court is to be guided by what is laid down by the Privy Council in In re *Abraham Mallory Dillet*[3], it seems to us that this case does not present features necessary for the granting of such a leave.

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1. A.I.R. 1931 Mad. 642.
2. A.I.R. 1950 Orissa 235.
3. (1887) 12 A.C. 459.
4. (1932) 64 M.L.J. 77 ; L.R. 59 I.A. 283 ; I.L.R. 13 Lah. 479 (P.C.).
5. (1942) 1 M.L.J. 5 : I.L.R. (1942) Lah, 36 (P.C.).

Recently a Bench of this Court to which one of us was a party in In re *Mandalapu Paduyya*[1], had considered the scope of Article 134 and laid down that as the Supreme Court of India will not interfere with the course of justice in criminal cases in the free fashion of a fully constituted Court of Criminal appeal and it will interfere only in special cases of great public or private importance or if injustice of a serious and substantial character has occurred, the High Court cannot grant leave to appeal, unless those circumstances mentioned exist. In that decision a number of cases were cited and discussed and, therefore, it is unnecessary for us to discuss them again. We may also, in this connection, refer to another decision in *Pritam Singh* v. *The State*[2].

It does not seem to us that the point decided in this criminal revision case is of such general and public importance or is likely to occur very often that we should grant leave to appeal to the Supreme Court. After all it is not everyday that a Magistrate, who is approached under section 145, Criminal Procedure Code, does not pass a preliminary order immediately on the receipt of the application, and what we have decided is that, as it is the duty of the Magistrate to pass a preliminary order without delay after the receipt of the application, the delay of the Court should not affect the rights of parties. We are of opinion that the point under consideration is not of such general or even public importance as to warrant granting of leave to appeal.

This petition is, therefore, dismissed.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE CHANDRA REDDI.

S. T. M. Vyravan Chettiar .. *Appellant**

v.

R. M. Rayalu Ayyar Nagaswami Ayyar & Co., through one of its partners N. M. R. Venkatakrishna Ayyar .. *Respondent.*

Civil Procedure Code (V of 1908), section 48—Computation of the period of twelve years—Principles governing—Limitation Act (IX of 1908), Article 182 (5) and Explanation I—Joint decree—Test—Mortgage decree against father and money decree against son—Final order in execution application against son—If would save limitation against father—Constructive res judicata*—Applicability to execution proceedings—Civil Procedure Code (V of 1908), section 65—Sale price—Date on which it should be credited.*

Under section 48, Civil Procedure Code, the period of 12 years should be computed from the date of the appellate decree as the original decree would merge in that of the appellate Court.

As the words " where there has been an appeal " in Article 182 (2) of the Limitation Act do not cover an appeal from an order which is passed in a collateral proceeding or which has no direct or immediate connection with the decree in execution, *ex hypothesi* such an order in appeal cannot be taken as a starting point for computing the period of 12 years under section 48, Civil Procedure Code.

The order of the appellate Court must be a decree within the meaning of section 2 (2) Civil Procedure Code.

The period of 12 years under section 48, Civil Procedure Code, should be computed from the date of the decree and not from the date when that decree is amended.

An execution application filed within 12 years from the date of the decree can be amended in proper cases even thereafter. For the purpose of section 48, Civil Procedure Code, an order dismissing an incompetent appeal cannot give a fresh starting point.

The words in Explanation I to Article 182 of the Limitation Act are clear and they can be applied only to decrees that have been passed jointly against more persons than one. The question in each case is whether the decree is a joint decree within the meaning of the Explanation. If there is a joint decree against all the defendants, the fact that the same decree gives a separate relief against one of the defendants does not make it any the less a joint decree within the meaning of the Explanation. Courts cannot introduce equitable considerations in construing the express words used in the Explanation and hold that decrees which are in form and substance separate decrees are in effect a joint decree within the meaning of the Explanation. Where in respect of a mortgage executed by a father for himself and as guardian of his son a suit is brought and a decree is passed against the father

1. (1950) 2 M.L.J. 569.
2. (1950) M.W.N. (Cri.) 236.

* A. A. O. Nos. 127 and 128 of 1947. 10th October, 1950.

alone but in appeal while the decree is confirmed against the father a simple money decree is passed against the son to the extent of his share in the family properties, there are really two separate decrees, one a money decree and the other a mortgage decree. They are passed against different defendants and they became executable at different times and against different properties. The fact that the debt was the same and that any payment towards or in discharge of the money decree or the mortgage decree, as the case may be, might *pro tanto* discharge the other in itself cannot be a ground for holding both the decrees as one joint decree against the defendants. So the final order on an execution application against the son would not save the bar of limitation against the father.

As the principles of constructive *res judicata* apply to orders in execution, if a plea that an execution application is barred by limitation is not raised and execution has been ordered it cannot be raised again when a later execution application is filed.

The sale price fetched at an execution sale should be credited towards the decree on the date of the sale itself and not on the date of the confirmation of sale. When a decree-holder purchases the property, he becomes the owner of the property from the date of the sale itself and it follows that the debt is also *pro tanto* reduced from that date. The fact that the purchaser did not take possession could not confer on him higher right than that which flows from section 65 of the Civil Procedure Code.

Appeals against the orders of the Subordinate Judge's Court of Mathurai, dated the 8th January, 1947, and 9th November, 1946, respectively, in E. P. Nos. 76 of 1946 and 158 of 1944, respectively, in O. S. No. 114 of 1925.

C. S. Rama Rao Sahib for Appellant.

K. S. Ramabhadra Aiyar for Respondent.

The Judgment of the Court was delivered by

Subba Rao, J.—This is an appeal against the order of the Court of the Subordinate Judge of Madura in E.P. No. 76 of 1946. The facts relevant for appreciating the questions raised may be briefly narrated. Thothan Chetti is the father of Vyravan Chetti. Shanmugham Chetti is the son of Vyravan Chetti. Vyravan Chetti executed a mortgage in favour of the plaintiff in September, 1921, for himself and as guardian of his son, the 2nd defendant, for a sum of Rs. 50,000. The mortgagee instituted O.S. No. 114 of 1925 against Vyravan Chetti and his son and obtained a preliminary mortgage decree against the share of Vyravan Chetti on 16th January, 1930. Final decree was passed on 30th September, 1930. The suit against his son, the 2nd defendant was dismissed. There were appeal and cross-appeal to the High Court against that decree being, A. S. Nos. 406 and 467 of 1930. On 14th August, 1934, the High Court confirmed the mortgage decree against the 1st defendant and passed a simple money decree against the 2nd defendant to the extent of his share in the family properties. Meanwhile, in execution of the mortgage decree the share of the 1st defendant was brought to sale, and for the balance of the amount due a personal decree was obtained against him on 15th November, 1932. An appeal was filed to the High Court against the personal decree, being C.M.A. No. 66 of 1933. That appeal also was heard along with the appeals against the preliminary decree and was dismissed on 14th August, 1934. Various applications were filed in execution of both the money decree and the mortgage decree. After giving credit to the amounts realised, the decree-holder filed E. P. No. 76 of 1946 against the 1st defendant for the balance of the amount due to him. On 13th December, 1944, the 1st defendant filed an application for relief under section 14 of the Madras Agriculturists Relief Act, and the learned Subordinate Judge, by an order, dated 2nd September, 1946, gave the relief. The appeal against that order is C.M.A. No. 644 of 1946, which we have dismissed[1]. In E.P. No. 76 of 1946 the learned Judge directed the decree-holder to file a momo. of calculation to which the judgment-debtor raised various objections. He also filed several memos. on different basis to substantiate his objections. After hearing the objections and expressing his views on the same, the learned Judge directed the decree-holder to file a fresh memo. of calculation. He filed a memo. on 2nd September, 1946, claiming Rs. 30,005-14-0 as on 2nd September, 1946, *plus* costs of execution. On 8th January, 1947, he heard arguments on the question of limitation. Having held that the application was not barred by limitation he accepted the memo. filed by the decree-holder and fixed the amount payable to him at Rs. 30,005-14-0. By an order,

1. (1951) 1 M.L.J. 158.

dated 6th March, 1947, E.P. No. 76 of 1947 was amended and the ascertained figure was substituted. The 1st defendant preferred the above appeal against that order.

The learned counsel for the appellant in an exhaustive and careful argument contended that E.P. No. 76 of 1946 was barred by limitation. He contended that the personal decree against the 1st defendant was dated 15th November, 1932 and therefore E.P. No. 76 of 1946, which was filed on 4th March, 1946, is clearly barred under section 48 of the Civil Procedure Code. It may be mentioned at the outset that this point was not pressed before the learned Subordinate Judge. But as it raises a question of law based on facts in regard to which there is no dispute, we allowed the learned counsel to raise that plea for the first time before us. His argument as finally elaborated may be specified under four sub-heads. (1) The personal decree against the 1st defendant was made on 15th November, 1932. An incompetent appeal was filed against that decree being C. M. A. No. 66 of 1933. That was not a regular appeal, but was filed as a miscellaneous appeal as if against an order, without full court-fee being paid. As no regular appeal was filed the executable personal decree for the purpose of section 48 of the Civil Procedure Code was the personal decree passed on 15th November, 1932. (2) The order passed by the High Court dismissing the appeal was not a decree within the meaning of section 2 (2) of the Civil Procedure Code as it is not a decree adjudicating the rights of parties in a regular appeal. (3) As the decree was amended under section 14 of the Madras Agriculturists Relief Act, the rights of parties thereafter are now governed by the amended decree. The execution application filed on the basis of the amended decree was not maintainable. The execution application should not have been amended after twelve years. In support of his contentions the learned counsel for the appellant cited a long catena of cases. Most of the cases cited deal with principles well-settled. We should have thought that the discussion of case-law would be unnecessary. But in view of the persistence with which the cases were pressed on us and to respect the advocacy of the learned counsel we shall proceed to consider them in some detail.

Before we deal with the cases, the relevant provision of section 48 of the Civil Procedure Code may be read :

"48. (1) Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from—

(*a*) the date of the decree sought to be executed . . . . ."

Under this section the upper limit for the execution of the decree is fixed at 12 years from the date of the decree. This section corresponds with the 3rd and 4th paras. of section 230 of the Code of 1882. The relevant provisions of that section are as follows :

"Where an application to execute a decree for the payment of money or delivery of other property has been made under this section and granted, no subsequent application to execute the same decree shall be granted after the expiration of the 12 years from any of the following dates, namely,

(*a*) the date of the decree sought to be enforced or of the decree, if any, on appeal affirming the same ;

(*b*) * * * *

The words " or of the decree if any on appeal affirming the same " have been omitted in the new section as they are not only redundant but also limit the operation of those words only to an appeal affirming the decree of the Court below. There is no particular reason why the decree in an appeal allowing or modifying the decree of the lower Court should be on a different position. The omission of the words removes an ambiguity. Under the present section the *terminus a quo* for the purpose of section 48 would be the decree of the appellate Court irrespective of the manner of the relief given by the appeal decree. This is on the well-established principle that the decree of the first Court merges in the appellate decree.

The first case cited before us is that of the Judicial Committee in *Khulna Lona Company, Ltd.* v. *Jnanendra Nath Bose*[1]. The mortgage decree in that case directed hat the mortgaged properties sholuld be sold and if the proceeds of the sale were nsufficient the balance should be realised from other properties and the persons of the judgment-debtors. The application was filed more than 12 years from the late of the decree. It was argued that the application was filed within twelve years after the mortgaged properties were sold and, therefore, it was not hit by section 48, Civil Procedure Code. But it was held that the application, having been filed more han 12 years after the date of the decree, was not executable in view of section 48 of the Civil Procedure Code. In *Sahu Nandlal* v. *Sahu Dharam Kirti*[2], the facts are, he trial Court passed a decree on the basis of an award from which no appeal vas allowed by law. A so-called appeal was filed to the High Court, but was dismissed on the ground that no appeal lay. An attempt was made to compute the periods of limitation prescribed under section 48, Civil Procedure Code, from the late of the order of the High Court dismissing the appeal. The learned Judges ield that the said order was not a decree affirming the decree of the trial Court und therefore there was no appeal decree in which the decree of the trial Court ould merge. The principle underlying this decision is intelligible. As no appeal ay at all to the High Court, the dismissal of the incompetent appeal was held by he learned Judges not to be a decree within the meaning of the Act. In *Thandava-murthi* v. *Durgamba*[3], an application was put in after 12 years of the decree for amendnent of the execution petition by adding a prayer of attachment and sale of immoveible properties of the judgment-debtors. The application was amended without notice to the judgment-debtors. When the properties were attached the judgment-lebtors objected to the attachment on the ground that by reason of the amendnent the decree-holder was allowed to evade the provisions of section 48, Civil Procedure Code. The learned Judges pointed out that in appropriate circumstances and for adequate reasons an application filed before 12 years could be amended after the expiry of the 12 years, and if so amended, section 48, Civil Procedure Code, had no application. But in that case they agreed with the Court below that it was not a fit case for amendment. This case was relied upon in support of the proposition that an application should not be amended after the expiry of the 12 years. But a perusal of the judgment shows that the learned Judges clearly expressed the contrary view. *Moideen Kutti* v. *Subramanya Aiyar*[4] is a decision under Article 182 (2) of the Limitation Act. Though it does not arise under section 48, Civil Procedure Code, this case was pressed into service by analogy. Under Article 182 (2) of the Limitation Act the period of limitation would run from the date of the final decree or order of the appellate Court or the withdrawal of the appeal. In construing the Article the learned Judge held that an appeal against an order cancelling the order recording satisfaction of a decree is not a final decree passed in appeal within the meaning of that Article. It is an obvious case, as it is impossible to hold that an order in such an appeal is the final decree of the appellate Court. In *Ramachandra Rao* v. *Parasuramayya*[5], the Full Bench decided that the period of 12 years laid down by section 48, Civil Procedure Code, should be computed from the original and not the amended decree. The proposition laid by the Full Bench was not questioned by the other side. *Oorakarai Seetharama Chettiar* v. *Sheik Abdul Rahiman Sahib*[6], is another case on the interpretation of Article 182 (2) of the Limitation Act. The learned Judge held that an appeal against an order refusing to record satisfaction of a decree would not affect the running of limitation. The reason of the rule was that the order in appeal did not affect the decree in any way as it continued to remain valid and without modification. In *Kayumbu Pillai*, In re,[7] the question was whether an order dismissing the appeal for non-compliance with the order requiring security for

1. (1917) 22 C.W.N. 145 : 45 I.C. 436 (P.C.).
2. (1925) I.L.R. 48 All. 377 : A.I.R. 1926 All. 440.
3. A.I.R. 1928 Mad. 1154.
4. (1939) M.W.N. 996.
5. (1940) 1 M.L.J. 235 : I.L.R. (1940) Mad. 349 (F.B.).
6. (1940) 2 M.L.J. 371.
7. (1941) 2 M.L.J. 500 : I.L.R. (1941) Mad. 954 (F.B.)

costs and dismissing the appeal for non-payment of the required court-fee were decrees within the meaning of the definition in section 2 (2) of the Code. The Full Bench held that such orders were not decrees within the meaning of section 2 (2) of the Civil Procedure Code as they did not embody a final expression of adjudication upon any right claimed or defence set up. In *Shanmugam*, In re[1], Mr. Justice Happell held that a regular appeal should be filed against a personal decree after paying *ad valorem* court-fee. In *Nacharammal* v. *Veerappa Chettiar*[2], a Bench of this Court held that the decree to be executed is that of the appellate decree of final jurisdiction where there has been an appeal and the period of 12 years under section 48 has to be computed from the date of such appellate decree. In *Lakshminarasinga Rao* v. *Balasubramanyam*[3], in a partition suit a preliminary decree was passed giving the plaintiffs some immediate executable reliefs. Subsequently a final decree was passed. For the relief given in the preliminary decree an Execution Petition was filed more than 12 years after the date of the preliminary decree, but within 12 years period from the final decree. The learned Judge held that the execution application was barred as the criterion date for computing limitation was the date on which the decree became operative. In *Bhawanipore Banking Corporation* v. *Gouri Shankar Sharma*[4] the Supreme Court gave an authoritative interpretation of Article 182 (2) of the Limitation Act. In that case an application in a suit on a mortgage under section 36 of the Bengal Moneylenders Act was dismissed for default. An application was taken out under Order 9, rule 9 for setting aside that order and that was dismissed. An appeal against that order was also dismissed. When it was sought to be argued that the limitation would start not from the date of the final mortgage decree but from the date of the order in the aforesaid appeal, the learned Judges pointed that the expression "where there has been an appeal" in the third column mut be read with the words in column 1 of Article 182 (2), namely, "for execution of a decree or order of any civil Court". So construed, they held that the words "where there has been an appeal" would not cover an appeal from an order which was passed in a collateral proceeding or which has no direct or immediate connection with the decree under execution. The Allahabad High Court in *Kunwar Bahadur Singh* v. *Sheo Shankar*[5], expressed the same view, namely, that an appeal under Article 182 (2) means an appeal from the decree sought to be executed and no other appeal.

From a consideration of the aforesaid decisions the following principles may be gathered :—

(1) Under section 48, Civil Procedure Code, the period of 12 years should be computed from the date of the appellate decree as the original decree would merge in that of the appellate Court.

(2) The words "where there has been an appeal" in Article 182 (2) of the Limitation Act cannot be held to cover an appeal from an order which is passed in a collateral proceeding or which has no direct or immediate connection with the decree in execution. If that is so, in the case of Article 182 (2) *ex hypothesi* such an order in appeal cannot be taken as a starting point for computing the period of 12 years under section 48, Civil Procedure Code.

(3) The order of the appellate Court must be a decree within the meaning of section 2, clause (2) of the Civil Procedure Code. It will be a decree only if it embodies a formal expression of an adjudication determining the rights of the parties with regard to all or any of the matters in controversy in the suit.

(4) The period of 12 years under section 48 would be computed from the date of the decree and not from the date when that decree is amended.

(5) An execution application if filed within 12 years from the date of the decree can be amended in proper cases.

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1. (1945) 2 M.L.J. 87 : I.L.R. (1946) Mad. 299.
2. (1946) 1 M.L.J. 128 : I.L.R. (1946) Mad. 817.
3. (1948) 2 M.L.J. 249.
4. (1950) S.C.J. 171 : (1950) S.C.R. 25.
5. A.I.R. 1950 All. 327.

(6) A regular appeal lies against the personal decree passed in a mortgage it and in such an appeal *ad valorem* court-fee will have to be paid.

(7) For the purpose of section 48, Civil Procedure Code, an order dismissing incompetent appeal cannot give a fresh starting point.

On the basis of the aforesaid principles all the contentions of the learned counsel the appellant will have to be negatived. The first two contentions of the rned counsel are based upon misapprehension of facts. As aforesaid the eliminary decree in O. S. No. 114 of 1925 was passed on 16th January, 1930. ie personal decree against the 1st defendant was made on 15th November, 1932. S. No. 406 and 467 of 1930 were filed against the preliminary mortgage decree. M. A. No. 66 of 1933 was filed against the personal decree. The appeals as ll as the C. M. A. were heard by Ramesam and Stone, JJ., and they were disposed on 14th August, 1934. That C. M. A. was filed by the 1st defendant himf. Neither the respondent nor the Court raised the objection that the court-fee id was insufficient. The appeal was heard on the merits and the learned Judges missed the appeal with costs confirming the personal decree made by the subdinate Court. The learned counsel contended that C. M. A. No. 66 of 1933 s an incompetent appeal and the fact that the High Court decided the case the merits will not convert an incompetent appeal into a competent one. We not hold that the appeal was an incompetent appeal. The appeal was filed ainst the personal decree made in the suit. The fact that it was called a "C.M.A." not decisive of the question to be decided. Nor the fact that the appellant ated the decree as an order is conclusive between the parties. The fact remains it an appeal was filed against the personal decree. If the respondent had taken plea the Court perhaps would have insisted upon additional court-fee to be id. The fact that an appeal was disposed of on insufficient court-fee would t make the decision made therein one passed without jurisdiction. So far as decision in that appeal was concerned, it is binding on the parties, and as it ally adjudicated the rights between the parties, it would certainly be a decree hin the meaing of section 2 (2) of the Civil Procedure Code. The learned nsel then pressed on us the same point from a different angle. He argued it the order of the High Court in C. M. A. No. 66 of 1933 is not a decree as it s not made in a regular appeal under section 96, Civil Procedure Code, or in appeal against an order under section 47, Civil Procedure Code and it is only order within the meaning of section 2 (14), Civil Procedure Code. This argunt is only a repetition of the first point. As we have held that there was an peal against the personal decree, the decision of the High Court would certainly a decree within the meaning of the definition. We do not also see any merits the third point. The learned counsel contended that the present application the basis of the original decree would not be maintainable as the rights of the ties are now governed by the amended decree and they should be worked out separate execution application wherein the judgment-debtor would be at liberty raise pleas open to him. Apart from the fact that this argument was not raised he court below, we cannot see how the present application is not maintainable. decree that is now sought to be executed is a personal decree passed against 1st defendant. It is certainly executable though subject to the statutory proons of section 48, Civil Procedure Code. Nor do we find any merits in the ned counsel's fourth point. He argued that the execution petition should have been amended after 12 years so as to enable the decree-holder to evade provisions of section 48, Civil Procedure Code. This argument does not come h grace from a person who was responsible for getting the decree amended. At intsance of the first defendant the decree was amended. Pursuant to the endment it was necessary for the decree-holder to make suitable amendments the execution application. The learned Judge in exercise of his discretion wed suitable amendments to be carried out in the execution application. We not say that the order amending the execution application was either without sdiction or otherwise not valid.

The learned counsel then argued that E. P. No. 76 of 1946 is barred by limitation. To appreciate his argument a few facts may be recapitulated. As we have already pointed out, there was a mortgage decree against the share of the 1st defendant and then a personal decree for the balance of the amount due after the properties pertaining to his share were sold. Against the 2nd defendant there was a money decree. The money decree was passed on 14th August, 1934. The personal decree against the 1st defendant was made on 15th November, 1932, and was confirmed on 14th August, 1934. In execution of the personal decree against the 1st defendant E. P. No. 281 of 1934 was filed for his arrest. He was arrested and that petition was closed on 24th June, 1935. E. P. Nos. 55 of 1935 and 301 of 1939 were filed in execution of the money decree against the 2nd defendant. The former was disposed of on 16th November, 1937 and the latter on 9th July, 1940. E. P. No. 302 of 1939 was filed against the 1st defendant for costs, and the costs were recovered on 8th February, 1941. E. P. No. 12 of 1941 was then filed against the 1st defendant in execution of his personal decree and it ended on 4th July, 1941. The present application No. 76 of 1946 was filed on 4th March, 1946. It is obvious from the aforesaid facts that both E. P. Nos. 302 of 1939 and 12 of 1941 would be barred by limitation unless the final orders in E. P. No. 55 of of 1935 and E. P. No. 301 of 1939, filed against the 2nd defendant would save the bar of limitation. The learned Subordinate Judge held that the personal decree against the father and the money decree against the son both spring out of the same debt and passed in the same suit, and therefore for the purpose of execution they should be considered as one decree against both the father and the son. In that view he held that the final orders in applications against the son would save the bar of limitation against the father. The relevant article is Article 182 (5) of the Limitation Act read with the Explanation. The material part of the Article reads :

For the execution of a decree or order of any civil Court not provided for by Article 183 or by section 48 of the Code of Civil Procedure V of 1908.	Three years	5. (Where the application next hereinafter mentioned has been made) the date of the final order passed on an application made in accordance with law to the proper Court for execution, or to take some step-in-aid of execution of the decree or order. . . . . *Explanation I.*— Where the decree or order has been passed severally in favour of more persons than one, distinguishing portions of the subject-matter as payable or deliverable to each, the application . . . . shall take effect against only such of the said persons or their representatives as it may be made by. But where the decree or order has been passed jointly in favour of more persons than one, such application, if made by any one or more of them, or by his or their representatives, shall take effect in favour of them all.

It is a well recognised principle of construction that in construing the provisions of the Limitation Act equitable considerations are out of place and the strict grammatical meaning of the words is the only safe guide. The crucial point, therefore, is whether the money decree against the son and the mortgage decree against the father can be treated as one decree jointly passed against the father and the son. If it be a joint decree, the final order in an execution application against the son would certainly save the period of limitation against the father. Unhampered by the decisions which we will immediately refer to, we find it difficult to hold that there was a joint decree against the father and the son in O. S. No. 114 of 1925. A perusal of the preliminary decree dated 16th January, 1931, in that suit discloses that the Court gave the mortgage decree only against the 1st defendant's share in the family properties. The final decree also deals only with the liability of the father in regard to his share. The personal decree of 1932 was passed for the balance of the amount due to him after his share was sold. The money decree against the son was made in August, 1934. The two decrees therefore were passed on different dates. Under the decrees the amounts would be realisable from their

no joint decree against the father and the son within the meaning of the Explanation, and if so, the execution application against the father is barred by limitation.

We shall now proceed to consider the cases cited on either side to discover, if possible, the meaning to be attributed to the words "decree or order passed jointly against more persons than one". In *Appu Rao* v. *Ramakrishna Chettiar*[1], there was a decree directing the defendant to execute a muchilika, and in appeal that decree was confirmed, but costs also were awarded to the plaintiff. The question was whether the previous applications for recovery of costs incidental to the execution proceedings could be relied upon to save the bar of limitation against the decree for the execution of the muchilika. The learned Judges held that the execution application was barred by limitation as the previous application did not relate to the execution of the decree or any part of it. According to the Madras High Court, a decree is a joint decree within the meaning of Explanation I to Article 182 if any one of the reliefs given in the decree is against the defendants jointly even though some other reliefs may be given against the defendants separately, so that if in respect of the joint relief an application for execution is made against one of them, it will save limitation in regard to the other defendants even in respect of the reliefs which have been decreed against them solely, that is separately. The leading case taking this view is found in *Subramanya Chettiar* v. *Alagappa Chettiar by agent Palaniappa Chetti*[2]. There a decree awarded mesne profits against *A* and *B* jointly and costs jointly against *A*, *B* and *C*. An application to execute the decree for mesne profits against *A* and *B*, the learned Judges held, kept alive the rights to execute the decree for costs against *C* under Part 2 of paragraph 2 of Explanation I to Article 182 of the Limitation Act. At page 269 they observe,

"reading the second part of the paragraph liberally, there can be no doubt that it applies. There has been a joint decree against more persons than one and there has been an application in execution of that decree against two of these persons and this application takes effect against all the persons against whom the joint decree was passed."

such portion as was supported by legal necessity the usual mortgage decree was passed against all the defendants. Simultaneously a simple money decree for the balance was passed against two executants of the bond in suit. The decree-holder first executed the decree so far as it was a decree for sale and then within three years of this, though more than three years from the date of the decree, applied for execution of the simple money decree partly by arrest of one of the judgment-debtors. The learned Judges held the application was within time. At page 168 the reason of the decision is put in these words :—

"In this case a decree was passed against all the defendants with regard to part of the mortgage money and this too, with regard to the same property. It seems to us that this was really one decree for the whole of the mortgage money."

The facts bring that case within liberal interpretation of the Explanation. There was a joint decree against all the defendants though in regard to a part of the claim it would be a joint decree even according to the Madras view. The Patna High Court had an occasion to deal with the scope of Explanation I to Article 182 of the Limitation Act in *Bishun Chand* v. *Abhoykumar Chand*[1]. The facts in that case were : A mortgage was executed in respect of two properties *D* and *S*. *S* had been sold for arrears of revenue, but the defendant Abhoy Kumar was in possession of the balance of the sale proceeds after the arrears of revenue were paid. A decree was passed on that mortgage for recovery of the amount by the sale of the *D* property and also for recovery of the Rs. 715 from the money in the hands of Abhoykumar. The question in that case was whether the order in the first application of the sale of the property *D* would save the bar of limitation for the application for the realisation of the amount in the hands of Abhoykumar. The learned Judges held that the execution application was not barred and made the following observation at page 703 :—

"It appears to me that the main relief, the realisation of the mortgage dues, being the one governing note of the decree, makes the two sources of realisation interdependent. This is the reason why a mortgagee is entitled to proceed against one of his securities at a time, if he thinks it to be sufficient for realisation."

From the facts it is obvious that the sum of Rs. 715 was only the substituted security in the place of the property S, being the balance of the realisations from the sale of the said property. The debt was the mortgage debt. It was realisable from and out of the mortgaged properties. The realisations from one or the other would *pro tanto* go to reduce the liability of the other. In the circumstances of the case, the learned Judges held that the decree was really one decree for the whole of the mortgage money. In *Motilal* v. *Champa Lal*[2], the decree-holder obtained a simple money decree against three brothers. The decree was passed against all the three brothers. But so far as two of them were concerned, the decree was made recoverable only from the family properties in their hands. The learned Judges held for the purpose of application of Explanation I that the mere fact that the decree differentiated between the judgment-debtors as regards the mode of execution did not affect the fact that all of them were jointly liable for the decretal amount. The Calcutta High Court had expressed its view on the interpretation of Article 182, Explanation I of Schedule I, Limitation Act, in a decision reported in *Charu Chandra Roy* v. *Hrishikesh Roy*[3]. In that case, in a mortgage suit a joint decree was passed against all the judgment-debtors and a personal decree was passed for costs against a particular judgment-debtor. The question was whether an application for execution of the joint decree would keep alive the entire decree including a portion granting separate relief which was not executed. At page 319 the learned Judges applied the following test, namely, whether the separate relief given againt a particular judgment-debtor was really a part of the joint decree passed against all the judgment-debtors. Applying the test, the learned Judges ruled that the decree for costs against the particular judgment-debtor did not form part of the final mortgage decree and therefore, the money decree was not kept alive. *Hanumanjee (Idol)* v. *Surajdeo Narain*[4], is rather instructive. In that case a decree

1. A.I.R. 1924 Pat. 700.
2. A.I.R. 1929 All. 795.
3. (1937) 67 C.L.J. 316.
4. (1943) I.L.R. 23 Pat. 150.

in 1937 provided that a certain sum of money was to be realised by the sale mortgaged properties after the expiry of the period of grace and that there be a separate money decree for another sum. The mortgage portion of ree was made final in 1939, but no mention was made therein of the money of the earlier decree. Execution of the final decree was taken out in 1939, ecree-holder applied in 1941 for the execution of the money portion of the of 1937. The learned Judges held that the decree in 1937 was party preliminid partly final and Explanation I of Article 182 could not be applied to such e. *Sivalinga Thevar* v. *Srinivasa Mudaliar*[1] was relied upon for the contenat where a father and son are sued and there is a decree both against the and the son, the decree as against the son will become barred by limitation lication is not made within the time prescribed by Article 182 notwithstanding one reason or other execution of the decree against the father is not barred tation. The learned Judges held that in such a case for the purpose of limitae decree against the son must be looked at independently, from the decree the father. The learned Judges in that case were not dealing with the ation with which we are now concerned. The Bombay High Court in a ported in *Dhulasaheb Dawalsaheb* v. *Bijapur Municipality*[2], dissented from dras view and held that the Explanation would not apply in a case where a e is partly joint and partly several. At page 255, Chagla, C.J., commented decision reported in *Subramanya Chettiar* v. *Alagappa Chettiar*[3] as follows :

"With very great respect I am unable to agree with this view of the Madras High Court. It is difficult to understand why even a literal interpretation of the second paragraph of Explanation II to section 182, should drive one to the conclusion to which the Madras High Court seems to have given. When the Explanation speaks of a decree, it must include a decree or part of a decree and a portion of a decree and putting that interpretation upon the second paragraph of the Explanation we are able to reconcile all difficulties and to come to a solution which is not illogical or anomalous."

we cannot say that there is no force in the comment, we are bound by dras view. From a consideration of the aforesaid decisions the law on the may be stated thus : The words in the Explanation are clear and they applied only to decrees that have been passed jointly against more persons ne. The question in each case is whether the decree is a joint decree the meaning of the Explanation. If there is a joint decree against all the nts the fact that the same decree gives a separate relief against one of the nts does not make it any the less a joint decree within the meaning of the ation. The Madras view on this subject is unanimous and the Calcutta High Court struck a different note, we prefer to follow the view. Though a joint decree may be passed against all and a separate against some of them, the said decrees, though in form separate, are so pendent that in certain circumstances may be treated as a joint decree. cannot introduce equitable considerations in construing the express words the Explanation and hold that decrees which are in form and substance e decrees are in effect a joint decree within the meaning of the Explanation. present case, there were two separate decrees, one a money decree and ier a mortgage decree. They were passed against different defendants. ecame executable at different times and the amount was realisable from t properties. It is also conceivable of the money decree getting barred fore a final decree is passed. We would be introducing a fiction if we held immediate executable money decree against one person is a joint decree him and another against whom a preliminary mortgage decree was passed. t that the debt was the same and that any payment towards or in discharge money decree or the mortgage decree, as the case may be, might *pro tanto* ge the other in itself cannot be a ground for holding both the decrees as one ecree against the defendants. It may be reasonable to hold so but it would g violence to the language of the Explanation. We therefore hold that

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947) 2 M.L.J. 583.
948) 51 Bom. L.R. 252.

3. (1906) I.L.R. 30 Mad. 268.

the execution applications filed against the 2nd defendant would not save the bar of limitation against the 1st defendant.

Even so, it was argued by Mr. Rama Rao Sahib that that plea is not open to the 1st defendant at this stage on the principle of constructive *res judicata*. E. P. No. 12 of 1941 was filed by the decree-holder on 3rd January, 1941, for executing the decree for a sum of Rs. 1,47,307-14-6. The relief asked for was the attachment of the excess sale proceeds due to the 1st defendant which was in deposit to the credit of E. P. No. 302 of 1939. Notice was issued to the 1st defendant. He was served on 12th March, 1941 and he filed a counter on 29th March, 1941. The application was posted for trial to 5th April, 1941. The learned Judge passed the following order :

"There is no plea worth consideration. The decree-holder cannot be asked to enforce some other remedy just to oblige the defendant. Attachment effected will stand. Petitioner may apply for a cheque."

E. P. No. 161 of 1942 was filed on 20th July, 1942, for executing the personal decree against the 1st defendant. The relief asked in that application was for attachment of sale proceeds in E. P. No. 41 of 1941 in O. S. No. 75 of 1934. Notice was served on the 1st defendant in person and the 1st defendant filed a counter stating that he had no interest and he had no objection. The amount was attached and transferred to the credit of O. S. No. 114 of 1925 and was paid towards the decree. In both these applications the 1st defendant should have taken the plea that the application was barred by limitation. As such a plea was not taken and as execution was ordered, in our view the judgment-debtor is now precluded on the principle of constructive *res judicata* to raise the plea of limitation over again. The application of the principles of constructive *res judicata* to orders in execution has been decided as early as 1882. In *Mungul Pershad Dichit* v. *Girja Kant Lahiri*[1], the Judicial Committee held that where an execution petition was barred by limitation but execution had been ordered to proceed, it was not open to the judgment-debtor in a subsequent application to plead that the former application was barred by limitation. The same principle had been applied and followed by the Judicial Committee in a later decision reported in *Rajah of Ramnad* v. *Veluswami Thevar*[2]. In *Adilakshmi Ammal* v. *Srinivasa Goundan*[3], Mr. Justice Horwill held that the order in a previous applictation directing the sale of the properties would bar the judgment-debtor from raising the plea in a subsequent application that it was barred by limitation. An exhaustive discussion of the application of the principles of constructive *res judicata* to execution proceedings will be found in *Venkataranga Reddi* v. *Chinna Sithamma*[4]. The facts of that case are, a decree for mesne profits had been passed against a Hindu father and his undivided minor sons, directing recovery of the profits from the father personally and from the family properties of all of them. An application for execution was instituted against the father alone, but he did not appear and oppose the application as being time-barred despite notice to him. The learned Judges held that the order passed in such an application would preclude him from raising a plea of limitation in subsequent proceedings, even though the application on which the order was passed did not fructify and was eventually dismissed. We respectfully agree with the view expressed in that judgment. But the learned counsel for the appellant contended that the principle of constructive *res judicata* should be very cautiously applied to execution proceedings and that in this case his client did not raise the plea of limitation in those two applications as his client was boud to pay the costs awarded against him in execution proceedings. In the Court below this plea, namely, that he did not press his plea of limitation as the orders for payment of execution costs passed against him were not barred by limitation. Indeed, a perusal of the execution applications shows that the personal decree was being executed not any orders for costs. In our view, the present contention is only an after-thought. Learned counsel for the appellant relied upon the decision in *Kailasa Thevar* v. *Ramaswami Aiyangar*[5]. But the facts in that

1. (1881) I.L.R. 8 Cal. 51 : L.R. 8 I.A. 123.
2. (1920) 40 M.L.J. 197 : L.R. 48 I.A. 45.
3. (1944) 1 M.L.J. 36.
4. (1941) 1 M.L.J. 270.
5. (1948) 2 M.L.J. 28.

Rs. 30,005-14-0 is not correct. The first objection raised by him relates to 2 items of Rs. 24,300 and Rs. 42,513. The sum of Rs. 24,300 represents the amount for which the judgment-debtor's properties were sold on 13th July, 1936, in E. P. No. 55 of 1935. The sum of Rs. 42,513 was credited towards the decree on 11th January, 1932. It represents the sale proceeds in regard to the sale of the 1st defendant's properties on 5th October, 1931, in E. P. No. 48 of 1931. The learned advocate's argument is that those two amounts were credited towards the decree on the date of the confirmation of the sales whereas they should have been credited on the date of the sale itself. This would make a difference in interest. He relied upon section 65, Civil Procedure Code. Under that section where immoveable property is sold in execution of a decree and such sale has become absolute the property would be deemed to have vested in the purchaser from the time the property is sold and not from the time when the sale becomes absolute. Under this section the vesting of the property is thus made to relate back to the date of the sale. Relying upon this section the learned counsel pressed on us to hold that the sale price should have been credited on the date of the sale itself. We think there is considerable force in this argument. When the decree-holder purchaser becomes the owner of a property from the date of the sale itself it follows that the debt was *pro tanto* reduced from that date. But the learned counsel for the respondent contended that he had not taken possession. The fact that he did not take possession could not confer on him higher right than that which flows from the provisions of section 65, Civil Procedure Code. As he became the owner of the properties on the dates of the sale it may be open to him to take appropriate proceedings for the mesne profits from the date of the sale itself. It is then contended that this point was not raised in regard to the second item of Rs. 42,513. But as the facts are not in dispute we cannot reject the plea of the appellant on that ground. We therefore direct these two items to be credited towards the decree on the dates of the sale, that is, 13th July, 1936, in the case of Rs. 24,300 and 5th October, 1931, in the case of Rs. 42,513.

It is then contended that the Court below was wrong in directing his client to pay the entire costs of Rs. 4,343-12-7. His argument is that as the decree was split up the costs also should be split up as the costs in O. S. No. 114 of 1925 were awarded on the entire claim. Apart from the fact that this point was not taken in the Court below, we are of opinion that there is no merit in this contention. The costs in question were awarded only against the 1st defendant and that decree had become final. In I. A. No. 11 of 1945, the learned Judge, though he apportioned the debt between the judgment-debtors, directed that full costs should be paid by the defendants in O. S. No. 114 of 1925. That order also had become final as we dismissed the appeal. Apart from that if we accept the argument of the learned counsel logically the costs awarded in O. S. Nos. 75 of 1935 and 114 of 1925 should be clubbed together and divided in equal shares between the defendants in both the suits. If so calculated, we find he has to pay a higher amount than that he has to pay under the decree. We therefore negative this objection also.

Then the learned counsel put before us a memo. filed by him in the Court below dated 12th November, 1946, and contended that we should accept that memo. A perusal of that memo. shows that he calculated on the apportioned principal compound interest at 12 per cent. till the date of the decree and thereafter at 6 per cent. simple interest on the apportioned principal amount. This is contrary to the express terms of the preliminary decree. Under the preliminary

decree the principal amount was directed to be paid at 12 per cent. compound interest till the date of the decree and thereafter at 6 per cent. on the total amount. The calculation accepted by the lower Court followed the directions in the preliminary decree. The fact that the appellant was able to get a relief under section 14 of the Madras Agriculturists Relief Act would not, in our view, enable him to reopen or question the directions in regard to the interests given in the preliminary decree.

Mr. Ramabhadra Aiyar then contended that a sum of Rs. 1,550 attached in E. P. No. 158 of 1944 was not credited towards the decree. Mr. Rama Rao Sahib says that this sum was not drawn out by his client. The lower Court will ascertain whether the said amount was drawn out by the respondent or whether that amount is in deposit in Court to be credited towards the decree. If such amount is available or already drawn out the Court will give credit towards the decree.

In the result, the appeal is allowed in part. The parties will pay and receive proportionate costs. The lower Court will proceed with the execution after allowing the decree-holder to make suitable amendments as per our directions.

C. M. A. No. 128 of 1947 :—No separate arguments were addressed in this appeal. This appeal is therefore dismissed, but in the circumstances, without costs.

V.S. C. M. A. No. 127 *allowed in part.* C. M. A. No. 128 *dismissed.*

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT :—S. FAZL ALI, B. K. MUKHERJEA AND N. CHANDRASEKHARA AIYAR, JJ.

V. VR. N. M. Subbayya Chettiar .. *Appellant**

v.

The Commissioner of Income-tax, Madras. .. *Respondent.*

Income-tax Act (XI of 1922), section 4-A (b)—Scope of—Kartha of undivided Hindu family (the assessee) domiciled and living in Ceylon, but having properties in British India—Visits during year of account to British India on several occasions the total period of stay being 101 days attending to litigations and Income-tax matters—Failure of the assessee to produce evidence to show control and management of the affairs of the family was in Colombo—Assessee if "resident" in British India.

The words used in section 4-A (*b*) of the Income-tax Act show that, normally, a Hindu undivided family will be taken to be resident in the taxable territories, but that such a presumption will not apply if the case can be brought under the second part of the provision. The word "affairs" must mean affairs which are relevant for the purpose of the Income-tax Act and which have some relation to income. In order to bring the case under the exception, it has to be seen whether the seat of the direction and control of the affairs of the family is inside or outside British India. The word "wholly" suggests that a Hindu undivided family may have more than one "residence" in the same way as a corporation may have. The onus of proving facts which would bring his case within the exception which is provided by the latter part of section 4-A (*b*) is on the assessee and in the absence of such proof, the normal presumption namely that the family is resident in the taxable territories must be given effect to.

The Kartha and members of a Joint Hindu family (the assessee) were resident in Ceylon and also domiciled in that country. The Kartha owned a house, some immoveable property and investments in British India. In the year of account which is the basis of the assessment it was found that he had visited British India on seven occasions and the total period of his stay in British India was 101 days. During his stays in British India he attended to the family litigations and income-tax proceedings. The assessee did not produce any evidence so as to help the income-tax authorities to determine whether the management and control of the businesses in India was situate in Colombo and further, he had also started two partnership businesses in India during the year of account. On the question whether the assessee is "resident" in British India.

Held : The mere fact that the assessee has a house in British India, where his mother lives, cannot constitute that place the seat of control and management of the affairs of the family. Nor can much importance be attached to the fact that the assessee had to stay in British India for 101 days in the particular year. By merely coming out to India to take part in the litigation, he cannot be said to have shifted the seat of management and control of the affairs of the family or to have started a second centre for such control and management. As mere "activity" cannot be the test of residence,

*Civil Appeal No. XXXVIII of 1949. 21st December, 1950.

e starting of the two new businesses cannot affect the question. As the assessee failed to produce e necessary evidence to show that the control was in Colombo, the position is this—on the one hand ere is the fact that the head and karta of the assessee's family who controls and manages its affairs rmanently lives in Colombo and the family is domiciled in Ceylon and on the other hand, there e the acts done by the karta in British India, which, though not conclusive by themselves to tablish the existence of more than one centre of control for the affairs of the family, are by no means elevant to the matter in issue and therefore cannot be ruled out of consideration in determining it. these circumstances, in the absence of material evidence which the assessee failed to produce, must be held that the onus of proving such facts as would bring his case within the exception d not been discharged by the assessee and the normal presumption that the assessee was resident the taxable territory must be given effect to.

As the case has been decided mainly with reference to the question of onus of proof, the decision ust be confined to the year of assessment to which this case relates.

On appeal from the judgment of the Madras High Court[1] in Case Referred o. 25 of 1946 [66 R. A. No. 89 (Madras)[1] of 1944-45, Income-tax Appellate ribunal, Madras Bench].

K. Rajah Aiyar, Senior Advocate (*K. Srinivasan*, Advocate, with him), for ppellant.

M. C. Setalvad, Attorney-General for India (*G. N. Joshi*, Advocate, with him), r Respondent.

The Court delivered the following

JUDGMENTS : *Fazl Ali, J.*—This is an appeal from a judgment of the High ourt of Judicature at Madras on a reference made to it under section 66 (1) the Indian Income-tax Act by the Income-tax Appellate Tribunal in connec- on with the assessment of the appellant to income-tax for the year 1942-43. he question of law referred to the High Court was as follows :

"Whether in the circumstances of the case, the assessee (a Hindu undivided family) is 'resident' British India under section 4-A (*b*) of the Income-tax Act."

The circumstances of the case may be briefly stated as follows. The appellant the *karta* of a joint Hindu family and has been living in Ceylon with his wife, n and three daughters, and they are stated to be domiciled in that country. e carries on business in Colombo under the name and style of the General Trading orporation, and he owns a house, some immoveable property and investments British India. He has also shares in two firms situated at Vijayapuram and agapatnam in British India. In the year of account, 1941-42, which is the sis of the present assessment, the appellant is said to have visited British India seven occasions and the total period of his stay in British India was 101 days. hat he did during this period is summarized in the Judgment of one of the learned dges of the High Court in these words :

"During such stays, he personally attended to a litigation relating to the family lands both in e trial Court and in the Court of appeal. He was also attending the income-tax proceedings relating the assessment of the family income, appearing before the Income-tax authorities at Karaikudi d Madras. On one of these occasions, he obtained an extension of time for payment of the tax ter interviewing the authority concerned . . . . . ."

The other facts relied upon by the income-tax authorities were that he did ot produce the file of correspondence with the business in Colombo so as to help em in determining whether the management and control of the business was tuated in Colombo and he had started two partnership businesses in India on th February, 1942 and remained in India for some time after the commence- ent of those businesses.

Upon the facts so stated, the Income-tax Officer and the Assistant Com- issioner of Income-tax held that the appellant was a resident within the meaning section 4-A (*b*) of the Income-tax Act, and was therefore liable to be assessed in spect of his foreign income. The Income-tax Appellate Tribunal however me to a different conclusion and held that in the circumstances of the case it could ot be held that any act of management or control was exercised by the appellant

1. (1947) 2 M.L.J. 474.

during his stay in British India and therefore he was not liable to assessment in respect of his income outside British India. This view was not accepted by a Bench of the Madras High Court consisting of the learned Chief Justice and Patanjali Sastri, J. They held that the tribunal had misdirected itself in determining the question of the "residence" of the appellant's family and that on the facts proved the control and management of the affairs of the family cannot be held to have been wholly situated outside British India, with the result that the family must be deemed to be resident in British India within the meaning of section 4-A (*b*) of the Income-tax Act. In this appeal, the appellant has questioned the correctness of the High Court's decision.

Section 4-A (*b*) runs thus :—

"For the purposes of this Act—

A Hindu undivided family, firm or other association of persons is resident in British India unless the control and management of its affairs is situated wholly without British India."

It will be noticed that section 4-A deals with "residence" in the taxable territories, of (*a*) individuals, (*b*) a Hindu undivided family, firm or other association of persons, and (*c*) a company. In each of these cases, certain tests have been laid down, and the test with which we are concerned is that laid down in section 4-A (*b*). This provision appears to be based very largely on the rule which has been applied in England to cases of corporations, in regard to which the law was stated thus by Lord Loreburn in *De Beers Consolidated Mines, Ltd.* v. *Howe*[1] :—

"A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business . . . . . The decision of Chief Baron Kelly and Baron Huddleston in *The Calcutta Jute Mills* v. *Nicholson* and *The Cesena Sulphur Company* v. *Nicholson*[2], now thirty years ago, involved the principle that a company resides for purposes of Income-tax where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule, and the real business is carried on where the central management and control actually abides."

It is clear that what is said in section 4-A (*b*) of the Income-tax Act is what Lord Loreburn intended to convey by the words "where the central management and control actually abides."

The principles which are now well-established in England and which will be found to have been very clearly enunciated in *Swedish Central Railway Company, Limited* v. *Thompson*[3], which is one of the leading cases on the subject, are :—

(1) that the conception of residence in the case of a fictitious "person", such as a company, is as artificial as the company itself, and the locality of the residence can only be determined by analogy, by asking where is the head and seat and directing power of the affairs of the company. What these words mean have been explained by Patanjali Sastri, J., with very great clarity in the following passage where he deals with the meaning of section 4-A (*b*) of the Income-tax Act :—

"'Control and management' signifies in the present context, the controlling and directive power, 'the head and brain' as it is sometimes called, and 'situated' implies the functioning of such power at a particular place with some degree of permanence, while 'wholly' would seem to recognize the possibility of the seat of such power being divided between two distinct and separated places."

As a general rule, the control and management of a business remains in the hands of a person or a group of persons, and the question to be asked is wherefrom the person or group of persons controls or directs the business.

(2) Mere activity by the Company in a place does not create residence, with the result that a company may be "residing" in one place and doing a great deal of business in another.

(3) The central management and control of a company may be divided, and it may keep house and do business in more than one place, and, if so, it may have more than one residence.

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1. (1905) 5 T. C. 198.
2. (1876) 1 Ex. D. 428.
3. (1925) 9 T. C. 373.

(4) In case of dual residence, it is necessary to show that the company per- ıs some of the vital organic functions incidental to its existence as such in both places, so that in fact there are two centres of management.

It appears to us that these principles have to be kept in view in properly cons- ng section 4-A (*b*) of the Act. The words used in this provision clearly show ly, that, normally, a Hindu undivided family will be taken to be resident in taxable territories, but such a presumption will not apply if the case can be ıght under the second part of the provision. Secondly, we take it that the d " affairs " must mean affairs which are relevant for the purpose of the Income- Act and which have some relation to income. Thirdly, in order to bring the : under the exception, we have to ask whether the seat of the direction and trol of the affairs of the family is inside or outside British India. Lastly, word " wholly " suggests that a Hindu undivided family may have more than " residence " in the same way as a corporation may have.

The question which now arises is what is the result of the application of these ıciples to this case, and whether it can be held that the central control and ıagement of the affairs of the assessee's family has been shown to be divided in case.

It seems to us that the mere fact that the assessee has a house at Kanadukathan, ıre his mother lives, cannot constitute that place the seat of control and manage- ıt of the affairs of the family. Nor are we inclined in the circumstances of present case to attach much importance to the fact that the assessee had to in British India for 101 days in a particular year. He was undoubtedly rested in the litigation with regard to his family property as well as in the ıme-tax proceedings, and by merely coming out to India to take part in them, :annot be said to have shifted the seat of management and control of the affairs ıis family, or to have started a second centre for such control and management. : same remark must apply to the starting of two partnership businesses, as mere :tivity " cannot be the test of residence. It seems to us that the learned Judges ıe High Court have taken rather a narrow view of the meaning of section 4-A (*b*), ıuse they seem to have proceeded on the assumption that merely because assessee attended to some of the affairs of his family during his visit to British ia in the particular year, he brought himself within the ambit of the rule. On other hand, it seems to us that the more correct approach to the case was le by the Appellate Assistant Commissioner of Income-tax in the following ıage which occurs in his order dated the 24th February, 1944 :

" During a major portion of the accounting period (year ending 12th April, 1942) the appellant controlling the businesses in Burma and Saigon and there is no evidence that such control was ised only from Colombo. No correspondent or other evidence was produced which would show any instructions were issued from Colombo as regards the management of the affairs in British a especially as it was an unauthorized clerk who was looking after such affairs. The presump- therefore is that whenever he came to British India the appellant was looking after these affairs elf and exercising control by issuing instructions . . . . It has been admitted that there are rs of the family in British India. Has it been definitely established in this case that the control management of such affairs has been only in Colombo ? I have to hold it has not been established he reasons already stated by me."

There can be no doubt that the onus of proving facts which would bring :ase within the exception which is provided by the latter part of section 4-A (*b*), on the assessee. The appellant was called upon to adduce evidence to show : the control and management of the affairs of the family was situated wholly ıide the taxable territories, but the correspondence to which the Assistant ımissioner of Income-tax refers and other material evidence which might have ٧n that normally and as a matter of course the affairs in India were also being trolled from Colombo were not produced. The position therefore is this. the one hand, we have the fact that the head and karta of the assessee's family) controls and manages its affairs permanently lives in Colombo and the family ɔmiciled in Ceylon. On the other hand, we have certain acts done by the karta self in British India, which, though not conclusive by themselves to establish

the existence of more than one centre of control for the affairs of the family, are by no means irrelevant to the matter in issue and therefore cannot be completely ruled out of consideration in determining it. In these circumstances, and in the absence of the material evidence to which reference has been made, the finding of the Assistant Commissioner that the onus of proving such facts as would bring his case within the exception had not been discharged by the assessee and the normal presumption must be given effect to, appears to us to be a legitimate conclusion. In this view, the appeal must be dismissed with costs, but we should like to observe that as this case has to be decided mainly with reference to the question of onus of proof, the decision in this appeal must be confined to the year of assessment to which this case relates, and it would be open to the appellant to show in future years by proper evidence that the seat of control and management of the affairs of the family is wholly outside British India.

Mukherjea, J.—I agree with my learned brother, Fazl Ali, J., both in his reasoning and in his conclusion.

Chandrasekhara Aiyar, J.—I concur in the judgment of my learned brother, Fazl Ali, J.

Agent for Appellant : *M. S. K. Sastri.*

Agent for Respondent : *P. A. Mehta.*

V. S. ——— *Appeal dismissed.*

[THE SUPREME COURT OF INDIA.]

(Civil Appellate Jurisdiction.)

PRESENT :—H. J. KANIA, *Chief Justice*, M. PATANJALI SASTRI AND S. R. DAS, JJ.

Pannalal Jankidas, a firm .. *Appellants**

v.

Mohanlal and another .. *Respondents.*

Principal and agent—Failure of agent to insure goods bought for principal in spite of specific instructions to insure—Destruction of goods by explosion—Ordinary policy of fire insurance if taken not covering damage by explosion—Bombay Explosion (Compensation) Ordinance awarding full compensation in the case of all insured goods and only half compensation in the case of uninsured goods—Liability of agent for damages for the loss to the principal—Bombay Explosion (Compensation) Ordinance (1944), *section* 18 (2)—*Scope of the bar of suits under.*

The plaintiffs who were commission agents in Bombay purchased for the defendants several bales of piecegoods and after despatching the major portion of them according to the directions of the defendants and for which permits had been obtained from the Textile Commissioner of Bombay, had stored the remaining bales in their godown pending the receipt of the necessary permits in respect of them. As the goods could not be railed without such permits and in view of the delay in getting them it was agreed between the plaintiffs and the defendants that the defendants should pay a certain amount for each bale for insurance charges and that the goods were to remain insured till despatched. The defendants did not insure the goods in spite of the specific instructions of the defendants but nevertheless had charged them in their accounts with insurance premia at the rates agreed to. While the goods were thus in the godown of the plaintiffs an explosion occurred in the Bombay harbour and fires were caused and the goods of the defendants stored in the plaintiffs' godown were destroyed either by the fire or explosion. The plaintiffs sued to recover the price of the goods from the defendants on the ground of the agent's right to indemnity. The defendants contended that inasmuch as the plaintiffs by their negligence and misconduct had not insured the goods they were not entitled to the indemnity claimed. In the alternative they contended that the plaintiffs were liable to make good the loss caused to the defendants by their failure to insure the goods and that they were entitled to set-off this loss against the claim for the price. They also counter-claimed the same amount if their set-off was not allowed. Soon after the explosion the Government had issued the Bombay Explosion (Compensation) Ordinance, 1944, according to which full compensation was payable on all insured goods and only half compensation in respect of uninsured goods. It was contended on behalf of the plaintiffs that even if they had insured under the general fire insurance policy it would not have covered the case of an explosion and that by reason of the passing of the Ordinance under which full compensation became payable on all insured goods, their liability would not be affected.

*Civil Appeal No. 71 of 1949. 21st December, 1950.

Held (*Patanjali Sastri, J.*, differing) : In the present case it was the duty of the plaintiffs to insure the goods, as they had agreed to do. By their misconduct in not having insured the goods they have incurred a liability and the fact that the Ordinance did not exist or was not in the contemplation of the parties, is irrelevant for deciding the question of liability. The liability was incurred by reason of the breach of their duty and the plaintiffs made themselves liable to pay damages. The measure of damages was the loss suffered by the defendants on account of the goods not being insured. The Bombay Explosion (Compensation) Ordinance only substitutes a new basis for assessing compensation for the ordinary basis for assessing unliquidated damages. The compensation, under the Ordinance is payable on proof of the existence of a fire insurance policy irrespective of the terms of the policy. The non-recovery of half the amount of the defendants' claim from the Government under the Ordinance because of the absence of a fire insurance policy, thus directly arises from the neglect of the plaintiffs to insure the goods as they had been instructed to do or agreed to do and which in fact they represented that they had done. These are not indirect or remote damages. The contention that under the policy of insurance, if it had been taken, the assured could not have recovered anything for loss caused by the fire due to the explosion cannot be accepted. Nor could it be said that because of the Government intervention in issuing the Ordinance, the plaintiffs are sought to be made liable under a new liability because the Ordinance does not create any new liability but only quantifies the damages instead of leaving the unliquidated damages to be assessed in the usual way.

As the defendants are not claiming to recover money from the plaintiffs otherwise than under section 18 (1) of the Ordinance, the bar under section 18 (2) does not apply to the case.

Per *Patanjali Sastri, J.*—It is true that if the plaintiffs had taken out a fire insurance policy the defendants could have obtained the full value of the goods from the Government. But it cannot be said that the defendants' inability to recover such full value from the Government arises directly or naturally in the usual course of things out of the plaintiffs' failure to insure because independent and disconnected events had to occur to produce the result (*i.e.*), the Government's scheme of compensation embodied in the Ordinance, the agreement with the insurance companies regarding compensation, and the consequent distinction between insured and uninsured property in providing compensation for their loss.

On appeal from the Judgment and Decree dated the 11th April, 1947, of the High Court of Judicature at Bombay (Stone, C.J. and Chagla, J.) in Appeal No. 39 of 1946, arising out of Suit No. 1373 of 1944.

Rang Behari Lal, Senior Advocate (*S. Rajeswar Nath Nigam*, Advocate, with him), for Appellants.

M. C. Setalvad, Senior Advocate (*Ram Ditta Mal* and *B. Sen*, Advocates, with him), for Respondents.

The Court delivered the following

JUDGMENTS : *Kania, C.J.*—This is an appeal from a judgment of the High Court at Bombay. Although the record is heavy and many points were argued in the trial court and in the court of appeal at Bombay, the important point argued before us is only one.

The appellants (plaintiffs) are a firm of commission agents in Bombay. The respondents (defendants) were their constituents. Accounts between the parties in respect of their dealings were made up and settled upto the 30th of October, 1943. Piecegoods and yarn continued to be purchased and consigned by the plaintiffs to the defendants' joint family firm thereafter. One bale of piecegoods was purchased and despatched in November, 1943. In January, 1944, restrictions were imposed against the consignment of piecegoods and/or yarn outside Bombay by rail without obtaining the necessary previous permit from the Textile Commissioner at Bombay. On or about the 6th February, 1944, Mohanlal of the defendants' joint family firm came to Bombay and the plaintiffs purchased on their behalf 278 bales of piecegoods. Ninety-four out of those were despatched according to the defendants' instructions. The plaintiffs, according to the defendants' instructions, applied for and obtained permit to consign several more bales. On the permits being issued they were despatched on 14th February, 1944, to destinations given by the defendants. On the 10th April, 1944, the plaintiffs, after obtaining the necessary permits, despatched more bales as directed by the defendants. The dispute between the parties relates to the remaining 92 bales which were stored in godown No. 424, Baroda Street, Argyle Road, Bombay, pending the receipt of permit for consigning the same.

On the 14th April, 1944, there occurred a big explosion in the Bombay harbour which destroyed several immoveable properties and godowns with moveable

property covering a large area near the port. Fires were caused by the explosion and they also caused considerable destruction of moveable and immoveable properties. These 92 bales purchased by the plaintiffs on account of the defendants were also destroyed either by the fire or the explosion. The plaintiffs filed a suit to recover the price of these 92 bales from the defendants on the ground of the agent's right to indemnity. The defendants contended that the plaintiffs were their *pucca adatiyas*, that the property in the goods did not pass to them and that they were not liable for the price till delivery of the goods was given to them. In the alternative, in para. 4 of their written statement, they pleaded that when Mohanlal of the defendants' firm was in Bombay and the plaintiffs stated that the goods could not be railed until permits were obtained, it was agreed between the plaintiffs and the defendants that the defendants were to pay annas four per bale per month to the plaintiffs for insurance charges and the goods were thus to remain insured till despatched according to their instructions. In paragraph 21 of their written statement, they contended that if their plea that the plaintiffs were *pucca adatiyas* was not accepted and the plaintiffs were held to be their commission agents, the plaintiffs were guilty of negligence and misconduct in the business of agency, as in spite of specific instructions and agreement they had failed to insure the goods. They contended that owing to this negligence and misconduct the plaintiffs were not entitled to the indemnity claimed. In the alternative they contended that the plaintiffs were liable to make good the loss caused to the defendants by their failure to insure the said bales. They contended that they were entitled to set-off this loss against the claim for the price. They also counter-claimed the same amount if their set-off was not allowed. On these pleadings the parties went to a hearing. Issue 10 covered the defendants' plea about the plaintiffs' negligence and misconduct in not insuring the 92 bales and the counter-claim arising therefrom.

Numerous witnesses were called before the trial court and the learned judge after considering their demeanour and hearing their evidence came to the conclusion that the plaintiffs' witnesses were unreliable, except when they were corroborated by documentary evidence. He also disbelieved the defendants' evidence. He held that the agreement to insure the goods was not proved and passed a decree in favour of the plaintiffs. On appeal, differing from the view of the trial court, the appeal court held that instructions were given by Mohanlal to insure the goods and that the agreement was proved. In thus differing from the trial court's decision they accepted the well-recognised principle to give full weight to the trial judge's observations about the witnesses. They however found that on the documents the view of the learned trial judge was not correct. In doing so, they principally relied on statements of account sent by the plaintiffs to the defendants in respect of bales purchased in February, 1944 and despatched by them out of the lot of 271 bales previously and where the plaintiffs had charged the defendants insurance premia at the rates mentioned in the defendants' written statement. They rejected the plaintiffs' explanation, which was accepted by the trial judge, that these entries were foolishly made out of cupidity by the plaintiffs.

After a brief discussion in which this point was haltingly urged before us, the learned counsel for the plaintiffs did not very properly dispute this conclusion of the appeal court. In our opinion, the finding of the appeal court, having regard to the documents, was correct.

That left for decision the important question of damages to which the respondents were entitled. Before the appellate court in Bombay, it was conceded by the respondents' counsel that the insurance which was to be effected by the appellants under the agreement was on the usual terms of fire insurance policies prevalent in Bombay. Clause 7 of that form of policy, *inter alia*, provided as follows :—

" Unless otherwise expressly stated in the policy, this insurance does not cover . . . . . .

(h) any loss or damage occasioned by or through or in consequence of explosion but loss or damage by explosion of gas used for illuminating or domestic purposes in a building in which gas is

not generated and which does not form part of any gas-works will be deemed to be lost by fire within the meaning of this policy."

The appellants urged that granting that they were in default and had committed a breach of duty in not insuring the goods according to the instructions or the agreement, the respondents could not recover anything from them due to damage arising from the explosion, because the policy of fire insurance, if taken out, would not have given to the respondents the money claimed by them. For this purpose they relied on a statement in Mayne on Damages (11th Ed.) at page 592, as follows :—

"Therefore if an agent is ordered to procure a policy of insurance for his principal and neglects to do it, and yet the policy, if procured, would not have entitled the principal, in the events which have happened, to recover the loss or damage, the agent may avail himself of that as a complete defence."

In the present case, after the explosion considerable discussion about the liability of the insurance companies under their policies of fire insurance and the liability of Government for alleged negligence in unloading high explosives from a ship on the docks appears to have taken place. On the 1st of July, 1944, the Governor-General promulgated the Bombay Explosion (Compensation) Ordinance, 1944. The preamble to that Ordinance runs as follows :—

"Whereas an emergency has arisen which makes it necessary to provide for and regulate the payment of compensation for . . . . . damage to property due to or arising out of the explosions and fires which occurred in the Bombay docks on the 14th April, 1944, to restrict the litigation in connection with the said explosions and fires and to make certain other provisions in connection therewith."

The other relevant provisions may be also noticed at this stage. Uninsured property was defined to mean property which was not covered whether wholly or partially by any policy of fire, marine or miscellaneous insurance at the time of the explosion. After providing for the procedure according to which compensation may be claimed and dealt with by the Claims Committee to be set up under the Ordinance and an appeal and review from their decision, section 14 provided as follows :—

"14. Subject to the provisions of this Ordinance, there shall be paid by the Central Government compensation for explosion damage to property being

(*a*) damage caused by fire to property insured whether wholly or partially at the time of the explosion against fire under a policy (other than a policy of marine insurance) covering fire risk, or damage caused by blast without fire intervening to property insured whether wholly or partially at the time of the explosion under a policy (other than a policy of marine insurance) covering fire and explosion risk, of an amount equal to the proved loss, or

(*b*) damage caused by blast without fire intervening to property insured whether wholly or partially at the time of the explosion against fire under a policy (other than a policy of marine insurance) covering fire risk but not explosion risk, of an amount equal to 87½ per centum of the proved loss, to the holder of the policy of insurance covering the damaged property, or if he is deceased, to his legal representatives."

Section 15 provided for contribution by the insurers towards the payment of amounts to be paid under the Ordinance. Section 18 of the Ordinance runs as follows :—

"18. (1) Nothing in this Ordinance shall prevent the recovery of compensation for death or personal injury under the Workmen's Compensation Act, 1923 (VIII of 1923), or under any policy of life insurance or against personal accident or under any other contract or scheme providing for the payment of compensation for death or personal injury, or for damage to property under any policy of marine or miscellaneous insurance.

(2) Save as provided in sub-section (1), no person shall have, or be deemed ever to have had, otherwise than under this Ordinance any right whether in contract or in tort or otherwise to any compensation or damages for any death, personal injury or damage to or loss of any property, rights or interests, due to or in any way arising out of the explosion; and no suit or other legal proceedings for any such compensation or damage shall, save as aforesaid, be maintainable in any Court against the Crown or the Trustees of the Port of Bombay or the Municipal Corporation of the City of Bombay or against any servants or agents of the Crown or of the said Trustees or Municipal Corporation or against any other person whomsoever; and no act or omission which caused or contributed to the explosion shall be deemed to have been done or omitted to be done otherwise than lawfully.

(3) No suit, prosecution or other legal proceeding whatsoever shall lie against any person for anything in good faith done or ordered to be done in combating or mitigating the effects of the

explosion, or for anything in good faith done or intended to be done in pursuance of this Ordinance or any rules or orders made thereunder."

It is common ground that in respect of uninsured merchandise fifty per cent. compensation was to be paid under the Ordinance. The appellants have recovered that amount and have now agreed to give credit for the same to the respondents. The dispute is in respect of the remaining fifty per cent. It is not disputed that if the goods had been insured, under section 14 of the Ordinance, full compensation would have been recovered by the appellants and become payable to the respondents.

The appellants' contention is two-fold. Firstly, that if they had insured the goods the ordinary fire insurance policy would not have covered the risk and therefore although they had committed a breach of the agreement or been negligent in their duty as agents, they were not liable to pay anything more to the respondents. In the alternative it was argued on their behalf that the intervention of Government in passing this Ordinance could not increase or add to the liability of the appellants for the breach of contract or breach of duty and therefore they were not liable to pay the compensation which would have been receivable by the respondents if the goods had been insured. The second contention is that the counter-claim of the respondents is barred under section 18 (2) of the Ordinance. In the Indian Contract Act, sections 211 and 212 provide for the consequences of an agent acting otherwise than according to his duty towards the principal. Under section 211 when an agent conducts the business of the principal otherwise than according to the directions given by the principal, if any loss be sustained he must make it good to his principal and if any profit accrues he must account for it. In *Smith* v. *Lascelles*[1], it was held that if an agent was instructed to insure goods and neglected to do so he was liable to the principal for their value in the event of their being lost. Section 212 of the Indian Contract Act provides as follows :—

"An agent is always bound to act with reasonable diligence and use such skill as he possesses ; to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct."

These sections make it clear that in case of the agent's negligence he is liable to make good the damage directly arising from his neglect but not indirectly or remotely caused by such neglect or misconduct. The question therefore is whether in the present case the claim of the respondents based on the neglect or misconduct can be stated to be a direct consequence of such neglect or misconduct or is only indirectly or remotely caused by such neglect.

Two positions can be visualized as arising from the appellants' neglect in this case. The appellants could be treated either as insurers themselves or can be considered as having agreed to cause the goods insured by a recognised insurance company on the usual fire insurance policy terms. In *Tickel* v. *Short*[2], the Lord Chancellor shortly stated the proposition of law in these terms :—

"The rule of equity is, that if an order is sent by a principal to a factor to make an insurance ; and he charges his principal, as if it was made ; if he never in fact has made that insurance, he is considered as the insurer himself."

If therefore, as in the present case, the appellants were given instructions to insure the goods and they charged the respondents as if they had insured the goods, the law would throw upon them the liability of an insurer as if they stood in the position of insurers, *i.e.*, the Court will then be entitled in equity to proceed on the footing as if an insurance had been effected by the appellants and the goods stood covered under a fire insurance policy. Whatever consequences follow from that position must be accepted and enforced in a court of equity against the appellants. Proceeding on that line of reasoning under section 14 of the Ordinance the only thing which is required to be considered is whether the goods were covered by a fire insurance policy. The terms of the policy are immaterial. If, therefore, the appellants are considered as having insured the goods and are precluded

1. (1788) 2 T.R. 187.

2. 2 Ves. Sen. 239.

from saying that the goods were not covered by a fire insurance policy, the loss arising from the fact that the goods were not so covered is a direct consequence of their neglect and they must make it good. That will make them liable to pay what was claimed by the respondents.

If, however, it is considered that they were not themselves insurers but that they had agreed only to keep the goods insured under a policy of insurance of a recognised insurance company on the usual fire insurance policy terms, the question is whether the damages claimed by the respondents directly flow from their neglect of duty in not being able to produce such a fire insurance policy. Our attention has been drawn to an instructive judgment which makes the distinction between direct and remote damages clear. In re *An Arbitration between Polemis and another and Furness, Withy & Co., Ltd.*[1], there is a discussion on this point in the judgment of Bankes, L.J. He drew attention to the observations of Lord Sumner in *Weld Blundell* v. *Stephens*[2], who observed as follows :

"What are natural, probable and necessary consequences? Everything that happens, happens in the order of nature and is therefore natural. Nothing that happens by the free choice of a thinking man is necessary except in the sense of pre-destination. To speak of probable consequences is to throw everything upon the jury. It is tautologous to speak of effective cause or to say that damages too remote from the cause are irrecoverable, for an effective cause is simply that which causes, and in law, what is ineffective or too remote is not a cause at all. I still venture to think that direct cause is the best expression . . . . . What a defendant ought to have anticipated as a reasonable man is material when the question is whether or not he was guilty of negligence, that is, of want of due care according to the circumstances. This however goes to culpability, not to compensation."

Bankes, L.J., after noticing the above observations, stated as follows :

"Under these circumstances I consider that it is immaterial that the causing of the spark by the falling of the plank could not have been reasonably anticipated. The appellants' junior counsel sought to draw a distinction between the anticipation of the extent of damage resulting from a negligent act, and the anticipation of the type of damage resulting from such an act . . . . I do not think that the distinction can be admitted. Given the breach of duty which constitutes the negligence, and given the damage as a direct result of that negligence, the anticipations of the person whose negligent act has produced the damage appear to me to be irrelevant."

The question of what is remoteness of damages in a case of negligence has been reviewed in detail in a recent decision of the House of Lords in *Monarch Steamship Co., Ltd.* v. *Karlshamns Oljefabriker*[3]. In that case the question arose in respect of damages due to the late delivery of goods shipped for a port in Sweden, but which ship, owing to its unseaworthiness, was delayed in its voyage and owing to the outbreak of war under orders of the British Admiralty, was directed not to proceed to the Swedish port but ordered to discharge the cargo at Glasgow. The assignees of the bills of lading from the shippers had to forward the goods in neutral ships chartered for the purpose to the Swedish port. A war risks clause in the charterparty exonerated the owners of the vessel in the event of compliance with any orders given by the government of the nation under whose flag the ship sailed, as to destination, delivery or otherwise. The holders of the bills of lading claimed the re-transport charges from Glasgow to the Swedish port. It was contended that these damages were too remote. The House of Lords rejected the contention. In the speech of Lord Wright most of the relevant authorities have been reviewed and the *ratio decidendi* has been set out. In *Hadley* v. *Baxendale*[4], Alderson B., giving the Judgment of the Court, thought that the proper rule in such a case consisted of two alternatives. He said :

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, *or* such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

In the opinion of Lord Wright this in truth gives effect to the broad general rule of the law of damages that a party injured by the other party's breach of contract

1. (1921) 3 K.B. 560.
2. (1920) A.C. 983-984.
3. (1949) A.C. 196.
4. 9 Ex. 341.

"is entitled to such money compensation as will put him in the position in which he would have been but for the breach."

This rule was stated by Lord Blackburn in *Livingstone* v. *Rawyards Coal Co.*[1], as follows :

"Where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

The rule stated by Alderson B., has consistently been accepted as correct; the only difficulty has been in applying it. The distinction drawn is between damages arising naturally (which means in the normal course of things) and cases where there were special and extraordinary circumstances beyond the reasonable provision of the parties. The distinction between these types is usually described in English Law as that between general and special damages; the latter are such that if they are not communicated it would not be fair or reasonable to hold the defendant responsible for losses which he could not be taken to contemplate as likely to result from his breach of contract. Viscount Haldane, L.C., in the *British Westinghouse Electric & Manufacturing Co., Ltd.* v. *The Underground Electric Railways Co. of London*[2], on the question of damages said :

"In some of the cases there are expressions as to the principles governing the measure of general damages which at first sight seem difficult to harmonize. The apparent discrepancies are, however, mainly due to the varying nature of the particular questions submitted for decision. The quantum of damage is a question of fact, and the only guidance the law can give is to lay down general principles which afford at times but scanty assistance in dealing with particular cases. The Judges who give guidance to juries in these cases have necessarily to look at their special character, and to mould for the purposes of different kinds of claim, the expression of the general principles which apply to them and this is apt to give rise to an appearance of ambiguity . . . . . It was necessary to balance loss and gain and no simple solution was possible."

The House of Lords in *Liesbosch, Dredger* v. *Edison, S. S. (Owners)*[3] had stated at page 463 that it was impossible to lay down any universal formula. The dominant rule of law is the principle of *restitutio in integrum* and *subsidiary rules can only be justified if they give effect to that rule.* (The italics are mine.) In *Smith, Hogg & Co., Ltd.* v. *Black Sea & Baltic General Insurance Co., Ltd.*[4], the loss of a vessel occurred through the negligence of the master operating on conditions of unseaworthiness existing since the commencement of the voyage. The loss was held to be caused by the breach of the warranty of seaworthiness and recoverable accordingly. There was an exception of negligence. At page 1005 in the judgment of that case it is stated

"no distinction could be drawn between cases where the negligent conduct of the master is a cause and cases where any other cause, such as perils of the sea, is a co-operating cause. A negligent act is as much a co-operating cause if it is a cause at all, as an act which is not negligent. What was then being emphasized was that a voluntary act (negligent or not) of a human agent is not generally an independent or new cause for this purpose which breaks the chain of causation, as it is called, so as to exclude from consideration the causal effect of the unseaworthiness."

In that case it was held that the unseaworthiness created in the vessel instability which combined with negligence of the master caused the loss. No new law was laid down in that case. Similarly in the *Standard Oil Co. of New York* v. *Clan Line Steamers, Ltd.*[5], the vessel capsized because the master not being instructed by its owners as to the peculiarities of a turret ship, so handled her that she capsized. That loss was immediately due to perils of the sea which overwhelmed her when she capsized liability for which was excepted, but the dominant cause was her unseaworthiness in that her master, though otherwise efficient, was inefficient in not being aware of the special danger. In general, all the authorities are in agreement in this respect and embody the same rule. The shipowner, of course, under the familiar general rule, is debarred by his breach of duty from relying on the specific exception. Though he would not be liable for the consequences caused by the specific excepted peril or the accident alone if he were not in default, and though the unseaworthiness existing

1. (1880) 5 A. C. 25, 39.
2. (1912) A.C. 673, 689.
3. (1933) A.C. 449.
4. (1940) A.C. 997.
5. (1924) A.C. 100.

at the commencement of the voyage might not be operative or known until the time when the accident occurs, yet then the breach of the warranty operates directly as a cause and, indeed, a dominant cause. Causation in law does not depend on remoteness or immediacy in time. These observations meet the appellants' contention about the Government Ordinance intervening to fix the damages. They show that such intervention does not break the chain of causation, nor does it make the loss, *i.e.*, damages, remote. The statement of law in Mayne on Damages quoted above, only reproduces the principle of law stated by Lord Blackburn in *Livingstone* v. *Rawyards Coal Company*[1].

Bearing in mind this state of the law it appears clear that in the present case it was the duty of the appellants to insure the goods, as they had agreed to do. Once misconduct is admitted or proved, the fact that the Ordinance did not exist and could not have been in the contemplation of the parties is irrelevant for deciding the question of liability. The liability was incurred by reason of the breach of their duty and the appellants made themselves liable to pay damages. The measure of damages was the loss suffered by the respondents on account of the goods not being insured. The next point to be decided is what difference the promulgation of the Ordinance makes in the liability of the appellants. The relevant provisions are noted above. The scheme of the Ordinance clearly is, as stated in the preamble, to provide for and regulate the payment of compensation and to prevent litigation, amongst other things. It is thus a comprehensive legislation which replaces the rights of parties either under the policy of insurance against insurance companies, or on the ground of negligence against Government by the owners of the goods, as also claim by insurance companies against Government. The validity of this legislation is not challenged. Section 18 gives it a retrospective effect. Therefore the Ordinance only substitutes a new basis for assessing compensation for the ordinary basis for assessing unliquidated damages. The compensation under the Ordinance is payable on proof of the existence of a fire insurance policy irrespective of the terms of the policy. The non-recovery of half the amount of the respondents' claim from the Government under the Ordinance because of the absence of a fire insurance policy, thus directly arises from the neglect of the appellants to insure the goods, as they had been instructed to do or agreed to do and which in fact they represented that they had done. In our opinion, these are not indirect or remote damages.

The contention that under the policy of insurance the assured could not have recovered anything for loss caused by the fire due to explosion cannot be accepted. Firstly, this contention of the assured's inability to receive any compensation because of clause 7 of the form of common policy was not raised in the trial court. No issue was raised in respect thereof and no arguments in support or against it were heard. It was suggested for the first time, as appears from the judgment of Chagla, J., in the court of appeal. The assumption that because of clause 7 of the policy no insurance company would have paid the loss cannot be assumed to be necessarily and unquestionably sound and in view of the terms of the Ordinance not capable of being determined. There appears no reason under the circumstances to proceed as if an adverse decision on the interpretation of the policy had been given against the respondents and to hold the appellants free from liability for not recovering half the value of the goods which could have been recovered if the goods had been insured (irrespective of the terms on which the policy stood) as agreed to be done by them. I do not think when the relations between the parties are of a principal and an agent and the agent is found to have committed a breach of his duty, it is correct to take a narrow view of the situation. The agent chose to gamble in not insuring the goods and desired to charge the agreed premia, on the footing that the goods were covered by insurance. If so, he must take the consequences of his default. The argument that their liability as an agent who had agreed to insure should be ascertained as on the date of the explosion is no answer to the claim of the respondents. The position would be this. Assuming that the appellants had insured

1. (1880) 5 A.C. 25.

the goods on the terms of the usual fire insurance policy, the respondents could ask them either to assign the policy to the respondents or ask them to file a suit against the insurance company contending that the fire, and not the explosion, was the cause of the loss and was covered by the policy of insurance. Before the Court could decide the rights of the parties, the Ordinance promulgated by the Governor-General prevented the decision of the dispute, but the Government undertook to pay the loss on the footing that the policy covered the risk. The misconduct gave rise to the liability to make good the damage and to put the respondents in the same position in which they would have been if their goods had been insured.

On behalf of the appellants it was urged that because of the Government intervention in issuing the Ordinance they were sought to be made liable under a new liability. Their liability has been and exists on the basis that a fire insurance policy existed, as they were instructed to insure the goods and which they represented they had done. The liability arises not because of the Ordinance but because of the breach of their duty in failing to insure, which has taken place apart from the Ordinance and which is not affected by the Ordinance. The utmost that they could urge is that the extent of their liability arising from their misconduct was not anticipated by them when they agreed to perform their duty. That however is no defence in law if the damages directly flow from the breach of duty. The Ordinance only quantifies the damages instead of leaving the unliquidated damages to be assessed in the usual way. The Ordinance lays down the yardstick for fixing the damages under different circumstances, which cover all alternative situations, and the liability for failure to insure must now be measured by the new basis. It does not create any new liability. The appellants' contention on this point therefore must be rejected.

The only other point urged before us was based on the construction of section 18 of the Ordinance. It was argued on behalf of the appellants that apart from what could be recovered under clause (1) of section 18 the Ordinance extinguished all right, whether in contract or tort or otherwise to any compensation or damage for loss of any property due to or in any way arising out of the explosion and provided that no suit or other legal proceedings for any such compensation or damages shall, save as aforesaid, be maintainable in any court against the Crown or against any other person whatsoever. It was urged that in establishing their claim the respondents must plead the right to recover the amount due to explosion and that was barred under section 18 (2). In our opinion, this contention is unsound. The appellants have filed this suit to recover the price of the goods on the ground of indemnity. The respondents' answer is that the appellants are not entitled to the indemnity because they are guilty of a breach of duty in the business of the agency. They contend that they could be liable to pay for the goods only if the appellants give them the goods or deliver the same according to their instructions. They counter-claim that if the appellants are unable to give them the goods they must pay them the value thereof. The appellants plead by way of defence to the counter-claim that the goods were destroyed without any neglect on their part by fire caused by the explosion and therefore they were not liable. The respondents' rejoinder is that they had asked the appellants to insure the goods and if the appellants had not failed in their duty they would have reimbursed the respondents. The appellants then plead that even if they had insured the goods the respondents could not have recovered anything from the insurance companies. It is in reply to this contention that the respondents say that the appellants' liability to recover money from the insurance company on the terms of the usual fire insurance policy is irrelevant because they could have recovered the money if they had insured in fact, irrespective of the terms of the policy, under the Ordinance. The respondents are not thus claiming to recover money from the appellants otherwise than under section 18 (1) of the Ordinance. Their cause of action is the misconduct of the agent in the business of agency and is quite different. It is not for compensation arising from explosion.

was argued that damages formed part of the cause of action of the respon-
framing the counter-claim and therefore section 18 (2) stood in the way
respondents. The contention is unsound because the cause of action is
ed by the averment that there was a duty or agreement to insure, that
as a failure to perform that duty, that loss had occasioned to the respon-
cause of the failure to perform the duty and the appellants were therefore
r the breach of the duty. The quantum of damages is not a part of the
f action. It is a matter to be ascertained by the Court according to well
vn principles of law.

result is that the appeal fails and is dismissed with costs.

direct result of the explosion . . . . . ." "Uninsured proper
perty which was not covered whether wholly or partially by any policy of fire, mar
eous insurance at the time of the explosion."

on 14 so far as it is material here, provides that

there shall be paid by the Central Government compensation for explosion dam
being damage caused by fire to property insured whether wholly or partially at the
ion against fire under a policy covering fire risk . . . an amount equal to the pr

on 15 provides for payment of contribution to Government by i
panies. Section 16 provides for compensation for such damage to u
erty on a certain scale mentioned in that section. Section 18 (2) enact
rtain exceptions not material here,

'no person shall have or be deemed ever to have had otherwise than under this
ght, whether in contract or in tort or otherwise, to any compensation or damages for a
ge to or loss of any property, rights or interests, due to or in any way arising out of the
o suit or other legal proceeding for any such compensation or damages shall, save a
intainable in any Court against the Crown . . . . . or against any servants or a
n . . . . or against any other person whomsoever; and no act or omission wh
ributed to the explosion shall be deemed to have been done or omitted to be don
lawfully."

It is admitted that the appellants recovered from the Central Go
r section 16 nearly one half of the value of the goods destroyed by fir
custody as compensation for the loss of the respondents' goods a
n credit to the respondents in their accounts for the amount thus
dispute now relates to the respondents' claim to the balance of the
goods as damages for the appellants' failure to keep them insured a
he agreement between the parties as the full value of the goods co
obtained from the Government under section 14 without regar
pted risk if only they had been insured against fire. The scheme of
e appears to be that the Government, instead of having probably to
erous law suits for compensation for loss of or damage to property ba
ged negligence of their officers in having allowed the explosion to ta
ertook to pay an amount equal to the "proved loss" in cases of loss o
oods which had been insured against fire, etc., and smaller amounts f
age to uninsured goods, putting an end, at the same time, to all right
ation or damages arising out of the explosion, and barring all suits
eedings for the same.

On the basis of these provisions it was contended on behalf of th
s that the appellants, by reason of their failure to keep the good
e liable under the law to place the respondents, who had suffered th
same position as if the appellants had performed their agreement c
the instructions of the respondents. Learned counsel for the re
d the claim on the neglect of duty on the part of the appellants as co
its in carrying out the instructions of their principals, and relied on the
ection 212 of the Indian Contract Act, which provides *inter alia* that a
nd

" to make compensation to his principal in respect of the direct consequence of his c
: of skill or misconduct, but not in respect of loss or damage which are indirectly
ed by such neglect, want of skill or misconduct."

the other hand, it was urged on behalf of the appellants that the que
e determined on the basis of a breach of contract for the consequences
vision is made in section 73 of the Indian Contract Act. That section

" where a contract is broken the party who suffers by that breach is entitled to rece
y who has broken the contract compensation for any loss or damage caused to him th
rally arose in the usual course of things from such breach or which the parties knev
d the contract to be likely to result from the breach of it. Such compensation
n for any remote or indirect loss or damage sustained by reason of the breach."

o not think that it makes much difference, so far as the assessment
nages is concerned, whether the default of the appellants is treated as

here a man going to be married to an heiress, his horse having cast a shoe on the journey, d a blacksmith who did the work so unskilfully that the horse was lamed, and the rider not rrived in time the lady married another ; and the blacksmith was held liable for the loss of the ."

e learned Judge warned

e should inevitably fall into a similar absurdity unless we applied the rules of commonsense t the extent of liability for the breach of a contract of this sort."

mmonsense point of view was thus put by Lord Wright in *Liesbosch, Dredger m, S.S. (Owners)*[2] :

ie law cannot take account of everything that follows a wrongful act ; it regards some sub-natters as outside the scope of its selection because ' it were infinite for the law to judge the causes,' or consequence of consequences. Thus the loss of a ship by collision due to the sel's sole fault may force the shipowner into bankruptcy and that again may involve his suffering, loss of education or opportunities in life, but no such loss could be recovered from gdoer. In the varied web of affairs the law must abstract some consequences as relevant, aps on grounds of pure logic but simply for practical reasons."

onsiderations have led the Courts to evolve the qualifying rules of remoteness to which alone the broad principle of *restitutio in integrum* now finds its tion.

plying these principles to the facts of the present case, what is the position ? pondents lost their goods by fires arising out of the explosion presumably he negligent conduct of the Government's officers or servants at the docks. the appellants had taken out a fire insurance policy in ordinary form it ıot have covered the loss, for fire due to explosion would be an excepted So the appellants' failure to keep the goods insured produced no direct

Government on the terms stated therein and at the same time putting a
ights to recover compensation save as provided in the Ordinance and h
s and other proceedings for that purpose. As any claim to compen
: the Government must be based upon the negligence of their servan
ıment took no note of excepted risks in insurance policies and und
y to pay full compensation in case of all insured property, doubtless be
an arrangement with certain Insurance Companies the Government ob
ortionate contribution as provided for in section 15, though on the hyp
r servants' negligence their liability in law would be the same in resp
l and uninsured property. If the Ordinance had provided for partial
ion in both cases, as it would probably have done if the Insurance
had not agreed to come into the scheme with their contributions, th
nts could have no claim to recover the balance from the appe
hstanding that the supposed direct causal connection between the
default and the respondents' loss would still be there. The truth is
) such connection and it was because of the provisions of the Ord
made a distinction between insured and uninsured property in the
pensation for explosion damage, and barred rights and remedies und
l law in relation thereto, that the respondents were unable to recov
:e of the value of their goods destroyed by fire. But such inability
arded as flowing naturally or directly from the appellants' default.

: was suggested that the provisions of the Ordinance must be taken to
ed the ordinary rules of law as to remoteness of damage, as section
uished retrospectively from the date of the explosion, all rights and re
the general law for obtaining compensation for explosion damage and
the rights therein provided. The substituted right to compensat
the Government and insured property were concerned, was not sub
strictive conditions in the policies, and therefore, it was claimed, the n
nages in this case must be determined irrespectively of the existence
excluding " explosion " from the scope of the common form of policy.
ıent is, in my opinion, more ingenious than sound. The short answ
t the Ordinance did not purport to displace or supersede any rule
measure of damages or to amend or abrogate any terms in insurance p
is nothing in the Ordinance to indicate that the clause excepting ex
ned in the fire insurance policies issued in Bombay should be deemec
nd void. As already stated, the Government, having accepted liabi
ion damage, were not really concerned with the restrictive conditions
s. Their liability did not arise out of such policies. In view of
ance Companies having agreed to contribute a certain proportion, the C
undertook liability to pay full compensation for loss of insured property
the terms of insurance, which had no relevance to the liability whi
ed. To suggest, in such circumstances, that the clause excepting ex
all fire policies issued in common form in Bombay was legislatively ab
my opinion, extravagant and far-fetched. The respondents' good
yed when the explosion occurred on the 14th April, 1944, and on th
could have recovered nothing except perhaps nominal damages for the
failure to insure the goods as they agreed to do. It is difficult to s
irtue of the Ordinance passed more than two months later, thei
st the appellants, which the respondents themselves are contending
y way affected by the provisions of the Ordinance, could become enlarg

The next contention raised on behalf of the appellants before us re
aintainability of the respondents' counter-claim. The contention i
section 18 (2) of the Ordinance which provides that " no suit or oth
eding for any such compensation or damages " (*i.e.*, compensation or d
ıy damage to or loss of any property, rights or interests due to or in a
g out of the explosion) " shall, save as aforesaid," (exceptions not r
" be maintainable in any court against the Crown .....or against ar

Indeed, the respondents appear to my mind to be in a
is point. They must necessarily say, in order to have been
alue of the goods from the Government if they had been
ge to the goods was

roperty, being damage caused by fire to property insured whether
e of the explosion against fire under a policy covering fire risk."

nat, no claim could be made against the Government
so the very basis of their claim against the appellants
nts' neglect of duty, the respondents could have recovered
ds from the Government would fail. But if they had to say
t by explosion damage within the meaning of section 14,
uld be bringing themselves under the bar of section 18 (2).
. therefore claim that the loss of the goods was explosion
ing of the Ordinance so as to bring the case within section 14
ntend that the loss was not " due to or did not in any way
n " in order to avoid the bar under section 18. Both sec-
ve in view the *physical cause* for the loss or damage to property
is claimed and not the *cause of action* in relation to the person
ought. The respondents cannot, in my opinion, be allowed
ositions in order to bring themselves within the one and get

llow the appeal and dismiss the counter-claim.

nts : *Mohan Behari Lal.*

lents : *I. N. Shroff.*

Appeal allowed.

The Court delivered the following

JUDGMENTS : *Kania, C.J.* (Das, J. agreeing with him)—This judgment of the High Court at Bombay delivered on a reference Appellate Tribunal under the Indian Income-tax Act. The mat The assessees (appellants) are the executors of the will of Mr. J. K on the 9th of April, 1942, having made his last will on the 8 Probate of the will was issued to the executors on the 10th of Au his lifetime, the testator carried on the business of shipping of the will contains directions about carrying on this business of disposal. It directs the executors to carry on the business as a his death with power to make fresh contracts and discharge the liabilities and all other usual and necessary powers, unless special which, in the opinion of the executors, made it expedient to sell This business was to be carried on for a period not exceeding tw

e expiration of one year from the testator's death that the said undertaking would t be sold to his nephews because none was willing or able to purchase it or, if it nained unsold at the end of a year, to any of the nephews then (whichever event st happened) the executors were directed to sell the undertaking to such third rson on such terms and at such price as they thought proper. The clause ended th the following words :—

"I expressly declare that in carrying on the said undertaking my trustees shall, in addition to powers, discretion and authorities vested in them by law, have power to carry or discontinue y part of the said undertaking or to augment or diminish the capital employed and generally to as absolute owners without being responsible for any loss.".

The business was sold to one of the nephews on the 1st of January, 1943. ne appellants contended that within the meaning of section 25 (4) of the Indian

of such sale or gift and the exemption from liability to tax will be for a terminating on that day. It cannot again be seriously disputed that if the settled his business on trust under a deed of settlement there will be a suc to the business by another person on the day of the settlement. Similarly, event of his death intestate his heir-at-law will succeed to the business on t of his death. The argument advanced on behalf of the appellants that present case having regard to the terms of clause 13 of the will there ha "no succession in such capacity to another person" because the executor carrying on the business only with a view to sell it as a going concern, be accepted because on the day of the death of the deceased the estate in the business got vested in the executor, and the executors carried on the b within the meaning of section 3 read with section 10 of the Act and as such personally liable as assessee. Thus there came about a change in the assess therefore "a succession in such capacity" took place within the meaning of 25 (4) of the Income-tax Act. It seems clear that if the testator had ferred the business to a trustee, although the trustees will not be the be owners, in law there will be a succession of the business to another, within the meaning of section 25 (4) of the Indian Income-tax Act. If in case that result follows there appears no reason why when the legal estate i ferred by operation of law to an executor there should not be consid

ccession *inter vivos*. Whatever force there may have been in the suggestion
the sub-section could not have contemplated cases of testamentary or
ate succession if there was no provision for the assessment of profits earned
deceased person in the hands of his representatives, there seems to be no
ient reason for excluding from the scope of the sub-section cases of succession
ath in view of the provision in section 24-B. On the other hand, proviso (*c*) to
n 24 (2), which refers to a person "succeeded in such capacity by another
n otherwise than by inheritance," would seem to imply that "succession,"
at term is used in the Act, includes devolution on death.

ıe ownership of the k
of section 10. I do no
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ssor. The question i
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business as the prede
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[THE SUPREME COURT OF INDIA.]

(Civil Appellate Jurisdiction.)

RESENT :—S. FAZL ALI, B. K. MUKHERJEA AND N. CHANDRASEKHARA AIYAR, JJ.

nanambal Ammal .. *Appellant**

v.

. Raju Ayyar and others .. *Respondents.*

Will—Construction—Value of decisions in respect of particular wills—General principles of construction—sumption of intestacy—If and when can be raised.

It is seldom profitable to compare the words of one will with those of another or to attempt to d out to which of the wills, upon which decisions have been given in reported cases, the will before e Court approximates closely. Cases are helpful only in so far as they purport to lay down certain neral principles of construction and at the present day these principles seem to be fairly well settled.

The cardinal maxim to be observed by Courts in construing a will is to endeavour to ascertain e intentions of the testator. This intention has to be gathered primarily from the language of the cument which is to be read as a whole without indulging in any conjecture or speculation as to at the testator would have done if he had been better informed or better advised.

A presumption against intestacy may be raised if it is justified by the context of the document surrounding circumstances; but it can be invoked only when there is undoubted ambiguity in ertainment of the intentions of the testator.

On appeal from the Judgment and Decree, dated the 27th November, 1945 the High Court of Judicature at Madras (Wadsworth and Rajamannar, JJ.)[1] Appeal No. 518 of 1944 arising out of decree dated the 10th July 1944 in O.S. o. 34 of 1943.

B. Somayya, Senior Advocate (*R. Ramamurthi*, Advocate, with him) for Appellant.

K. S. Krishnaswamy Aiyangar, Senior Advocate, (*K. Narasimha Aiyangar*, Advocate, ith him) for Respondent No. 1.

The Judgment of the Court was delivered by

Mukherjea, J.—This appeal is directed against an appellate judgment of a ivision Bench of the Madras High Court, dated 27th November, 1945, reversing the cision of the Subordinate Judge of Mayuram made in Original Suit No. 34 of 43.

There is no dispute about the material facts of the case which lie within a ort compass and the controversy centres round one point only which turns upon e construction of a will left by one Kothandarama Ayyar to whom the properties in suit admittedly belonged. Kothandarama, who was a Hindu inhabitant the District of Tanjore and owned considerable properties, died on 25th April, 05, leaving behind him as his near relations his adoptive mother, Valu Ammal, s widow, Parbati, and two daughters, Nagammal and Gnanambal, of whom agammal, who became a widow during the testator's life-time, had an fant daughter named Alamelu. Kothandarama executed his last will on th March, 1905 and by this will, the genuineness of which is not disputed the present litigation, he gave an authority to his widow to adopt unto him son of his second daughter Gnanambal, should she beget one before January 1908 in the alternative any of the sons of his two nephews, if the widow so chose.

The suit, out of which the appeal arises, was commenced by Raju Ayyar, o was a son of one of the testator's nephews and was taken in adoption by the dow in terms of the will; and it was for recovery of possession of certain properties, known as Kothangudi properties which formed part of the testator's ate on the allegation that under the will mentioned above, these properties re given to Nagammal, the widowed daughter of the testator for her life-time, t as there was no disposition of the remaining interest after the death of the tenant, the properties vested in the plaintiff as the adopted son and heir of

* Civil Appeal No. 13 of 1950. 21st December, 1950.

1. (1946) 1 M.L.J. 283.

the deceased on the death of Nagammal which took place on 3rd of January, 1943. Gnanambal, the second daughter of the testator, was the first and main defendant in the suit, and she resisted the plaintiff's claim primarily on the ground that there was no intestacy as regards the suit properties after the termination of the life interest of Nagammal, and that under the terms of the will itself she was entitled to get these properties in absolute right after the death of Nagammal, subject to payment of a sum of Rs. 5,000 to Alamelu, the daughter of Nagammal. Alamelu was made the second defendant in the suit and as she died when the suit was pending in the trial Court, her heirs were impleaded as defendants 3 to 9.

The first Court accepted the contention of the defendant No. 1 and dismissed the plaintiff's suit. On appeal to the High Court, the judgment was reversed and the plaintiff's claim was allowed. The defendant No. 1 has now come up on appeal to this Court.

To appreciate the contentions that have been raised by the parties to this appeal, it would be convenient first of all to refer briefly to the relevant provisions of the will. After cancelling his previous wills, the testator in the third paragraph of his will gave his widow authority to adopt a son. She was to adopt the son of Gnanambal, if the latter got a son previous to January 1908, or she could adopt any of the sons of the testator's nephews. Paragraph 4 provides that if the first course is followed, that is, if the son of Gnanambal is adopted by the widow, then all the properties, movable and immovable, belonging to the testator excepting the village of Kothangudi, the house at Injigudi and the other properties which were disposed of by the will would go to such adopted son. Paragraph 5, which is material for our present purpose runs as follows :—

"The whole village of Kothangudi and the house at Injigudi, both of Nannilam Taluk, my daughter Nagammal shall enjoy with life interest and after her the said property shall pass to my daughter Gnanam and her children on payment by the latter of Rs. 5,000 to Alamelu, Nagammal's daughter."

By the sixth paragraph the Nallathukudi and Pungavur villages together with certain house property at Mayavaram are given to the testator's adoptive mother and wife in equal shares to be enjoyed by both of them during their lifetime and after their death they are to pass on to the adopted son. Paragraph 7 gives a small house absolutely to Nagammal for her residence and paragraph 8 makes certain provisions for management of the properties. In paragraph 9 direction is given to collect the money due on the insurance policy on the life of the testator and to pay off his debts. Paragraph 10 mentions certain charities, the expenses of which are to be defrayed from the income of the Nallathukudi properties. Paragraph 11 then says that in the event of the widow adopting any of the nephew's sons of the testator, such son shall inherit the entire property at Kokkur and also the lands of Nallathukudi after the death of the testator's wife and mother. By paragraph 12, the village of Maruthanthanallur is given to Gnanambal and paragraph 13 provides that "the village of Kothangudi shall be enjoyed by Nagammal as stated in paragraph 5." By paragraphs 15 and 16 the remainder in the house at Mayavaram situated in the east row of Vellalarkovil Street is given to Gnanambal after the death of the testator's wife and mother. Paragraph 18 provides for certain other charities. In paragraph 20 it is stated that if the wife of the testator should die before January 1908 without making any adoption, then the eldest or any son of Gnanambal would be his adopted son without any formality and inherit all the properties subject to the conditions mentioned in the will. Paragraph 21, which is the penultimate paragraph in the will further lays down that if all the three contingencies fail and no adoption is taken, the male child or children born to Gnanambal shall inherit as grandsons all the properties of the testator, subject to the conditions specified in the will. These, in brief, are the dispositions made in the will. The plaintiff founds his claim upon paragraph 13 of the will which, according to him, contains the entire disposition so far as the Kothangudi property is concerned. That village is given to Nagammal for her life with no disposition of the remaining interest. If the remainder has not been

sposed of, there is no doubt that the plaintiff would be entitled to the property the heir of the testator under the ordinary law of inheritance.

The defendant No. 1, on the other hand, relies on paragraph 5 of the will, bich gives the Kothangudi village and the Injigudi house to Nagammal to be ijoyed by her so long as she lives and after her death they are to go to Gnanambal id her children, subject to the payment of a sum of Rs. 5,000 to be paid to Ala-elu, the daughter of Nagammal.

The High Court on a construction of the will has found in favour of the aintiff primarily on the ground that in the contingency which happened in the esent case, *viz.*, that the widow took in adoption a nephew's son of the testator, aragraph 5 of the will did not come into operation at all. The disposition as gards Kothangudi property is, therefore, to be found exclusively in paragraph 13 the will and the actual words employed by the testator in that paragraph do ot indicate that apart from Nagammal's taking a life estate in the Kothangudi llage the rest of the provisions in regard to this property as laid down in para-aph 5 would also be incorporated into paragraph 13. An obvious difficulty, cording to the learned Judges, in accepting the construction sought to be put on the will by defendant No. 1 is that paragraph 5 speaks both of Kothangudi id Injigudi properties, whereas paragraph 13 does not mention the Injigudi house all, nor does it purport to give a life interest in the same to Nagammal. It uld not be reasonably held on construction of the will that the intention of the stator was that Gnanambal was to pay Rs. 5,000 to Alamelu for the Kothangudi operty alone. The result was that the plaintiff's claim was allowed. It is e propriety of this decision that has been challenged before us in this appeal.

In course of the arguments, we have been referred by the learned Counsel n both sides to quite a large number of decided authorities, both English and ndian, in support of their respective contentions. It is seldom profitable to compare e words of one will with those of another or to attempt to find out to which of e wills, upon which decisions have been given in reported cases, the will before approximates closely. Cases are helpful only in so far as they purport to lay own certain general principles of construction and at the present day these general rinciples seem to be fairly well settled.

The cardinal maxim to be observed by Courts in construing a will is to ndeavour to ascertain the intentions of the testator. This intention has to be thered primarily from the language of the document which is to be read as a hole without indulging in any conjecture or speculation as to what the testator ould have done if he had been better informed or better advised. In construing e language of the will as the Privy Council observed in *Venkata Narasimha* v. *rthasarathy*[1]

> "the Courts are entitled and bound to bear in mind other matters than merely the words ed. They must consider the surrounding circumstances, the position of the testaor, his family ationship, the probability that he would use words in a particular sense, and many other things hich are often summed up in the somewhat picturesque figure 'The Court is entitled to put itself to the testator's armchair' . . . . . But all this is solely as an aid to arriving at a right nstruction of the will, and to ascertain the meaning of its language when used by that particular stator in that document. So soon as the construction is settled, the duty of the Court is to carry t the intentions as expressed, and none other. The Court is in no case justified in adding to testa-entary dispositions . . . . . In all cases it must loyally carry out the will as properly cons-ued, and this duty is universal, and is true alike of wills of every nationality and every religion or nk of life."

A question is sometimes raised as to whether in construing a will the Court ould lean against intestacy. The desire to avoid intestacy was considered by e Privy Council in the case referred to above as a rule based on English neces-ty and English habits of thought which should not necessarily bind an Indian ourt. It seems that a presumption against intestacy may be raised if it is justi-

1. (1913) 26 M.L.J. 411 : I.L.R. 37 Mad. 192 : L.R. 41 I.A. 51, at p. 70 (P.C.).

fied by the context of the document or the surrounding circumstances ; but it can be invoked only when there is undoubted ambiguity in ascertainment of the intentions of the testator. As Lord Justice Romer observed in In *Re, Edwards* : *Jones* v. *Jones*[1]

> " it cannot be that merely with a view to avoiding intestacy you are to do otherwise than construe plain words according to their plain meaning."

It is in the light of the above principles that we should proceed to examine the contents of the will before us.

The present will, which is the last of four testamentary documents executed by the testator, appears to have been prepared with a great deal of care and circumspection. The testator had clearly in mind the different situations that might arise in case his widow adopted either Gnanambal's son or a son of one of the nephews of the testator. He envisaged also the possibility of the widow dying without making any adoption at all. Besides the son to be adopted, the only other relations who had natural claims upon the affection and bounty of the testator and for whom he desired to make provisions were his wife, his adoptive mother, the two daughters and the infant grand-daughter. The interests given to his wife, the adoptive mother and the eldest daughter, who were all widows, were for their life-time, except a small house property which was given absolutely for the residence of the eldest daughter. On the other hand, the bequests in favour of Gnanambal, who was a married daughter, and the adopted son of the testator, were absolute in their character. Besides these dispositions, there were certain gifts for charity which were to be met out of the income of the properties given to the wife and the adoptive mother for their lives. One singular feature in the will is that the testator took scrupulous care to include in it every item of property that he owned.

There are two provisions in the will relating to Kothangudi property to which the dispute in the present suit relates. One is in paragraph 5 which gives this property along with the house at Injigudi to Nagammal, the remainder being given to the appellant subject to the payment of a sum of Rs. 5,000 to Alamelu, the daughter of Nagammal. The other is in paragraph 13, which merely says that Nagammal was to get it for life as stated in paragraph 5. The view taken by the High Court and which has been pressed for our acceptance here by the learned Counsel for the respondents is that paragraph 5 was meant to be operative only if Gnanambal's son was adopted by the widow. As that was not done, paragraphs 4 to 8 of the will, it is urged, will go out of the picture altogether and it is not permissible to refer to them except to the extent that they were impliedly incorporated in the subsequent paragraphs of the will. We do not think that this is the correct way of reading the document. The testator undoubtedly contemplated different contingencies ; but a reading of the whole will does not show that he wanted to make separate and self-contained provisions with regard to each of the contingencies that might arise and that each set of provisions were to be read as exclusive of the other set or sets. That does not appear to be the scheme of the will. The testator's main desire undoubtedly was that his widow should adopt the son of his daughter Gnanambal, and in the first part of his will after making provisions for his two daughters, his wife and adoptive mother and also for certain charities, he left the rest of his properties to the son of Gnanambal that was to be adopted by his widow. In the second part of the will, which is comprised in paragraphs 11 to 16, the testator sets out the modifications which he desires to make in the earlier dispositions in case a son of one of his nephews was adopted by the widow. It was not the intention of the testator that on the happening of the second contingency, all the earlier provisions of the will would stand cancelled and the entire dispositions of the testator's property would have to be found within the four corners of paragraphs 11 to 16 of the will. In our opinion, the

1. (1906) 1 Ch. 570, at p. 574.

provisions made for the two daug
made in paragraphs 5, 6 and 7 of
payment of debts contained in par
under all the three contingencies r
that provisions of paragraphs 7, 9,
in paragraphs 11 to 16, althou
take effect on the happening of t
tingency contemplated by the test
expressly stated that if no adoptio
would inherit the properties and h
ditions mentioned in the will. Th
to the provisions made for the mo
as well as in respect to payment o
ed in paragraph 10.

The changes that are to take
are in regard to the bequests in fa
of the will, the adopted son was to
exception of those given to the tw
paragraph 11, if the adoption is of
son gets only the Kokkur properti
village after the death of the testat
thanallur which would go to the
under paragraph 11 and is given t
interest in the Mayavaram house
paragraph 6. Subject to the chan
6 and 7 would, in our opinion, still
was a nephew's son of the testator.
with regard to the provision in pa
only stated that the village Kothan
in paragraph 5. It may be conced
the entire provision of paragraph
purpose. It is enough that paragra
way. The statement in paragraph
the testator used only for the purpo
would be enjoyed by Nagammal ev
is not by way of making any new
already done. The affirmation of
superfluous cannot exclude the rest.
the provisions in paragraph 5, parti
to Alamelu, was not repeated in pa
not consider it necessary or it may l
noted here that the testator did not
small house that was given absolute
certainly not the intention of the t
house on the happening of the seco
to be applicable—and in our opinio
adding to or altering any of the wor
question of making a new will for t
persons simply because the will sho
affection. The provision is in the
pretation as to whether it is applica
in the present case. The position, t
in paragraphs 5, 6 and 7, which we
two daughters of the testator wer
testator's death. They were not conti
ent upon the adoption of Gnanamb
reversionary interest in the Mayava

son under the provisions
mother was taken away
person adopted was not
operative the Injigudi ho
for her life and in fact tl
No difficulty also arises r
stated by the High Cour

Having regard to tl
attempted to provide f
anxiety displayed by hi
he owned, it is not prob
the future devolution of
direction had to be repe
gift of Rs. 5,000 to Alam
is not necessary for tl
presumption against int
fortifies the conclusion w

The result is that tl
Court are set aside and
will have costs of all the

Agent for Appellant

Agent for Responde

G.R./V.S.

IN THE HIG

PRE

Gadampetti Subbiah Se

v.

Chaluvadi Ramayya Se

Pleadings—Amendment of
—Rejection—Propriety—Interfe

It is not an inflexible ru
cause of action to the suit sl
justice to get an adjudication
it should be granted provided

Where in a suit for de
brought about with a view
was omitted by oversight it

Held, that the petitione
avoid the multiplicity of pr

Though it is in the disc
pleadings and the High Cou
the exercise of that discretion
High Court to set it right.

Petition under sect
will be pleased to revise
dated 29th November,

C. A. Vaidyalingam
Reddi for Petitioner.

K. Umamaheswaram

filing of the present suit may be shortly stated :

The two insolvents executed two sale deeds in favour of the first respondent herein on 4th October, 1931 and another on 17th August, 1932, prior to their adjudication conveying their interest completely in the suit property under these three documents. There was a crop of litigation between these respondents on the one hand and either the Official Receiver or the general body of creditors on the other relating to this property and ultimately the petitioners herein filed an application under section 54-A of the Provincial Insolvency Act for permission to take proceedings to avoid the alienations wherein reference was made to the three sale deeds executed by the insolvents in favour of the present respondents. The permission applied for was granted.

In pursuance of that permission the petitioners applied under section 4 of the Provincial Insolvency Act for a declaration that the suit house continued to be the property of the insolvents and that the two sale deeds executed on 4th October, 1931, were not binding on the general body of creditors as they were brought into existence with the object of defeating and delaying the creditors on the eve of their insolvency. Admittedly there was no reference to the sale-deed, dated 17th August, 1932.

This application was opposed by the respondents herein on the ground that it raised several complicated questions relating to limitation and the maintainability of this application, etc., and therefore ought not to be gone into in summary proceedings under section 4 of the Provincial Insolvency Act. That objection prevailed with the Court and it declined to inquire into the matter. In the result it dismissed the petition under section 4 referring the parties to a suit.

Thereupon, the petitioners herein filed a suit for the reliefs mentioned above, stating the cause of action for the suit to be the date of the two sale deeds, *viz.*, 4th October, 1931. This suit was opposed by the present respondents *inter alia* on the ground that even assuming that the averments made in the plaint were true, it would not affect their right, title and interest in the moiety of the house which was conveyed to them under a separate sale-deed on 17th August, 1932 and the suit should be dismissed so far as one half of the house was concerned.

This has led the petitioners to seek the amendment of the plaint by adding the necessary allegations with reference to the sale-deed, dated 17th August, 1932, which was alleged to have been omitted by oversight. This application was resisted by the defendants on the grounds that the suit being the outcome of the leave granted to the petitioners in respect of the two sale-deeds they should not be permitted to enlarge the scope of the leave thus obtained by them and secondly it would result in defeating the right of limitation that has accrued to the first respondent. These pleas found favour with the trial Court with the result that the petition for amendment was dismissed with costs. Hence this Civil Revision Petition.

In this petition it is maintained by Mr. Ramachandra Rao, the learned counsel for the petitioners, that the amendment was necessary in order to obtain an adjudication on all the issues in controversy and this would in no way prejudicially affect the respondents herein. On behalf of the respondents the contentions put forward in the lower Court were repeated. I think I must accept the argument advanced by the counsel for the petitioners. I am not able to agree with the trial Court

dment would enlarge the scope of the suit for the
or in this suit is a declaration that the properties c
ne insolvents and the title thereto does not vest in
in any way altered or its scope enlarged by the amer
ay of amendment is to add to the cause of action for
itting this amndment would be to enable the plaintifl
the transaction evidenced by the third sale deed.
law that all amendments that would result in adding
: suit should be refused. If the amendment is necessa
:o get an adjudication on all the issues in controver
proceedings, it should be granted, provided it does
naracter of the suit.

it is in the discretion of the trial Court to allow or
the pleadings and this Court will not interfere ord
ound discretion. But when the exercise of that d
: refusal of an amendment, it is the duty of this Cour
in this case that the petitioner should be permitte
to avoid the multiplicity of proceedings. I therefo
ial Court with a direction that the petitioners must
amendment. The respondents herein will have lil
:ten statement raising such further pleas as are open
:fore allowed. The order as to the costs will stand an
)sts of the first respondent, in this Court also, which
due diligence on their part that necessitated the pre
t.

HE HIGH COURT OF JUDICATURE AT MA

:—MR. P. V. RAJAMANNAR, *Chief Justice* AND
)ASTRI.

Paper Mills Co., Ltd. (in liquidation) by its
quidator .. *Ap*

s .. *Res*

Court Original Side Rules, Order 7—Suit by company in liquidation-rim and set-off—Leave of Court under section 171, Companies Act (VII

nst whom a company in winding up has instituted a suit shoul
that on a proper taking of the account between the company
utual credits and debits, no amount is due to the company or th
or less reduced. When the company has made a claim, any
the claim if successful would be a plea in defence. It may be f
he Court-fees, a written statement containing a plea of set-off
-suit; but that is not conclusive of the matter. There can be
lefendant is defensive in character. If it is so, then section 171
'. Leave of the Court under section 171 of the Companies A
ounter-claim and set-off. Accordingly leave to defend can be g

ha Sastri, J.—Where there have been mutual dealings betwe
g or claiming to prove a debt in the course of the winding up
e taken of what is due from the one party to the other in resp
from the one party has to be set-off against any sum due from t
e amount and not more has to be received or paid by either si
f the Official Liquidator could demand and recover in full mon
)tor, if he happens to be a creditor of the Company for an eq
ividend representing a fraction of the debt due to him from t
me whether this right of the creditor to a set-off is asserted befor
:r to the claim of the Official Liquidator in a suit filed by him.

No. 62 of 1950. 1st

A defendant pleading a set-off in defence is not commencing or proceeding with a suit or other legal proceeding against the company within the meaning of section 171 of the Companies Act and he leave of the Company Judge is not required to entitle him to resist or defend a suit filed by the Official Liquidator by pleading a set-off in his written statement.

Appeal against the order of Rajagopalan, J., dated 27th March, 1950, in Application No. 159 of 1950 in C.S. No. 376 of 1949, Original Side, High Court, Madras.

K. Narasimha Aiyar and *Messrs. Short Bewes & Company* for Appellant.

K. C. Jacob and *S. K. L. Ratan* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The Andhra Paper Mills, Co., Ltd., a Limited Company ncorporated under the Indian Companies Act, was directed to be wound up by an order of this Court made on the 23rd September, 1947 and one Mr. Price vas appointed Official Liquidator. The Official Liquidator on behalf of the company in liquidation filed a suit, after obtaining the leave of Court, for the ecovery of a sum of Rs. 2,74,734-15-6 with further interest from the date of suit rom Anand Brothers, a firm carrying on business in Madras. The suit was instituted under the provisions of Order VII of the Original Side Rules. The defendant irm was the sole selling agent of the plaintiff from 1942. By a resolution of the Board of Directors of the plaintiff company, dated 8th February, 1947, this agency if the defendant was terminated. The amount claimed in the suit is made up if Rs. 2,39,354-15-6, the balance alleged to be due from the defendant to the plaintiff company in respect of the value of stocks of paper delivered to the defendant after giving credit to the payments made by the defendant from time to time and interest at six per cent. per annum from the date of the termination of the agency, namely, 8th February, 1947. As the suit had been filed under Order VII of the Original Side Rules, the defendant took out an application (No. 3037 of 1949) for the grant of leave to appear and defend the suit. In the affidavit filed in support of this application by a partner of the defendant firm, the proposed defence was set out. The defence is adequately summarised by the Master before whom the application came up in the first instance. It comprised several claims by the defendant against the plaintiff company including claims for damages, the total amount of which was pleaded in reduction and discharge of the claim made by the plaintiff. The plaintiff opposed the application. In the counter-affidavit filed by the Official Liquidator the merits of the several claims made by the defendant were not traversed, but certain legal objections were raised. It was stated that the several items of claims made by the defendant fell under one or other of the two categories, namely, legal set-off or equitable set-off and they should be pursued, if at all, by the defendant independently and could not form the subject-matter of the defence to the action. The claims had to be preferred at the first instance before the Official Liquidator and if they were disallowed, they could be taken up before the Court on appeal. In any event it was said that court-fee had to be paid on the amount of these claims. Other legal pleas with reference to particular claims were also raised, but it is unnecessary to refer to them. The Official Liquidator further submitted that even if the defendant was entitled to succeed in respect of all or any of the claims, he was not entitled to a set-off against the claim in suit, as the defendant would be entitled only to a dividend on proof of its claims. As these claims were therefore no defence to the action, it was urged that no leave to defend should be granted to the defendant.

Another application was also filed by the defendant (No. 4188 of 1949) for an order converting the suit brought under the summary provisions of Order VII of the Original Side Rules into an ordinary suit. The two applications were heard by the Master who granted the defendant leave to defend unconditionally, except as regards an amount of Rs. 25,724-5-10 the liability for which was admitted by the defendant. In view of this order, he thought it was unnecessary to pass any separate order on the other application, though he was apparently not inclined to grant it. Mr. Narasimha Aiyar, the learned counsel for the Official Liquidator who appeared before the Master and who appeared before us contended before

him that the various cla
that have to be made w
the suit. He also conten
in respect of such claims
For the defendant it was
and that a set-off in bank
under the Civil Procedu
these questions which he
was convinced that some
would constitute pleas in
to be sham or illusory.

The Official Liquida
The appeal was heard an
the main, if not the only
several claims made by
claims, leave of the learn
obtained by the defenda
without such leave the d
counter-claim. It was ar
a suit which would come
other hand the defendant
or set-off or counter-clain
sary it could be obtained
questions. He thought
suit itself. All that he h
grant of leave to defend
cation itself was not ma
section 171 to file it. He
to a claim already made
obviously disclosed a tria
mately determine the tri
unconditionally as there
The appeal before us is a

Mr. Narasimha Aiya
pressed before us his obj
Act. That was his mai
view as Rajagopalan, J.,
under section 171 was n
in defence to an action
we think we cannot refi
defence of the defendant
of set-off or counter-clai
that the liability of the c
due credit to the several
these claims cannot be al
dealing with the windin
that such leave not hav
inevitable result would
think that it is necessary
case.

That section runs th

"When a winding up o
no suit or other legal proceedi
by leave of the Court, and su

Mr. Narasimha Aiyar's a

Therefore, section 171 would apply. I
attention to a passage in Palmer's Com

" the object of the winding up provisions of
Oak Pits Colliery Co.[1] " is to put all unsecured cr
To accomplish this it was indispensable that pr
execution, distress or other process should be sus
itself into a scramble for the assets. Accordingl
various cases to restrain proceedings . . . .
can, after presentation of the petition, restrain
ing up order being made, or a provisional lic
stayed and cannot be proceeded with without l
are compelled to come in and prove their clai
distribution of the company's assets is effected.

We are unable to see what bearing
171 of the Indian Companies Act. Th
Court is necessary to a set-off or count
company has commenced an action.
after the new Act of 1948, proceedings c

It was conceded by Mr. Narasiml
no leave would be necessary for a defen
wound up to file a written statement d
is because the defendant does not comr
only the suit filed by the company whic
in construing a section of the English C
of our Act thus,

" When once an action by the company i
for the defendants in the action to obtain leave
& Company v. *Griffiths (John) Cycle Co.*[2])."

No doubt that case related to an appe
against a decision of the Court of App
the plaintiff but the general principle
to all defensive proceedings. In *Palghu*
by a learned Judge of this Court (Ragha
up attaches certain property in execu
judgment-debtor, any claim petition by
legal proceeding" within the meanin
Act and it could be proceeded with v
laid down by the House of Lords in *Hun*
was followed.

The case in *Mersey Steel and Iron C*
in point. The plaintiff was a compan
It commenced an action to recover a s
by them to the defendants. The defen
way of counter-claim that the plaintif
and claimed a large amount as damag
objection that the defendants had not
make or prosecute a set-off or counter-
entitled to recover in respect of the co
claim by set-off. Lord Coleridge gave
but did not deal with the objection
been obtained. Before the Court of
Charles Russel, Q. C., for the plaintif

" Then under section 87 of the Companie
company which is being wound up, except wit
fresh action."

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1. (1882) 21 Ch. D. 322 at 329.
2. (1901) 85 L.T. 141.

nt with the following observation,

, defendant sued by a company must be entitlec

peal and reversed the decision of Lord Col
defendants were entitled to set-off agai
plaintiffs such damages as they, the defe
y breach of the contract by the plaintiffs.
is upheld by the House of Lords in *Mor*
1. In Halsbury, 2nd Edn., p. 718 (S.
hority for the position that leave is not ne
ainst the company in the nature of a def
sts of fairness and justice, we think that
stituted a suit, should not be prevente
g of the account between the company
credits and debits, no amount is due
liability is more or less reduced. Wh
ea which has the effect of reducing the c
It may be for certain purpo. es as for ex
containing a plea of set-off or counter-c
ıot conclusive of the matter. There can
efendant is defensive in character. If i

o deal fully or finally with the other qu
umely, whether the various claims in the
be open to the defendant having regard
ıg unsecured creditors which does not re
ery special cases, and whether the only
is claim before the Official Liquidator.
in the suit itself. They would be amo

he fact that applications are pending
of the several claims proposed to be set
efer to the following plea set up by the C
ations.

, if any, for the applicant is to have his right, if a
im or claiming a set-off in that suit and he cann
d by means of an application like the present or

rse of the argument that the several claim
l and unfounded. It was not said b
o legal impediment in the way of the def
l be no triable issues in the suit. In fac
wed by the Official Liquidator.

171 does not apply and therefore leave
was not necessary for the defendant to
r counter-claim, it follows that the Mast
granting the defendant leave to defend.
osts.

have two weeks' time from to-day to f
. 17-8-0 as costs of the defendant.

alleged to be due to him from the compan
pari passu with other creditors and take
obtain payment of his debt in full from t
The plea of set-off is in the nature of a cro
and cannot be put forward by the respond
Judge which in this case, had not been s

The argument on the first point overl
Act which, by reference, incorporates secti
Act and section 47 of the Provincial Act.
mutual dealings between a company and
a debt in the course of the winding up of t
of what is due from the one party to the
sum due from the one party has to be se
party and the balance of the amount and
either side respectively. The view of th
be unjust if the Official Liquidator could
by a debtor, but that very debtor, if he h
for an equal sum, must rest content v
of the debt due to him from the compa
this right of the creditor to a set-off is as
in answer to a claim of the Official Liquid

The second point relates to the pro
Indian Companies Act. Section 47 of
and section 46 of the Provincial Act whic
for the winding up of a company and
assets are wider in scope than Order 8, r
would permit, for instance, even a clai
against the claim of the Official Liquidator
due to the company, *Mersey Steel and*
v. *Jones & Co.*[2], *Jack* v. *Kepling*[3], Re *Ci*
such a set-off is claimed and established, th
demand for money of another cross dem
result that the claim of the Official Liqu
part as the case might be. The right of set-
by Order 8, rule 6 of the Civil Procedure C
statement of the defendant. If establishe
wholly or *pro tanto* as the case might be.
is not liable to make satisfaction of the cl
as equals the amount which he is entitle
plaintiff's claim is established, it is an a
to a decree of dismissal of the suit. The p
statement containing a set-off has the same
enable the Court to pronounce a final judg
of both the original claim and the set-off.
rule 19 of the Civil Procedure Code. This
statement containing a plea of set-off is to
for all purposes. The set-off allowed by
weapon of defence and a written statemen
suit by the Official Liquidator, is a defensi
having brought the defendant before Cou
have a right to contest the suit by raising all
a defence of set-off.

There is high authority in England fo
Judge is not necessary for raising a plea of s
Liquidator or for taking other defensive pr

1. (1884) 9 A. C. 434.
2. (1881) 8 Q.B.D. 147 (C.A.).

. by the defendant for damages for brea
ator of a company for recovery of the pric
company, Jessel, M.R., remarked :

ıre of a defence. A defendant sued by a company ı
:ave". *Mersey Steel and Iron Co.* v. *Naylor Benson & C*

he ground of want of leave which was overn
ppeal was apparently given up when the cas
Steel and Iron Co. v. *Naylor Benson & Co.*[2].
Co.[3], a limited company whose suit had bee
company was wound up during the pend
thereafter allowed. The defendant appeal
decision of the Court of Appeal without le
rey observed :

action by the company itself has been proceeded w
the action to obtain leave for any defensive proceed
party or privy to the proceedings in the Court of Ap
ıl in that appeal cannot now object to the appella
ces of the judgment by the ordinary means of an app

ds held that an appeal from a decision in
plaintiff was not a proceeding against the
ı 87 of the English Companies Act of 1862.

: of the case last mentioned has been foll
andas v. *Peoples Bank*[4], and *Simla Banking and*
Co.[5], by the Patna High Court in *Benares*
Rao, J., in this Court in *The Palghat Wa*
only dissenting note being struck by Brau
ank[6].

pleading a set-off in defence is not comm
ter legal proceeding against the company w
e Companies Act and the leave of the co
e him to resist or defend a suit filed by th
-off in his written statement. Here the cla
r and the defendant against each other are
view of section 229 of the Indian Companies A
is really a defence to the plaintiff's claim f
loes not apply. Where in a suit for recov
or the defendant counter-claims with a pra
ecific performance or declaratory relief, di
se, for there the counter-claim is an indepe
plaintiff's claim though the processual law mi
in the suit itself as effectually as in an ind
be done.

IN THE HIGH COURT OF JUDICATURE AT

PRESENT : P. V. RAJAMANNAR, *Chief Justice* AND M SUNDARAM.

Yerram Koti Reddi

v.

Nagineni Venkayya and another

District Board Election Dispute Rules, rules 1 (3) *and* 6 *and Civil Proc section* 151 *and Order* 9, *rule* 7—*Election Commissioner setting aside election—Re to set aside order—Commissioner setting aside his own order on finding sufficient c —Jurisdiction.*

It is clear from rule 6 of the Rules with respect to the decision of c elections that the Civil Procedure Code in its entirety is not applicable to a has the Election Commissioner all the powers and jurisdiction vested in governed by the Civil Procedure Code.

The petitioner filed a petition before the Election Commissioner of the respondent to the District Board of a place and at the hearing the re for time but the Election Commissioner after refusing the adjournment, and passed an order setting aside the election. Subsequently the respond Order 9, rule 7, Civil Procedure Code and section 151 for setting aside the by the Election Commissioner as he found that the respondent had sufficie the hearing. On the question whether the Election Commissioner had ju application,

Held, that in the absence of an express provision empowering him to either by way of review or by way of applications under Order 9, Civil Pro Commissioner will have no jurisdiction to do so.

Petition praying that in the circumstances stated in the with the High Court will be pleased to issue a writ of *cer* order of the Election Commissioner, dated 25th July, 1950, in and the connected records in C. P. No. 72 of 1949, on the fil Election Commissioner and Subordinate Judge of Guntur and

V. Subramaniam for Petitioner.

D. Munikanniah for 1st Respondent.

The Order of the Court was made by

The Chief Justice :—The petitioner filed a petition to s of the respondent to the Vellampalli Firka in the District Bo petition came up for hearing before the Election Commissi 1950, when the respondent's counsel prayed for time. His ap ment was, however, refused and the Election Commissioner we and examined the witnesses tendered by the petitioner. O him he passed an order setting aside the election of the respo the respondent filed an application purporting to be under section 151 of the Code of Civil Procedure, praying the El to set aside the order by which his election was set aside. missioner found that the respondent had sufficient cause f hearing and allowed the application. The petitioner seeks quashed on the ground that the Election Commissioner h entertain an application under Order 9, rule 7 of the Code c

The question is whether this provision of the Code of C to the case of an election petition. Under Rule 1, sub-rule respect to the decision of disputes as to validity of election, sioner exercising jurisdiction, under these rules shall be de jurisdiction as a *persona designata* and not in his capacity as a of Government as the case may be. It has been held ti Court that the order of the Election Commissioner is not by this Court under its revisional powers under section 115

* C. M. P. No. 7066 of 1950.

Commissioner cannot be deemed to be an ordinary Civil Court Civil Procedure Code that a special rule had to be framed in regi dure to be followed by him in the enquiry of an election petition. that

" Every election petition shall be enquired into by the Election Commission be in accordance with the procedure applicable under the Code of Civil Proc trial of suits ; provided that it shall only be necessary for the Election Comm memorandum of the substance of the evidence of any witness examined by him '

The Explanation to this rule specially vests the Election Commissio which are generally vested in a Court under the Code of Civil P pect of certain matters like discovery and inspection, enforcing th witnesses, compelling the production of documents, etc.

It is clear from this rule that the Civil Procedure Code in it applicable to an election petition. Nor has the Election Comm powers and jurisdiction vested in an ordinary Civil Court govern Procedure Code. If the Election Commissioner were such a Civil tion 115 could also have been applicable. The provisions of ru render the procedure applicable under the Civil Procedure Code suits applicable also to the enquiry of election petitions. But we a to hold that the provisions of the Civil Procedure Code which de arising after the final disposal of a suit would also apply to an e To give an instance, we have no hesitation in holding that the jurisd a final order which is conferred on an ordinary Civil Court under C of the Code is not vested in an Election Commissioner. Logically that the power to set aside a final order on the ground that one of prevented by sufficient cause from taking part in the trial of the su deemed not to have been conferred on the Election Commissioner. niah, the learned counsel for the respondent was unable to cite a support of the position, that procedure applicable to a trial would proceedings to set aside final orders. In the absence of an express prov ing him to set aside his own orders either by way of review or by tions under Order 9 of the Code of Civil Procedure, the Election will have no jurisdiction to do so. The order in question mu quashed.

There will be no order as to costs.

K. C.

IN THE HIGH COURT OF JUDICATURE AT MAD

Appeal against the order of the Fourth Presidency Magistrate of the Court of the Presidency Magistrates, G. T., Madras, in G. T. No. 180 of 1949, passed on 22nd December, 1949.

C. K. Venkatanarasimham and *S. Swaminathan* for Appellant.

A. C. Muthanna for The State Prosecutor (*S. Govind Swaminathan*) for the State.

The Court delivered the following

JUDGMENT.—The accused is one T. N. K. Govindarajulu Chetty, managing director of T. N. K. Govindarajulu Chetty & Co. He was convicted by the Fourth Presidency Magistrate, Madras, under section 15 (*a*) of the Madras General Sales Tax Act and sentenced to pay a fine of Rs. 500 or in default to undergo simple imprisonment for three months.

The facts are not in dispute and may briefly be stated. T. N. K. Govindarajulu Chetty & Co. are the managing agents of Messrs. Indian Metal and Metallurgical Corporation, having their head office at 498, Mint Street, Madras. T. N. K. Govindarajulu Chetty is the managing director of that company. For the year 1947-48 they sent a return showing a turnover of Rs. 7,67,641. Though the company purchased from Bombay 4 feet by 4 feet brass sheets of the value of Rs. 6,82,017-5-0 and sold them to customers, this amount was not shown in the return but instead, Rs. 1,15,620-8-3 was shown as manufacturing charges in respect whereof they claimed exemption under the Sales Tax Act. When the Deputy Commercial Tax Officer, Park Town, issued a notice on 26th February, 1949, under Rule 9 of the Madras General Sales Tax (Turnover and Assessment) Rules to the company pointing out that the entire sale price of the sheets should be included in the turnover, the company agreed to have that amount also included in the turnover. They explained the basis of their return in the following manner. They had received from their customers ingots for converting them into sheets. The ingots supplied to them were partly from goods purchased from them and partly from goods purchased outside. Under pressure of heavy work and strike at their works, they could not convert those ingots into sheets and supply them promptly. The customers began to threaten them for damages for late delivery. Pursuant to an arrangement entered into between them, they purchased the then available 4′ by 4′ sheets from the market and supplied them to their customers. As the ingots were the property of the customers and as they had to get only the manufacturing charges according to the contract, they billed them only for the manufacturing charges in conformity with the terms of the contract. As they had already billed for the value of the ingots and as the difference between the value of the ingots and the price at which the sheets were later supplied to the customers represent manufacturing costs, in the second bill, the manufacturing costs were shown. In view of the contract for conversion of ingots into sheets against the supply of raw materials, it was not possible for them to treat the supply of sheets as sale of sheets as they could recover from the customers only the manufacturing costs. In the circumstances, they could not possibly include the entire value of sheets in their turnover when they had in their custody the ingots supplied by the parties. The ingots supplied by the customers were later converted into sheets and sold in the market as sheets for which they had paid the sales tax entirely on the value of sheets according to the bills. After making the aforesaid statement, the company stated that even if the contention of the Sales Tax Officer was correct, the submission of the false return was only due to a *bona fide* mistake and they also agreed for the inclusion of the sum omitted without prejudice to their rights. On those facts the learned Presidency Magistrate held that the omission of Rs. 1,15,620-8-3 in the turnover was not due to inadvertence or mistake but was done consciously and deliberately and the accused must be deemed to have wilfully made a submission of an untrue return within the meaning of section 15 (*a*) of the Madras Sales Tax Act and therefore committed the offence of contravening that provision.

Learned counsel for the accused contended that when the accused omitted the aforesaid figure from the turnover he did it with the *bona fide* belief that he was entitled to do so and therefore he could not be said to have wilfully made a submission of an untrue return within the meaning of section 15 (*a*). The learned State Prosecutor did not dispute the correctness of the aforesaid facts nor did he suggest that the company resorted to a subterfuge to evade payment of the tax. But he contended that as the appellant did not omit the aforesaid amount by inadvertence or oversight or mistake, but because of his impression that the amount was not taxable, his omission would be a wilful submission of an untrue return within the meaning of the aforesaid section.

The relevant provisions of the Madras Sales Tax Act and the rules framed thereunder read as follows :

"Section 9 (1)—Every dealer whose turnover is ten thousand rupees or more in a year shall submit such return or returns of his turnover, in such manner, and within such periods as may be prescribed.

2. (*a*)—If the assessing authority is satisfied that any return submitted under sub-section (1) is correct and complete, he shall assess the dealer on the basis thereof.

(*b*)—If no return is submitted by the dealer under sub-section (1) before the date prescribed or specified in that behalf or if the return submitted by him appears to the assessing authority to be incorrect or incomplete, the assessing authority shall assess him to the best of his judgment :

Provided that before taking action under this clause, the dealer shall be given a reasonable opportunity of proving the correctness and completeness of any return submitted by him.

Section 15—Any person who,

(*a*) wilfully submits an untrue return or fails to submit a return as required by the provisions of this Act or the rules made thereunder,

shall, on conviction by a Presidency Magistrate or a Magistrate of the first class, be liable to a fine which may extend to one thousand rupees."

Rule 4 (1) of the Madras General Sales Tax (Turnover and Assessment) rules :

"Save as provided in sub-rule (2) the gross turnover of a dealer for the purposes of these rules shall be the amount for which goods are sold by him.

(3) For the purposes of sub-rule (1) the amount for which goods are sold by a dealer shall, in relation to a work contract, be deemed to be the amount payable to the dealer for carrying out such contract less a sum not exceeding such per centage of the amount payable as may be fixed by the Board of Revenue, from time to time for different areas, representing the usual proportion in such areas of the cost of labour to the cost of materials used in carrying out such contract."

It is not disputed that if the accused converted the ingots supplied by the customers into brass sheets, he would be entitled to exclude the manufacturing charges from his total turnover. The main question therefore that arises in the appeal is whether the exclusion of the manufacturing costs which represent the difference between the sale price of the ingots and the finished sheets was wilful.

The word "wilful" has not been defined under the Act. Learned counsel appearing for the accused and the State Prosecutor therefore cited before me a number of cases to help me to ascertain the meaning of the word having regard to the context in which it was used.

In *Smith* v. *Barnham*[1], the question was whether the appellant in that case in discharging the refuse in the course of his business, wilfully threw it into the stream within the meaning of 14 Geo. 3, C. 96, Bramwell, B defines the word as follows :

"'Wilfully' appears to me in this section to mean 'wantonly' or 'causelessly'".

In In re *The Postmaster-General and Colgan's Contract*[2], Barton, J., says :

"The words 'default' and 'wilful' are relative terms. Each case must depend upon its own circumstances. A concise summary of their meaning is given by Sirling, L.J., in *Bennett* v. *Stone*[3].

'According to the rule laid down in *Young & Harston's Contract*[4], a vendor commits a default, if he fails to do something which he ought reasonably to do, regard being had to the terms of the

1. (1875) Exch. D. 1, p. 419.
2. (1906) Ir. Rep. 1, p. 287.
3. (1903) 1 Ch. 509.
4. (1885) 31 Ch.D. 168.

contract which he has entered into with the purchaser, and is guilty of wilful default if he so fails when he is a free agent and knows what he is doing and intends to do what he does."

To this may be added as an obvious corollary that an honest mistake, the result of oversight or inadvertence, is not wilful unless persisted in after the attention of the vendor has been called to it."

In *Reg* v. *Senior*[1], Lord Russell of Killowen, C.J., in a different context, explains 'wilfully' to mean :

"that the acts if done deliberately and intentionally not by accident or inadvertence, but so that the mind of the person who does the acts goes with it."

The meaning of the word was also considered in various decisions in connection with wilful misconduct, wilful default, wilful neglect occurring in different statutes. In In re *Young and Harston's Contract*[2], Bowen, L.J., explained the word "wilful" which has been accepted and applied in subsequent cases, as follows :

"It (*i.e.*, the word 'wilful') generally, as used in courts of law, implies nothing blameable, but merely that the person of whose action or default the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing and intends to do what he is doing, and is a free agent."

In In re *Lord Mayor of London and Tubbs' Contract*[3], Lindley, L.J., says :

"I confess that I am more disposed to concur with Lord Bramwell's observations on the term 'wilful misconduct' in *Lewis* v. *Great Western Railway Co.*[4]. They are, in my opinion, quite consistent with Lord Bowen's observations in In re *Young and Harston's Contract*[2], if it be borne in mind that Lord Bowen presupposed knowledge of what was done, and intention to do it, and was not addressing himself to a case of an honest mistake or oversight."

In *Forder* v. *Great Western Railway Co.*[5], Lord Alverstone defines wilful misconduct with lucidity in the following passage :

"Wilful misconduct in such a special condition means misconduct to which the will is party as contradistinguished from accident, and is far beyond any negligence, even gross or culpable negligence, and involves that a person wilfully misconducts himself who knows and appreciates that it is wrong conduct on his part in the existing circumstances to do or to fail or omit to do (as the case may be), a particular thing, and yet intentionally does, or fails or omits to do it, or persists in the act, failure or omission regardless of consequences . . . . . or acts with reckless carelessness, not caring what the results of his carelessness may be."

In In re *Lord Mayor of London and Tubbs' Contract*[3], Lopes, L.J., says :

"It is difficult to lay down any general definition of wilful. The word is relative, and each case must depend on its own particular circumstances."

In In re *City Equitable Fire Insurance Co., Ltd.*[6], an interesting discussion explaining the meaning of the word "wilful" is found. On a misfeasance summons under section 215 of the Companies (Consolidation) Act, 1908, the Official Receiver as liquidator sought to make the respondent directors, all of whom (except the managing director) had admittedly acted honestly throughout, liable for negligence in respect of losses occasioned by investments and loans, and of payment of dividends out of capital. In determining the question of the liability of the directors, the meaning of the words "wilful neglect or default" in Article 150 of the Company's Articles of Association fell to be considered and elucidated. The learned Judges accepted and followed the definition of wilful misconduct given by Lord Alverstone in *Forder* v. *Great Western Ry. Co.*[5].

Coming to the Indian decisions, in *East Indian Ry. Co.* v. *Ahmed Ali Mohammad*[7], the question was whether a railway company was guilty of wilful neglect. The learned Judge says that the term "wilful neglect" implies an intentional and purposeful omission to do a certain act and it is an even more extreme term than "gross and culpable negligence" implying that an individual deliberately refrained with his eyes open from doing an act or taking a step which it is his duty to take. The Judicial Committee in *Tamboli* v. *The G. I. P. Railway Co.*[8] had to consider the meaning of the words "wilful neglect" in connection with the omission by

1. (1899) 1 Q.B. 283.
2. (1885) 31 Ch. D. 168.
3. (1894) 2 Ch.D. 524.
4. (1877) 3 Q.B.D. 206.
5. (1905) 2 K.B. 532.
6. (1925) 1 Ch. 407.
7. A.I.R. 1927 Nag. 34.
8. (1927) 54 M.L.J. 167 : L.R. 55 I.A. 67 : I.L.R. 52 Bom. 169 (P.C.).

a railway administration to provide efficient means for extinguishing a fire. They held that the words meant that the act was done deliberately and intentionally and not by accident or inadvertence, but so that the mind of the person who does the act goes with it. Govinda Menon, J., in *Jayarama Chettiar* v. *Emperor*[1], had occasion to deal with the meaning of the words " wilful submission " in section 15 (*a*) of the General Sales Tax Act. There, the petitioner who was a dealer in silver and gold jewels in Kumbakonam town and an assessee under the General Sales Tax Act furnished a return on 15th April, 1946, which did not include the value of 15,322 1/8 tolas weight of silver relating to the silver articles sold by him. The justification for the non-inclusion of that weight of silver, according to the petitioners, was the practice followed by him, to sell the articles, not for proper money consideration but only after getting back the equivalent weight of silver from the customers for the precise quantity of the silver utilised in the manufacture of the article or articles. The cash received as making or manufacturing charges was brought into the account and the quantity of silver was omitted from the account and from the return. The learned Judge after considering the case-law on the subject expressed his view in the following words :

"If the petitioner by inadvertence or oversight or mistake omitted to include these amounts in the 'A' return, then it is not a wilful act.' But, on the other hand, under the impression that this amount is not taxable and therefore need not be included in the return, he omits to make mention of it in the 'A' return with the full knowledge of his having omitted the same, in my opinion, he has wilfully omitted it. It need not necessarily be that in making such omission he should know that it was improper or criminal. The word 'wilfully' has been inserted in section 15 to exclude cases of inadvertence or mistake but not cases where the omission was due to a wrong view of the law or ignorance of the law."

I am not concerned in this case with the correctness of the conclusion arrived at by the learned Judge on the facts of that case. If the petitioner in that case practised a fraud on the Sales Tax authorities by adopting a procedure to evade payment, perhaps it may be said that the petitioner therein made a wilful submission of an untrue return. But with great respect to the learned Judge I cannot agree with the aforesaid observations as in my view they are far too wide and if accepted would make the use of the word " wilful " by the Legislature nugatory. In *Hudson* v. *Official Liquidator*[2], the learned Judges considered the meaning of the words wilful acts of defaults occurring in article 118 of the Company's Articles of Association which dealt with the conduct of the company's business. The article provided that the officers of the company would be entitled to an indemnity out of the funds of the company except in regard to their own wilful acts or defaults. After noticing the various English decisions cited before them, the learned Judges summarised their view in the following words :

"The adjective 'wilful' in 'wilful acts or defaults' has evidently been used as a description and not as a definition. The idea intended to be conveyed is that the default is occasioned by the exercise of volition or as the result of the non-exercise of will due to supine indifference, although the defaulter knew or was in a position to know that loss or harm was likely to result. The word does not necessarily suggest the idea of moral turpitude. We have also to eliminate the elements of accident or inadvertence or honest error of judgment. The default must be the result of deliberation or intent or be the consequence of reckless omission. 'Wilful default' therefore is indicative of some misconduct in the transaction of business or in the discharge of duty by omitting to do something either deliberately or by a reckless disregard of the fact whether the act or omission was or was not a breach of duty."

I am inclined to accept the aforesaid definition.

Having regard to the aforesaid discussion of the case-law and the meaning attributed by the different Judges to the word " wilful " the law on the subject may be stated as follows. As a general rule a guilty mind is an essential ingredient to crime. This mental element is ordinarily expressed in statutes by the use of the words such as " maliciously," " fraudulently," " negligently," " knowingly," etc. It is true that the rule is not inflexible and in some statutes particularly in the realm of municipal law an act is made an offence without an intention on the part of the accused. But in construing such statutes the following rule of construction given in Broom's Legal Maxims may be borne in mind.

1. (1947) 2 M.L.J. 585.

2. A.I.R. 1929 All. 826.

"Whether a statute should be construed in that sense or is subject to an implied qualification that there must be a guilty mind depends not entirely upon its language but also upon its subject-matter and the various circumstances that make the one construction or the other reasonable including the nature of the punishment imposed for its infringement."

In the instant case the Legislature designedly used the word "wilful" to express the mental element necessary to constitute the offence. The word "wilful" excludes *bona fides* in respect of the return. An honest and reasonable but a mistaken belief in the existence of circumstances which, if true, would have made the act lawful is a good defence. Wilful is a word of description. It describes the act constituting an offence, *viz.*, submission of a false return. A submission of a false return cannot be a wilful submission unless the dealer has deliberately made the return with the knowledge that he was excluding a taxable item. Otherwise, every submission of a return omitting a particular taxable item, though the assessee *bona fide* believed as one exempt from taxation, would become an offence. So construed, the word "wilful" becomes nugatory for, except in the case of arithmetical mistakes or omissions, a submission of a return omitting to include an item held subsequently by the taxing authorities, to be taxable, differing from the view of the assessee, will be an offence.

In my view this construction which leads to startling results should not be accepted unless the words in the statute are clear and unambiguous. Not only I do not see any such words but to my mind the word wilful used in the section was intended only to hit at intentional omissions of an assessee with full knowledge that the item omitted is a taxable one.

In the present case, on the facts admitted and found it is obvious that the assessee *bona fide* believed that his act of accommodation to his customers in keeping up to the terms of the contract entered into with them would not change the real nature of the transaction. If he was able to convert the ingots entrusted to him into brass sheets he would have got exemption in regard to his manufacturing charges. Indeed, as the evidence discloses and as the accounts show, he later on sold away the ingots entrusted to him after converting them into sheets paying sales tax. He might have been wrong in the view but I cannot say that he omitted the item deliberately with the idea of evading tax. The fact that immediately it was pointed out to him he was ready to make good the defect, is really indicative of his *bona fides*. I therefore hold on the evidence adduced in the case that the appellant did not wilfully submit an untrue return. The conviction and sentence are therefore set aside and the appeal is allowed.

V.P.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BASHEER AHMED SAYEED.

Mariyala Sambayya .. *Petitioner**

v.

Narala Bala Subba Reddi and another .. *Respondents.*

Civil Procedure Code (V of 1908), section 88—Interpleader suit—Requirements to be satisfied.

In order to enable a party to file an interpleader suit the party should be in a position to walk out of the suit with a mere claim for costs and shall not be entitled to have any other matter of contest between himself and the claimants.

If the plaintiff in the interpleader suit is found to have any interest in the subject-matter of the suit or if he is found to have colluded with one of the claimants then the right to file an interpleader suit cannot be availed of by him.

The petitioner herein filed a suit for recovery of a sum on a promissory note executed by first respondent in favour of one *G* who had transferred it to him and in the written statement filed by the respondent, it was pleaded *inter alia* that the original promisee *G* was not in law entitled to transfer the pronote and that the adopted son of *G* was entitled to the amount and further that the defendant had already paid a portion of the pronote amount to *G* in the presence of the petitioner himself.

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*C. R. P. No. 1618 of 1949. 7th December, 1950.

Subsequently the respondent filed an interpleader suit in which the same allegations were repeated in the plaint. On a question whether the interpleader suit could be entertained,

Held. In the circumstances the plaintiff had sufficient interest to see that the claim of the petitioner was defeated and he was also in collusion with one of the claimants and so he should not be allowed to file the interpleader suit.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Markapur (on the preliminary issue), dated 23rd September, 1949, in O. S. No. 48 of 1949.

N. Subramanyam for Petitioner.

W. Kothandaramayya for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner has preferred this revision against the order of the learned District Munsiff overruling his objection to the interpleader suit filed by the 1st respondent in the revision. The suit filed by the petitioner was one for recovery of a sum of Rs. 600 due under a pronote executed by the 1st respondent in favour of Garudamma and transferred to him. In the written statement filed by the respondent to that suit by the petitioner he pleaded *inter alia* that the original promisee Garudamma was not in law entitled to transfer the pronote in question and that the adopted son of Garudamma was entitled to the amount and further that he had already paid Rs. 200 on behalf of the pronote amount to Garudamma in the presence of the petitioner himself, who is no other than the maternal uncle of the original promisee. Issues have been framed in the original suit. After the framing of the issues, in consequence of certain notices issued by the adopted son to the respondent claiming the amount due on the promissory note, the respondent filed an interpleader suit to which objections have been taken by the petitioner.

In the plaint of the interpleader suit the respondent has pleaded more or less the same ground as set out in the written statement filed by him to the previous suit filed by the petitioner. Therein he raised the contention that the transfer was without legal authority, that the original promisee was only the holder of life estate, that she was not entitled to dispose of any property, that the adopted son was the person properly entitled to claim the amount; and that he had discharged the pronote in part by payment of a sum of Rs. 200 during the lifetime of the original promisee.

The question now is whether this interpleader suit could be entertained and whether there is sufficient justification for allowing the respondent to file the suit. This suit is obviously filed under section 88 of the Civil Procedure Code. Mr. Neti Subrahmanyam appearing for the petitioner has invited my attention to the decision reported in *Hari Karmakar* v. *J. A. Robin and two others*[1], which is more or less on facts similar to those contained in the present petition. In that decision it has been held that if the plaintiff in the interpleader suit was found to have any interest in the subject-matter of the suit or that if he was found to have colluded with one of the claimants, then the right to file an interpleader suit could not be availed of by him. On the facts of the present case it is evident both from the written statement filed by the 1st respondent as also the plaint filed by him in the interpleader suit that he has sufficient interest in seeing that the claim of the petitioner is defeated. The contents of the written statement as well as the plaint would point out only to that fact. Besides there is also ample evidence to show that the 1st respondent is in collusion with one of the claimants, namely, the adopted son. In this view I do not think that there is enough justification for allowing the 1st respondent to file the interpleader suit. In this connection Mr. Subrahmanyam has also invited my attention to a decision in *National Insurance Co.* v. *Dhirendra Nath*[2]. The principle laid therein is that in order to enable a party to file an interpleader suit the party should be in a position to walk out of the suit with a mere claim for

1. (1926) I.L.R. 4 Rang. 465.

2. (1938) I.L.R. 1 Cal. 53.

costs and shall not be entitled to have any other matter of contest between himself and the claimants. In this case the fact that the 1st respondent is claiming to have paid Rs. 200 already to the original promisee and is also raising contentions which have to be gone into at length to find out whether the transfer is valid, whether the petitioner is a holder in due course and so forth will certainly not bring the interpleader suit within the scope of section 88 of the Civil Procedure Code. On the other hand, Mr. Kothandaramiah appearing for the respondent has referred to a decision in *Secretary of State* v. *Mir Muhammad*[1]. I do not think the facts of that case apply to the facts in the present case. In my view the requirements of section 88 are not satisfied in the present case so as to enable the 1st respondent to file the interpleader suit. The learned District Munsiff, therefore, is not right in having allowed the 1st respondent to file the suit. The order of the lower Court is set aside.

This revision petition is, therefore, allowed with costs.

K.G. *Petition allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE PANCHAPAKESA AYYAR.

Thiruneelakanta Mudaliar .. *Appellant**

v.

Velayudha Mudaliar and others .. *Respondents.*

Limitation Act (IX of 1908), Article 118—Suit by contingent reversioner for a declaration that an alleged adoption by a Hindu never took place or was invalid—Suit filed beyond six years of knowledge of adoption by presumptive reversioners—Barred by limitation.

A suit by a reversioner for setting aside an adoption is a representative suit on behalf of the entire body of reversioners. There is one indivisible cause of action. The presumptive reversioner is the accredited representative of the entire body of reversioners. Contingent and remote reversioners may be allowed to file a suit by a Court in appropriate cases, if the presumptive reversioner was guilty of fraud, collusion or negligence, or has otherwise precluded himself from representing the reversion. It follows as a corollary from the aforesaid principles, that the period of limitation to any such suit will start only from the date of the knowledge of the adoption by the entire body of reversioners, that is, by the presumptive reversioner who is the accredited representative of such a body. If the limitation starts from the date of such knowledge the fact that the next reversioner is a minor or is under a disability will not stop the period of limitation from running or will give him an extended period of limitation prescribed under section 6 of the Indian Limitation Act.

A suit by a contingent reversioner filed more than six years from the date of the knowledge of the adoption by the presumptive reversioners is clearly barred by limitation under Article 118 of the Limitation Act.

Authorities discussed.

Appeal against the decree of the Court of the Subordinate Judge, Tanjore, dated 31st March, 1947, in O. S. No. 47 of 1946.

M. S. Venkatarama Aiyar and *M. S. Viswanathan* for Appellant.

K. S. Champakesa Aiyangar and *K. C. Srinivasan* for Respondents.

The Judgment of the Court was delivered by

Subba Rao, J.—This is an appeal by the first defendant against the decree and judgment of the Court of the Subordinate Judge of Tanjore in O. S. No. 47 of 1946, a suit filed by the 1st respondent for a declaration that the 1st defendant was not the duly adopted son of the late Shanmuga Velayudha Mudaliar. To appreciate the facts and the contentions of the parties the following genealogy may conveniently be referred to :

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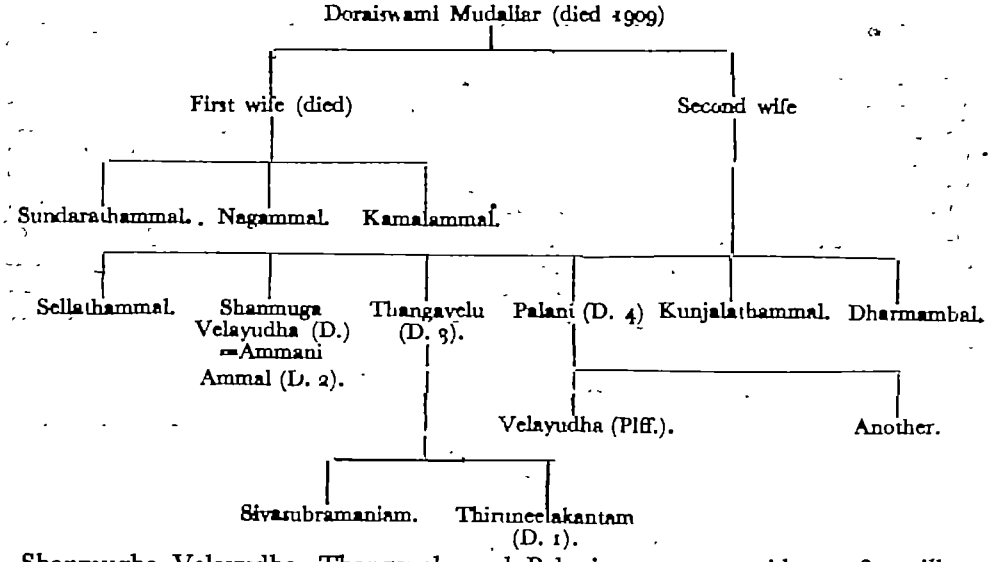
* Appeal No. 716 of 1947.

1. (1863) 1 M.H.C.R. 361.

1st November, 1950.



Shanmugha Velayudha, Thangavelu and Palaniappa were residents of a village called Thiruppanthurthi in Tanjore district. They became divided in 1923. Shanmugha Velayudha married the second defendant and had three children by her, but all of them died. Early in his life he took to bad habits and was keeping a concubine by name Rajathi by whom he had three children. Notwithstanding the partition the brothers were having a joint mess till 1928, but Shanmugha Velayudha was living for two years prior to his death in Tanjore in a house in Sarat Subba Rao's Lane. Ammani, who was practically discarded by him, was living with his brothers in the family house at Thiruppanthurthi. It is also in evidence that subsequently he discarded Rajathi and transferred his affection to her sister Saradambal. Rajathi filed an application under section 488, Criminal Procedure Code, against Shanmugha Velayudha claiming maintenance for herself and her children. Ammani also filed a suit in 1928 for maintenance in the District Munsiff's Court at Tiruvadi. In the month of February, 1929, Shanmugha Velayudha had an attack of typhoid. On 20th February, 1929, at midnight, he was taken in a motor bus to Tanjore. He died at about 5 P.M. on 21st February, 1929. On 25th February, 1929, an adoption deed was executed by Ammani Ammal wherein it was recited that the 1st defendant was given in adoption to her husband on 21st February, at about 9-30 A.M. This document was attested by as many as nine witnesses, and most of them were closely related to the parties.

After the death of Shanmugha Velayudha, Rajathi filed a pauper suit O. S. No. 69 of 1930 in the Court of the Subordinate Judge of Tanjore, as the next friend of her son Dhandayuthapani who, she alleged, was the illegitimate son of Shanmugha Velayudha and was entitled to succeed to the estate of the late Shanmugha Velayudha. She impleaded therein the 2nd defendant and the 1st defendant as parties. The 1st and the 2nd defendants filed therein written statements contending *inter alia* that the 1st defendant was taken in adoption by the deceased on the 21st February, 1929. There was a specific issue in that case on the question of adoption. Though all the attesting witnesses to the adoption deed were alive, and would have given very useful evidence if the adoption was true, Thangavelu the natural father of the 1st defendant thought fit to examine only Sabapathi Mudaliar and Harihara Aiyar. The learned Subordinate Judge held that the alleged adoption was not true. Ultimately that suit was disposed of in 1935 on a different point. Again Rajathi and her son filed O. P. No. 10 of 1943 in the Court of the Subordinate Judge of Tanjore for leave to sue *in forma pauperis* to recover a half share in the suit properties, for herself or for her son Dhandayuthapani, or, in the alternative, for maintenance of Rs. 100 a month. That was dismissed on 30th December, 1944.

Meanwhile all the members of the family put forward the 1st defendant as an adopted son and documents were executed on that basis. Under Exhibit D-2, dated 30th May, 1929, the patta was transferred to the name of the 1st defendant. He was also added as a legal representative to suits filed against the deceased Shanmugha Velayudha. In regard to the properties of Shanmugha Velayudha rent deeds were taken in his name. Even Thangavel and Palaniappa took usufructuary mortgages, Exhibit D-4, dated 18th March, 1931, and Exhibit D-8, dated 18th March, 1931, from the 1st defendant represented by the 2nd defendant as his guardian in respect of amounts payable to them by Shanmuga Velayudha. These documents continued to be taken in the name of the adopted son up to 1939. Disputes arose between the 3rd and 4th defendants. The 1st defendant's natural father filed O. S. No. 20 of 1945 in the Court of the Subordinate Judge of Tanjore and obtained a decree in 1946.

The present suit was filed by Velayudha, son of Palaniappa, for a declaration that the alleged adoption was not true. The 1st defendant is the alleged adopted son. The 2nd defendant is Ammani Ammal, widow of Shanmugha Velayudha. The 3rd and 4th defendants are the brothers of the Shanmugha Velayudha. The 1st defendant contended that he was adopted by Shanmugha Velayudha on the 21st February, 1929 and that the suit was barred by limitation. The 2nd and 4th defendants supported the plaintiff, while the 3rd defendant supported the case of the 1st defendant. The learned Subordinate Judge held that the suit was in time and that the adoption was not true. In the result he gave the declaration sought for by the plaintiff. The 1st defendant has preferred the above appeal against the decree and judgment of the Subordinate Judge.

The first question, therefore, that arises for consideration is whether the adoption of Thiruneelakanta, the 1st defendant, by Shanmugha Velayudha was true. The adoption is alleged to have taken place in February, 1929, and the suit questioning the same was filed in 1946.

* * * * *

(Their Lordships then considered the evidence and the conduct of the parties concluded.)

On a consideration of the entire evidence we agree with the lower Court that Shanmugha Velayudha did not take the first defendant in adoption on the 21st.

The more difficult question is that of limitation. Some material facts relevant to the question may be recapitulated. The genealogical tree extracted above shows that Shanmuga Velayudha had six sisters and two brothers, defendants 3 and 4. Sivasubramaniam is one of the sons of the third defendant. The plaintiff Velayudha is the son of the 4th defendant. The alleged adopted son is the younger son of the 3rd defendant. It will therefore be seen that on the death of Shanmuga Velayudha the presumptive reversioners were defendants 3 and 4, and the plaintiff and Sivasubramaniam were the contingent reversioners of equal degree. The plaintiff was a minor at that time and he attained majority only on 19th May, 1943. The plaint was filed on 15th June, 1946, (?) that is, within three years after the plaintiff attained majority. On the aforesaid facts the learned counsel for the appellant argues that the suit was barred by limitation under Article 118 of the Limitation Act. Article 118 of the Limitation Act reads :

"To obtain a declaration that an alleged adoption is invalid, or never in fact, took place.	Six years.	When the alleged adoption becomes known to the plaintiff."

The learned counsel's argument may be stated thus : The cause of action for the entire body of reversioners is one and the same. The suit filed by the presumptive reversioner, or under a certain contingency by a contingent reversioner, is a representative suit based upon the same cause of action. If the cause of action accrued to the body of reversioners, time begins to run at once and the fact that one of them is under a disability will not stop the limitation, once commenced. As on the death of Shanmuga Velayudha the presumptive reversioners, the 3rd and 4th defendants could have filed a suit when they had knowledge of the adoption, the period of limitation for such a suit started under the third column of Article 118,

from the date of their knowledge of such adoption and was barred after six years from that date. The learned counsel for the respondents contends that every reversioner has a separate right to sue and that, in any view, a cause of action could not accrue to the presumptive reversioners, if they are not competent to sue by reason of their collusion, fraud or any other justifiable ground. He further argued that if the plaintiff had the right to sue in his own right, section 6 of the Limitation Act would give him the extended period of limitation as he was under a disability to sue when the right to sue accrued to him.

To appreciate the nature of the right, the circumstances under which a cause of action would accrue and the mode of enforcing the right, it may be convenient to consider some of the cases cited to us which constitute landmarks in this branch of the law. The first case is that of the Judicial Committee reported in *Ram Anand Kunwar* v. *The Court of Wards*[1]. In that case, a minor filed a suit to set aside an adoption set up by the widow. One of the contentions raised was that the plaintiff had no *locus standi* to file the suit, as there were other nearer reversioners. Their Lordships considered in that case the nature and the limits of the right of remoter reversioners to file such a suit. At page 772 the following observations appear :

"Their Lordships are of opinion that although a suit of this nature may be brought by a contingent reversionary heir, yet that, as a general rule, it must be brought by the presumptive reversionary heir, that is to say, by the person, who would succeed if the widow were to die at that moment. They are also of opinion that such a suit may be brought by a more distant reversioner if those nearer in succession are in collusion with the widow or have precluded themselves from interfering. They consider that the rule laid down in *Bhikaji Apaji* v. *Jagannath Vital*[2] is correct. It cannot be the law that any one who may have a possibility of succeeding on the death of the widow can maintain a suit of the present nature, for, if so, the right to sue would belong to every one in the line of succession, however remote. The right to sue must, in their Lordships' opinion, be limited. If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue ; see *Koer Goolabsing* v. *Rao Kurun Singh*[3]. In such a case, upon a plaint stating the circumstances under which the more distant reversionary heir claims to sue, the Court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue, and would probably require the nearer reversioner to be made a party to the suit."

The above passage clearly indicates that a suit of that nature is a representative suit on behalf of the entire body of reversioners and that the presumptive reversioner will ordinarily be the representative for that purpose and that a remoter or contingent reversioner is allowed by Court in appropriate circumstances to represent the reversion, if the presumptive reversioner precluded himself from doing so in the circumstances mentioned in the passage. *Chiruvolu Punnamma* v. *Chiruvolu Perrazu*[4], is a decision of a Full Bench of this Court. In that case, the plaintiff, claiming to be a reversioner entitled to succeed to the estate of one Krishnabrahmam after the demise of the third defendant, brought a suit for a declaration of the invalidity of the adoption of the first defendant by the widow of the deceased Krishnabrahmam. In O.S. No. 147 of 1896 there was a compromise decree between the presumptive reversioner and the alleged adopted son whereby the adoption was upheld and the properties were divided between the widow, the presumptive reversioner, and the adopted son. The plaintiff instituted the suit on the 20th July, 1898. The question referred to the Full Bench was whether the presumptive reversioner, the mother, should be taken to have acted in a representative capacity in the earlier proceedings. The learned Judges held that she represented the entire reversion and that therefore the decree would be binding on the entire body of reversioners. It was argued before the learned Judges that the right of the reversioners to impeach as invalid an adoption was no more than personal to each individual, presumptive or otherwise. The learned Judges negatived the contention by tracing the history and the scope of that right. At page 402 they observed :

"It is needless to add that the true purpose of the concession of a right of suit in all these cases is the protection of the interest of the person or persons who may eventually turn out to be the heir or heirs, and the object of the legal proceeding is really the perpetuation of testimony, which owing

1. (1881) L.R. 8 I.A. 14 : I.L.R. 6 Cal. 764 (P.C.).
2. (1878) 10 Bom.H.C.R. A.C.J. 351.
3. (1871) 14 M.I.A. 176.
4. (1905) 16 M.L.J. 307 : I.L.R. 29 Mad. 390 (F.B.).

to lapse of time, might not be available for the heir when the succession actually opens. Now as it is not possible either to determine beforehand who will be the actual successor or to predicate the existence of any substantial distinction between the right of one reversioner and that of another, in theory, it would seem that, the right to take legal proceedings for perpetuation of testimony should be conceded to each and all of such persons".

At page 405 the learned Judges state the appropriate procedure in such a representative action in these terms :

"And this desirable end may be easily secured by adopting appropriate procedure. The presumptive reversioner, or, where in the discretion of the Court a remote reversioner is allowed to sue, the remote reversioner ought to be required to disclose the names of other persons interested in the reversion, so far as may be practicable, and notice should be served upon them of the commencement of the proceeding in order to enable them to apply to be made parties should they wish to do so."

At page 407 they point out :

"The whole conception in that case of the nature of the reversioner's right to sue is vitiated by the assumption that the right resides exclusively in the presumptive reversioner for the time being, and that not only on his death but also on his failure to sue within the limited time or on the occurrence of other circumstances justifying a suit by a remote reversioner there is an extinction of that presumptive reversioner's right and similar exclusive right springs up in favour of the person next in the line of succession and so on."

At page 408 the learned Judges lay down that there is but a single cause of action to be sued upon by the person or persons permitted to sue and that the reversioners who are likely to be affected by the inaction of those above them in the line of succession will be barred, unless they themselves sue within the time applicable to their case from the date of the alienation by which their possible future right was infringed. This decision may therefore be taken to lay down three propositions : (i) In a suit to set aside an adoption, the presumptive reversioner ought, on principle, be held to represent the remote reversioners ; (ii) the remote reversioners can, in certain circumstances, represent the reversion ; and (iii) there is only one cause of action for the entire reversion. Though the observations in the judgment indicate that in the view of the learned Judges the same principles would apply even in the case of an alienation by a widow, the judgment was confined only to that of adoption.

Veerayya v. *Gangamma*[1] dealt with the case of an alienation by a Hindu female possessing a limited estate. In that case the father, who was the presumptive reversioner, died without instituting a suit within 12 years from the date of the alienation ; but the learned Judges held that it did not disentitle his son from filing a suit for the same purpose even after 12 years after the alienation as he was a minor at the time and as he filed the suit within three years of attaining majority. It was argued that as at the time of the alienation the plaintiff's father was alive and, as the father could have instituted a suit for a declaration, the suit by the son must be taken to be barred because the cause of action for the declaratory suit was the same for both the father and the son. This argument was rejected on the ground that the remote reversioner, the son, did not claim from the presumptive *reversioner* the father.

The Judicial Committee had occasion to consider the question in *Venkatanarayana Pillai* v. *Subbammal*[2]. There one Venkatanarayana brought a suit on the 29th July, 1907, in the High Court of Madras to obtain a declaration that the adoption of the second defendant by the widow, the first defendant, was invalid. The High Court held that the adoption was valid. When the matter was pending before the Judicial Committee the plaintiff died and the next reversioner applied for leave to prosecute the appeal. It was opposed on the ground that the petitioner was not the legal representative of Venkatanarayana in respect of the reversionary right claimed by him to the estate of Venkatanarayana and that he could not be substituted in the place of the deceased appellant. At page 410 their Lordships observe :

"Under the Hindu Law the death of the female owner opens the inheritance to the reversioners and the one most nearly related at the time to the last full owner becomes entitled to possession. In

1. (1912) I.L.R. 36 Mad. 570.
2. (1915) 28 M.L.J. 535 : L.R. 42 I.A. 125 : I.L.R. 38 Mad. 406 (P.C.).

her lifetime, however, the reversionary right is a mere possibility or *spes successionis*. But this possibility is common to them all, for it cannot be predicated who would be the nearest reversioner at the time of her death. The Indian law, however, permits the institution of suits in the lifetime of the female owner for declaration that an adoption made by her is not valid, or an alienation effected by her is not binding, against the inheritance. The two articles of the Indian Limitation Act (IX of 1908) which deal with these two classes of suits differ widely in their language; Article 118, schedule I contains no restrictions as to the person entitled to sue; whilst in Article 125 the suit is contemplated to be by the person 'who, if the female died at the date of instituting the suit, would be entitled to possession'. But it does not follow from these words that the suit brought in the latter case by the nearest reversioner is for his personal benefit, for the object is to remove a common apprehended injury to the interests of all the reversioners, presumptive and contingent alike. Of course, the two classes of suits covered by these two articles are distinct in their scope and character, one relates to status and involves the adjudication of a right *in rem*; the other raises a question of mere justifiable necessity. But in both 'the right to sue' is based on the danger to the inheritance common to all the reversioners which arises from the nature of their rights."

At page 412 their Lordships observed :—

"It is the common injury to the reversionary rights which entitled the reversioners to sue. Apart, therefore, from the question whether 'the next presumable heir' is 'the legal representative' of the deceased presumptive reversioner, there remains the outstanding fact of identity of interest on the part of the general body of reversioners, near and remote, to get rid of the transaction which they regard as destructive of their rights".

The Judicial Committee preferred to implead the petitioner under Order 1, rule 1 of Act V of 1908 on the ground that the right to relief on the part of the reversioners existed severally in order of succession and arose out of one and the same transaction impugned as invalid and not binding against them as a body. We shall deal with this decision at a later stage as it was relied upon in support of the respondent's contention. This judgment marks a departure as it abolished the distinction recognised by earlier decisions between the case of an alienation by a widow and the case of an adoption. It also emphasises the representative character of a reversionary suit and also the identity of interest on the part of the general body of reversioners.

The decision in *Varamma* v. *Gopaladasayya*[1], is a very instructive one. The facts in that case were these : The second defendant the widow of the last male owner executed a sale deed conveying some of the properties belonging to him in favour of the third defendant. The presumptive reversioner failed to bring a suit within 12 years under Article 125 of the Limitation Act. The plaintiff who was born subsequently, that is, after the expiry of the 12 years, brought a suit to avoid the alienation in October 1915 within six years of his birth. The Full Bench held that the suit was barred by limitation. The *raison d'etre* of the decision was that the suit by the reversioner to set aside on alienation by the Hindu widow was a representative suit on behalf of all her reversioners, then existing or thereafter to be born, and that all of them had but a single cause of action which arose on the date of the alienation and, therefore, if the existing reversioners became barred by limitation, the reversioners thereafter to be borne were equally barred. Sadasiva Aiyar, J., observed at page 674 :

"I think it is impossible to hold that several suits could legally be maintained founded on such an identical interest and involving the same questions of law and fact so far as the dispute about the validity of an alienation is concerned."

Coutts Trotter, J., in considering the judgment of the Judicial Committee in *Venkatanarayana Pillai* v. *Subbammal*[2] says at page 678

"The decision was based on the express ground that the suit was a representative one and enured for the benefit of the whole class of reversioners. It seems to me impossible to escape from the logical conclusion that, if it enures for the benefit of all, it must equally enure to the detriment of all."

Seshagiri Aiyar, J., remarks at page 680 :

"*Prima facie* therefore it must be taken that the right agitated is not an individual right but a corporate right".

He proceeds to say that there can be no doubt that the cause of action is one and the same. In commenting on the decision of the Judicial Committee he points out that

1. (1917) 35 M.L.J. 57 : I.L.R. 41 Mad. 659 (F.B.).

2. (1915) 28 M.L.J. 525 : L.R. 42 I.A. 125 : I.L.R. 38 Mad. 406 (P.C.).

"The decision of the Committee on the other hand lays down definitely that the reversioners as a body have a common interest and that the right litigated is a joint right".

At page 683 the learned Judge observes :

"The proper way to look at these suits is to regard the plaintiff reversioner as being entrusted with the conduct of litigation on behalf of a body of persons ; ordinarily, the nearest reversioner is the person most competent to conduct it ; he has the right of preference ; but the circumstances may show that their position of *Dominus litis* should be taken away from his hands and should be entrusted to another".

In dealing with the question of limitation the learned Judge observes :

"This is a logical result of the decision of the Judicial Committee. The next step may be reached by the application of the principle contained in section 7 of the Limitation Act. The principle of that section is that if there are some persons in existence who are adults who could have safeguarded the common rights of themselves and of others similarly situated, the failure of the persons who are to litigate the right will start the cause of action not only against themselves but also against persons in similar circumstances".

No doubt, the Full Bench was dealing with the case of an alienation to set aside whereof a suit was brought by the plaintiff, who was born only subsequent to the 12 years period prescribed under Article 125 of the Limitation Act, after the cause of action accrued to the presumptive reversioner, but the principles on which the learned Judges based their decision are equally applicable to the present case.

The principle laid down by the Full Bench decision has been applied by a later Bench of this Court in *Venkatasivayya* v. *Ademma*[1], to a set of circumstances which are nearer to those found in the instant case. There a suit was filed by the remoter reversioner more than six years after the adoption came to the knowledge of the nearest reversioner. The nearest reversioner did not bring the suit because he had been bribed to give his consent to the adoption. The plaintiff was born after the alleged adoption but before the suit had become barred. On the facts the learned Judges held that time began to run against the whole body of reversioners from the date the next reversioners had knowledge of the adoption and that notwithstanding the fact that the plaintiff was born and was a minor before the expiry of the six years' period the suit was barred by limitation. They based their decision on the principle that a suit for a declaration that an adoption was invalid was a representative suit which the nearest reversioner was entitled to bring on behalf of the whole body of reversioners, born and unborn, within the period prescribed in the Article. Learned counsel for the respondents attempted to distinguish this case on the ground that the plaintiff was not born when the cause of action accrued and that the suit was brought within six years after the cause of action accrued. As the plaintiff was born within the six years' period if he had a separate right to sue, the suit would have been in time, if the contention of the learned counsel was correct.

In *Neelakantamier* v. *Chinnu Ammal*[2], Devadoss, J., held that a suit filed by a contingent reversioner who was a minor at the time of the alienation by the widow was barred by limitation, though he filed the suit within three years after he had attained majority, as there were other presumptive reversioners, who could have challenged the alienation within the time. At page 14, the learned Judge gives the reason for his decision in the following manner :

"But the question is not whether he could have sued. The question is whether the reversioners who could hve sued within 12 years ought to have sued. The result of their suit would have bound the appellant and therefore when the body of reversioners who could have brought a suit did not bring a suit, time must be counted from the date of the alienation."

In *Annapuranamma* v. *Appayya Sastri*[3], Kumaraswami Sastri, J., referred the following question to a Full Bench :

"Whether a suit filed by a reversioner who was a minor at the date of adoption would be in time if filed within 3 years after his attaining majority where the immediate presumptive reversioner dies before the period of limitation expires."

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1. (1920) 39 M.L.J. 621 : I.L.R. 44 Mad. 218.
2. (1926) 52 M.L.J. 13.
3. (1928) 56 M.L.J. 760 : I.L.R. 52 Mad. 620 (F.B.)

The point was elaborately argued before the learned Judge and his referring order discusses both the aspects of the question ; but unfortunately the Full Bench decided the case on another question which made it unnecessary for them to give their answer on the first question. The following observations are found at page 623 :

"These cases do not touch the present question as the appellant was in existence at the date of the adoption and the next presumptive reversioner died a year and a half after the adoption before his suit would have become barred by not suing within six years. If the present appellant, who was in existence at the date of the adoption, had the right to impeach the transaction and if the next reversioner died before the period of limitation expired, there seems to be no principle on which it can be held that a suit by a remote reversioner who was a minor at the date of the death of the next presumptive reversioner would be barred by limitation if filed within three years of his attaining majority."

The learned Judge, however, did not decide the question finally. Learned counsel relied upon those observations and said that the inclination of mind of the learned Judge was in favour of holding that the suit was in time ; but they do not represent his final opinion. We cannot agree with those observations either, as, if the cause of action accrued to the body of reversioners and limitation started against the reversioners, we do not see how the existence of a minor reversioner would stop the period of limitation from running.

On a consideration of the aforesaid decisions the law on the subject may be stated thus : A suit by a reversioner for setting aside an adoption is a representative suit on behalf of the entire body of reversioners. There is one indivisible cause of action. The presumptive reversioner is the accredited representative of the entire body of reversioners. Contingent and remote reversioners may be allowed to file a suit by a Court in appropriate cases, if the presumptive reversioner was guilty of fraud, collusion, or negligence, or has otherwise precluded himself from representing the reversion. It follows as a corollary from the aforesaid principles, that the period of limitation to any such suit will start only from the date of the knowledge of the adoption by the entire body of reversioners, that is, by the presumptive reversioner who is the accridited representative of such a body. If the limitation starts from the date of such knowledge the fact that the next reversioner is a minor or is under a disability will not stop the period of limitation from running or will give him an extended period of limitation prescribed under section 6 of the Indian Limitation Act.

Learned counsel for the respondents strongly relied upon the following observations of the Privy Council in *Venkatanarayana Pillai* v. *Subbammal*[1] in support of his argument that the cause of action was several and personal to each of the reversioners :

"the right to relief on the part of the reversioners exists severally in order of succession, and arises out of one and the same transaction impugned as invalid and not binding against them as a body."

If these words be understood to mean that the Judicial Committee recognised an independent right to sue, they cannot be reconciled with the earlier part of the judgment where in clear and unambiguous terms their Lordships declared that a suit by a reversioner was a representative suit and that there was an identity of interest on the part of the general body of reversioners. In Tagore Lectures, Mitra's Limitation and Prescription, Vol. 1, 6th Edn., at page 397, the words "cause of action" and "right to sue" have been explained in a succinct manner thus :

"The expression 'the cause of action' . . . . . includes 'the right to sue'. It comprises the entire set of facts that gives rise to an enforceable claim, that is, the right and its infringement. In a limited sense, the expression refers only to the facts constituting the infringement of the right. The right to sue accrues when the last act necessary for constituting a cause of action is done or happens, *i.e.*, when the final act of the series which constitute a cause of action is done or happens.

It follows that there cannot be a separate right to sue in respect of a representative action based upon the same cause of action. The observations of their Lordships in the context can only mean a right to represent on the happening of a contingency in respect of the same cause of action. The right mentioned therein is to

1. (1915) 28 M.L.J. 535 : L.R. 42 I.A. 125 : I.L.R. 38 Mad. 406 (P.C.).

be understood to relate to the procedural machinery that is evolved by a series of decisions to provide for the representation of the entire group of reversioners. The observations were so understood in *Varamma* v. *Gopaladasayya*[1]. Coutts Trotter, J., explains the observations at page 678 in the following manner :

"The right to relief in the sense of the right to obtain possession of the property no doubt exists in order of succession, but I take their Lordships' judgment to mean that the right to relief of a declaratory nature against the transaction impugned arises simultaneously and jointly for all the reversioners at the moment the act is done."

Seshagiri Aiyar, J., at page 681, when considering the same observations, remarks :

"I do not understand this sentence to lay down that the suit for a declaration is not in respect of a right common to a body of persons. The reference to rights existing severally may be explained as indicating that the remoter reversioners can themselves be plaintiffs ; "the order of succession" only suggests that it is not every remote reversioner that can come to Court without asking persons before him to undertake the task of getting their common right vindicated. I do not think that this sentence can be construed in the way the learned vakil contended for.

The decision of the Committee on the other hand lays down definitely that the reversioners as a body have a common interest and that the right litigated is a joint right".

We respectfully agree with the aforesaid observations.

Learned counsel for the respondents then strongly relied upon a Full Bench decision of the Lahore High Court reported in *Illahi Baksh* v. *Umar Baksh*[2]. No doubt, that judgment supports the learned counsel for the respondents, but a perusal of the judgment shows that the learned Judges based their decision on their view that the remoter reversioner had an independent, separate and personal right to sue. On that view they held that when a remote reversioner was a minor he could invoke the aid of section 6 of the Limitation Act. With all deference to the learned Judges we cannot share their view of the interpretation of the judgment of the Judicial Committee in *Venkatanarayana Pillai* v. *Subbammal*[3].

The learned counsel then relied upon certain anomalies and inconveniences that would follow, if the aforesaid view is accepted. Arguments based upon anomalies and *argumentum ab inconvenienti* will not avail, if the law and the provisions of the statute are clear. Equitable considerations have no place in construing the provisions of the Limitation Act. It is said that if the presumptive reversioner is a minor the suit may become barred if section 6 is not applied. If the presumptive reversioner, the accredited representative of the reversionary body, is a minor, it may reasonably be argued that the provisions of section 6 apply to him. Further, the next reversioner may file a suit with the permission of the Court on the ground that the presumptive reversioner is a minor and is not in a position to represent the estate. It is then suggested that if the presumptive reversioner is guilty of fraud, or otherwise precluded himself from filing a suit and the contingent reversioner is a minor the reversionary interest will suffer. Nothing prevents a contingent reversioner, if he is a minor, from filing a suit by a guardian. If there is a remoter reversioner, he can also file a suit with the requisite leave. Counsel then contended that if the cause of action accrued for the entire body of reversioners, knowledge of adoption by a remote reversioner who was not in contact with the other reversioners might completely bar the suit even if the presumptive and the nearer reversioners had no knowledge of the adoption. A reasonable answer to this difficulty is that the knowledge of the representative for the time being only can be attributed to the entire reversion. It is pointed out that if the presumptive reversioner had knowledge of the alleged adoption but he kept quiet fraudulently, the interests of the entire reversion may suffer. In the cases covered by section 18 of the Indian Limitation Act the next reversioner perhaps may get an extended period of limitation. It may be noticed that all the anomalies and the difficulties may not cause any real hardship as ultimately the actual reversioner at the time of the death of the widow has always the right to file a suit for recovery of possession. Any default made in the safeguarding of the interests of the reversion by the presumptive rever-

1. (1917) 35 M.L.J. 57 : I.L.R. 41 Mad. 659 (F.B.).
2. (1944) I.L.R. 26 Lah. 231.
3. (1915) 28 M.L.J. 535 : L.R. 42 I.A. 125 : I.L.R. 38 Mad. 406 (P.C.).

sioner or other reversioners will not affect the rights of the actual reversioner though there may be some difficulty from the standpoint of securing evidence. We hold that the suit, O.S. No. 47 of 1946 having been filed more than six years from the date of the knowledge of the adoption by the presumptive reversioners, is clearly barred by limitation under Article 118 of the Limitation Act.

In the result, the appeal is allowed, but, in the circumstances, each party is directed to bear his own costs throughout.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Nallamilli Veerayamma .. *Appellant* *

v.

Nallamilli Venkanna and others .. *Respondents.*

Hindu Women's Rights to Property Act (XVIII of 1937)—Mortgage debt—Partition of joint family properties—Right to share in mortgage debt by the widow.

In the case of a mortgage the debt, apart from the security, can be transferred though the debt could be realised by enforcing the security by the mortgagee or an assignee from him. If it is assignable as a debt *simpliciter*, it is equally partible. Accordingly, in a suit by a Hindu widow for a share in a mortgage debt under the Hindu Women's Rights to Property Act, before it was amended by Madras Act XXVI of 1947, the widow would be entitled to her share as the mortgage debt is partible.

Appeal and the memorandum of objections in the appeal against the decree of the Court of the Subordinate Judge, Rajahmundry, in O.S. No. 45 of 1945.

M. S. Ramachandra Rao for Appellant.

V. Parthasarathi for Respondents.

The Court delivered the following

JUDGMENT.—The only question in this appeal is whether a widow is entitled to a share in a mortgage debt under the Hindu Women's Rights to Property Act, before it was amended by Act XXVI of 1947. The second defendant and Ammi Reddi were brothers and sons of the first defendant, Venkanna. The third defendant is the son of the second defendant. The fourth defendant is the widow of the first defendant, who died pending suit. The father and sons constituted members of a joint Hindu family. The plaintiff as the widow of Ammi Reddi filed the suit for partition and for recovery of possession of her share in the joint family property under the Hindu Women's Rights to Property Act. The learned Subordinate Judge gave her a decree for partition in regard to the properties other than agricultural lands. Items 4 and 5 of schedule B are properties mortgaged in favour of the family. Exhibit D-2, dated 7th March, 1945, is the mortgage deed in respect of item 4. Exhibit D-1, dated 21st June, 1937, is the mortgage deed in regard to item 5. The properties secured under the aforesaid two documents consist of both agricultural and house property. The learned Subordinate Judge held that the mortgage debts are liable for partition proportionate to the value of the house property and that the plaintiff is not entitled to a partition of the balance of the debt. The plaintiff preferred the above appeal against the decree and judgment of the Subordinate Judge in so far as it was against her.

The solution to the problem depends upon the nature of a mortgage debt, and whether the debt is separable from the security for certain purposes. Fortunately this question had an authoritative treatment in the hands of the Judicial Committee in *Imperial Bank of India* v. *Bengal National Bank*[1]. The facts in that case are, as security for a loan the Bengal National Bank issued to the Imperial Bank of India debentures creating a floating charge upon their whole undertaking, properties, assets, interests, present and future. The debentures were not registered

*Appeal No. 701 of 1947 and Memo. of Objections. 4th December, 1950.

1. (1931) 61 M.L.J. 589 : L.R. 58 I.A. 323 : I.L.R. 59 Cal. 377 (P.C.).

under the Indian Registration Act. It was conceded in that case that the debentures as they were not registered did not create a charge upon any immoveable property. The Judicial Committee held that the debentures created a charge over the debts due to the National Bank, whether secured on immoveable property or not, and therefore the Imperial Bank was entitled to the benefit of all sums received in reduction of the debts whether from the realisation of securities or otherwise. When an argument was addressed to the effect that as the debentures were not registered no charge was created in respect of the debts in favour of the Imperial Bank, the Judicial Committee negatived that contention and made the following observations :

"The debts may be secured either on immoveable property or on merchandise ; they may be wholly secured or partly secured ; the security may have been given when the debt was created or later ; but in any case, the debts exist as moveable property ; and do not, if secured, become identified with the security or transformed into land in the one case or merchandise in the other. The separation between debt and security is well established ; the creditor is entitled to take a judgment for the debt without having recourse to his security. There would, therefore, apear to be no reason in principle why a creditor should not be able to charge his moveable assets, the debts due to him, even if he be unsuccessful by reason of statutory restrictions in transferring the security."

When the difficulty created by the exclusion of the mortgage debt from the definition of actionable claim was pointed out their Lordships met that objection as follows :—

"The effect of the amendment is to restrict the statutory rights on transfer such as the right to sue in the transferee's name, etc., to such transfers as are transfers of actionable claims as defined. There appears to be no difficulty in a transfer of the debt without security ; the original debtor can always redeem ; the relations between him and the original creditor are not altered ; indeed, in the present case, it would appear that the Imperial Bank can only enforce the debt in the name of the respondent bank, which, no doubt, the latter bank must permit. The transferee takes no further interest than the tranferor was able to give him. The rights of the parties are further declared by the amended section 134 of the Transfer of Property Act, which would appear to apply to their case."

The same principle has been applied and followed by the Judicial Committee in *Fanny Skinner* v. *Bank of Upper India, Ltd.*[1]. After considering the earlier decision at some length their Lordships observe :

"Applying that case, which need not be gone into in more detail, to the present the result is this, as it appears to their Lordships : the transfer of this mortgage debt was effective as between the transferor and the transferees. But any proceedings to recover the debt brought against the mortgagor must be, not in the name of the transferee, but in that of the transferor ".

From the aforesaid two judgments it is clear that a debt, apart from the security, can be transferred though the debt could be realised by enforcing the security by the mortgagee or an assignee from him. If it is assignable as a debt *simpliciter* it is equally partible. Applying the aforesaid principle, I hold that the mortgage debt covered by Exhibits D-1 and D-2 are partible and the plaintiff will be entitled to her share.

Respondents 1 to 3 preferred a memorandum of objections in regard to item 20 of C schedule property. Item 20 is 250 bags of paddy. The Commissioner found only 140 bags in three cells belonging to the family. One Karri Subbanna and Karri Venkatarayudu claimed 70 and 40 bags stored in two of the cells. Karri Subbanna was not a witness in the case, but Karri Venkatarayudu was examined as D.W. 2. He gave conflicting evidence and prevaricating answers in the witness box, and therefore the learned Subordinate Judge rightly disbelieved his evidence. As the cells admittedly belonged to the family, in the absence of any other evidence it is reasonable to assume that the bags found therein belonged to the family. I accept the finding of the Court below in regard to this item.

In the result, the appeal is allowed with costs, but the memorandum of objections is dismissed with costs.

K.C.

Appeal allowed.

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1. (1935) 69 M.L.J. 158 : L.R. 63 I.A. 115 : I.L.R. 57 All. 314 (P.C.).

[THE SUPREME COURT OF INDIA.]

(Civil Appellate Jurisdiction.)

PRESENT :—H. J. KANIA, *Chief Justice*, M. PATANJALI SASTRI AND S. R. DAS, JJ.

The Commissioner of Income-tax, West Bengal .. *Appellant* *

v.

Calcutta Agency, Limited .. *Respondent.*

Income-tax Act (XI of 1922), sections 66 and 10 (2) (xv)—Scope and nature of the jurisdiction of the High Court in the matter of Income-tax references—Reliance by High Court on facts not found by the Tribunal but mentioned in arguments of counsel—Propriety—Claim for deduction under section 10 (2) (xv)—Onus.

The jurisdiction of the High Court in the matter of Income-tax references is an advisory jurisdiction and under the Act the decision of the Tribunal on facts is final, unless it can be successfully assailed on the ground that there was no evidence for the conclusions on facts recorded by the Tribunal. It is therefore the duty of the High Court to start by looking at the facts found by the Tribunal and answer the questions of law on that footing. Any departure from this rule of law will convert the High Court into a fact-finding authority, which it is not under the advisory jurisdiction. It is not proper for the High Court to rely on facts not found in the statement of facts but mentioned by counsel in the arguments and to base their conclusions thereon.

In the case of a claim for exemption of an amount, contended to be an expenditure falling under section 10 (2) (xv) of the Income-tax Act, the burden of proving the necessary facts in that connection is on the assessee and where they are not established, he is not entitled to the deduction claimed.

On appeal from the Judgment and Order dated the 9th September, 1949, of the High Court of Judicature at Fort William in West Bengal (Harries, C.J. and Chatterjee, J.) in Income-tax Reference No. 8 of 1949 by the Income-tax Appellate Tribunal, Calcutta Branch.

M. C. Setalvad, Attorney-General for India (*G. N. Joshi*, Advocate, with him), for Appellant.

S. Mitra, Senior Advocate (*B. Banerji*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Kania, C.J.—This is an appeal from the judgment of the High Court at Calcutta (Harries, C.J. and Chatterjea, J.) pronounced on a reference made to it by the Income-tax Appellate Tribunal under section 66 (1) of the Indian Income-tax Act. The relevant facts are these. The respondents are a private limited company which was brought into existence to float various companies including cotton mills. In November, 1932, the Basanti Cotton Mills Co., Ltd., was incorporated and the respondents were appointed the managing agents. Their remuneration was fixed at a monthly allowance of Rs. 500 and a commission of 3 per cent. on all gross sales of goods manufactured by the Mills Company. The fixed monthly allowance was liable to be increased in the event of the capital of the company being increased. The details are immaterial. It appears that certain hundies were drawn by one of the directors of the respondent company, acting in the capacity of the managing agents of the Mill Company, in the name of the Mill Company and the same were negotiated to others. The Nath Bank, Ltd., claimed payment of these hundies. The Mill Company repudiated its liability as it appeared from the books of the Mill Company that they had not the use of the sum of Rs. 1,80,000 claimed by the Nath Bank, Ltd., under the hundies. The Nath Bank, Ltd., instituted four suits against the Mill Company, in two of which the respondents were party defendants. The Mill Company was advised to settle the suits and the respondent company entered into an agreement with the Mill Company, the material part of terms of which runs as follows :—

"Memorandum of Agreement made between the Calcutta Agency, Limited, of the one part and Basanti Cotton Mills, Ltd., of the other part WHEREAS the Nath Bank, Limited, demanded from the Mills the payment of the sum of Rs. 1,80,000 and interest thereon AND WHEREAS the said Mills repudiated their liability in respect thereof as it appeared from the books of the said Mills that the said Mills did not have the use of the said sum of Rs. 1,80,000 or any part thereof AND WHEREAS the said Nath Bank, Ltd., thereupon instituted four suits in High Court being Suit Nos. 1683, 1720, 1735

* Civil Appeal No. 59 of 1950. 21st December, 1950.

and 1757 of 1939 for the said aggregate sum of Rs. 1,80,000 and the interest thereon AND WHEREAS the said Mills have been advised to settle the said suits amicably AND WHEREAS the Calcutta Agency, Limited, by its Directors, S. N. Mitter or S. C. Mitter, having been and being still the Managing Agents of the said Mills have undertaken to reimburse the said Mills in respect of the decrees to be made in the said four suits in the manner hereinafter appearing NOW THESE PRESENT WITNESS AND IT IS HEREBY AGREED AND DECLARED.

(i) That out of the commission of 3 per cent. payable by the said Mills to the said Agency under Regulation 131 of the Articles of Association of the Company, the Company shall have a paramount lien on and deduct and set off a moiety thereof against any payment which the said Mills may make in respect of the said decrees or any of them and or costs of the said suits.

(ii) The said moiety shall be one half of the commission so payable less such sum as the Directors of the Mills may from time to time allow to be deducted."

Under the said agreement, the respondent company paid to the Mill Company Rs. 22,500 made up of Rs. 18,107 as principal and Rs. 4,393 as interest in the accounting year. The assessee Company claimed this before the Income-tax Appellate Tribunal as a deduction permitted under section 10 (2) (xv) of the Indian Income-tax Act. The relevant part of that section runs as follows :—

" 10. (1) The tax shall be payable by an assessee under the head 'Profits and gains of business, profession or vocation' in respect of the profits or gains of any business, profession or vocation carried on by him.

(2) Such profits or gains shall be computed after making the following allowance, namely :—

* * * * * *

(xv) any expenditure (not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly and exclusively for the purpose of such business, profession or vocation."

In the statement of the case submitted by the Tribunal after reciting the fact of the incorporation of the company and the terms of the compromise mentioned above, the arguments urged on behalf of the assessee company have been recapitulated. The first argument was that under the first proviso to section 7 of the Indian Income-tax Act, this payment was liable to be exempted. The Tribunal rejected that argument. On the reference, the High Court also rejected the same and it was not presented before us. The next argument of the respondent company was that in respect of Rs. 22,500 it was entitled to exemption under section 10 (2) (xv) of the Income-tax Act on the ground that the payment was an expenditure which was not in the nature of a capital expenditure or personal expenses of the applicant company but was an expenditure laid out wholly and exclusively for the purpose of its business. The assessees urged that if the applicant company did not agree to pay this amount,

"Basanti Cotton Mills, Ltd., could have brought a suit against the Company to realise this amount due on the hundis which would have exposed the applicant company to the public and in order to save themselves from the scandal and maintain the managing agency they agreed to the deduction of certain amounts from the managing agency commission due to it"

and therefore their case fell within the principles of the decision of *Mitchell* v. *B. W. Noble, Ltd.*[1]. The Tribunal found as facts : (1) That the applicant company agreed to pay off the decretal amount from the remuneration which they were entitled to get from the Basanti Cotton Mills. (2) The decree was passed against the applicant company evidently for certain misfeasance committed by its directors and the applicant company agreed to pay it off from its remuneration. (3) The books of account of Basanti Cotton Mills, Ltd., would show that they were paying the applicant company in full its remuneration and the books of the applicant company also show that it was entitled to its remuneration in full. (4) In the circumstances the Tribunal held that the expenditure was not laid out wholly and exclusively for the purpose of carrying on the business. (5) Besides the Tribunal was of the opinion that in this case it was not a revenue expenditure at all. As the payment had to be made towards liquidation of the decretal amount the Tribunal held in the circumstances of this case, that it was a capital payment. On behalf of the respondent it was argued in the further alternative that the Privy Council decision in *Raja Bijoy Singh Dudhuria's case*[2] would cover the present case. That contention was rejected by the Tribunal.

1. (1927) 1 K.B. 719.

2. 6 I.T.C. 449.

This statement of the case prepared by the Income-tax Tribunal and submitted to the High Court for its opinion was perused by the parties and they had no suggestions to make in respect of the same. The statement of the case was thus settled with the knowledge and approval of the parties. When the matter came before the High Court, Mr. Mitra, who argued the case for the present respondents, as shown by the judgment of the High Court, urged as follows :—

"If the applicant company had not agreed to pay the amount mentioned in the aforesaid agreement, then the Basanti Cotton Mills, Ltd., would have sued the company for the realisation of the amount due on the hundis and it seems that there would have been no defence to the action. This would have subjected the applicant company to the danger of public exposure and in order to save itself from the scandal and in order to maintain the managing agency, the applicant company agreed to deduct certain amounts from the managing agency commission and therefore such expenditure came within section 10 (2) (xv) of the Act."

The High Court thereafter noticed several cases including *Mitchell's case*[1] and towards the close of the judgment delivered by Chatterjea, J., observed as follows :—

"In this case it is clear that the agreement was entered into with a view to avoid the publicity of an action against the managing agents and consequent exposure and scandal and in order to maintain the managing agency so that the company could carry on its business as before. The payment in question did not bring in any new assets into existence nor in my opinion can it properly be said that it brought into existence an advantage for the enduring benefit of the company's trade. The appellate tribunal observed that the decree was evidently passed against the appellant company for certain misfeasance by its directors and the appellant company agreed to pay it off from its remuneration. . . . . The object of the agreement was to enable the company to remove a defect in carrying on the business of the company and to earn profits in its business. Therefore this case is covered by the judgment of the Court of Appeal in *Mitchell's case*' . . . . . ."

Applying this line of reasoning the High Court differed from the conclusion of the Tribunal and allowed the deduction to the respondent company under section 10 (2) (xv) of the Income-tax Act, as claimed by the respondents. The Commissioner of Income-tax, West Bengal, has come in appeal to us.

Now it is clear that this being a claim for exemption of an amount, contended to be an expenditure falling under section 10 (2) (xv), the burden of proving the necessary facts in that connection was on the assessee, it being common-ground that the commission was due and had become payable and was therefore the business income of the assessee company liable to the taxed in the assessment year. The jurisdiction of the High Court in the matter of income-tax references is an advisory jurisdiction and under the Act the decision of the Tribunal on facts is final, unless it can be successfully assailed on the ground that there was no evidence for the conclusions on facts recorded by the Tribunal. It is therefore the duty of the High Court to start by looking at the facts found by the Tribunal and answer the questions of law on that footing. Any departure from this rule of law will convert the High Court into a fact-finding authority, which it is not under the advisory jurisdiction. The statement of the case under the rules framed under the Income-tax Act is prepared with the knowledge of the parties concerned and they have a full opportunity to apply for any addition or deletion from that statement of the case. If they approved of that statement that is the agreed statement of facts by the parties on which the High Court has to pronounce its judgment. In the present case the parties perused the statement of case and as disclosed by the note made at the end of it had no suggestions to make in respect thereof. It is therefore clear that it was the duty of the High Court to start with that statement of the case as the final statement of facts. Surprisingly, we find that the High Court, in its judgment, has taken the argument of Mr. Mitra as if they were facts and have based their conclusion solely on that argument. Nowhere in the statement of the case prepared by the Tribunal and filed in the High Court the Tribunal had come to the conclusion that the payment was made by the assessee company to avoid any danger of public exposure or to save itself from scandal or in order to maintain the managing agency of the appellant company. The whole conclusion of the High Court is based on this unwarranted assumption of facts which are taken only from the argument of counsel for the present respondents

1. (1927) 1 K.B. 719.

before the High Court. The danger of failing to recognise that the jurisdiction of the High Court in these matters is only advisory and the conclusions of the Tribunal on facts are the conclusion on which the High Court is to exercise such advisory jurisdiction is illustrated by this case. It seems that unfortunately counsel for the respondents caught hold of *Mitchell's case*[1] and basing his argument on the circumstances under which a payment could be described as a business expenditure falling within the terms of section 10 (2) (xv), argued that the facts in the present case were the same. Instead of first ascertaining what were the facts found by the Tribunal in the present case, the process was reversed and the procedure adopted was to take *Mitchell's case*[1] as the law and argue that the facts in the present case covered the situation. In our opinion this is an entirely wrong approach and should not have been permitted by the High Court. The High Court fell into a grave error in omitting first to ascertain what were the facts found in the case stated by the Tribunal. The High Court overlooked that in *Mitchell's case*[1] the whole discussion started with a quotation from the case stated by the Commissioners as the facts of the case.

A scrutiny of the record in the present case shows that before the Income-tax Officer the assessees claimed only a deduction of the interest of Rs. 5,582 as a permissible deduction under section 10 (2) (iii) of the Income-tax Act. That claim was rejected by the Income-tax Officer. When the matter went to the Assistant Income-tax Commissioner it was argued that the Income-tax Officer was in error in not allowing the deduction of interest and was also wrong in not allowing the entire sum of Rs. 22,500 as a deduction on the ground that that portion of the income (*viz.*, Rs. 22,500) should be treated as not earned or deemed to be earned by the assessees at all, having regard to the decision of the Privy Council in *Raja Bijoy Singh Dudhuria's case*[2]. The first paragraph of the order of the Appellate Assistant Commissioner contains the following statement :—

"In disallowing this (interest) claim the Income-tax Officer was following the decision of my predecessor in his order, dated the 16th March, 1942, in appeal No. 1-C-11 of 1941-42. My predecessor observed : Nothing is in evidence to show that the managing agency company had surplus money and such money was invested or that there was any need to borrow. Thus the need to borrow is not established There is no doubt that money was borrowed but unless it can be proved that the borrowing is for the purpose of the business and the loan was used in the business, the interest cannot be allowed under section 10 (2) (iii)."

The second objection raised before the Appellate Assistant Commissioner was in these terms :—

"That the Income-tax Officer should have allowed the said sum of Rs. 22,500 as allowable expenditure being allocation of a sum out of the revenue receipt before it became income in the hands of the assessee."

The wording of the objection and the argument noticed in the order of the Appellate Assistant Commissioner show that the contention was that this sum should be treated as not having become the income of the assessee at all because it was deducted at the source by the Mill company. Reliance was placed for this contention on *Raja Bijoy Singh Dudhuria's case*[2]. The contention was rejected. At the third stage, when the assessee urged his contentions before the Income-tax Appellate Tribunal, he thought of urging as an argument that this was a permissible deduction under section 10 (2) (xv) because of the principles laid down in *Mitchell's case*[1]. No evidence, it appears, was led before the Income-tax Tribunal, nor has the Tribunal recorded any findings of fact on which the principles laid down in *Mitchell's case*[1] could be applied. The Tribunal's conclusions of facts were only as summarized in the earlier part of the judgment. It is therefore clear that the necessary facts required to be established before the principles laid down in *Mitchell's case*[1] could be applied, have not been found as facts in the present case at any stage of the proceedings and the High Court was in error in applying the principles of *Mitchell's case*[1] on the assumption of facts which were not proved. The High Court was carried away, it seems, by the argument of the counsel and

1. (1927) 1 K.B. 719. 2. 6 I.T.C. 419.

through error accepted the argument as facts. Indeed, if it had noticed the contention urged before the Income-tax Officer it would have seen at once that the argument urged in the High Court was to a certain extent in conflict with the contention that Rs. 1,80,000 being a loan on which the assessees had to pay interest, that interest item should be allowed to be deducted under section 10 (2) (iii) of the Income-tax Act. In our opinion, therefore, this appeal should be allowed on the simple ground that the facts necessary to be established by the respondents to support their claim for exemption under section 10 (2) (xv) of the Indian Income-tax Act have not been established at any stage of the proceedings and therefore they are not entitled to the deduction claimed. The appeal is therefore allowed with costs here and before the High Court.

Agent for Appellant : *P. A. Mehta.*

Agent for Respondent : *Ganpat Rai.*

Appeal allowed.

[THE SUPREME COURT OF INDIA.]

(Civil Appellate Jurisdiction.)

PRESENT :—H. J. KANIA, *Chief Justice*, S. FAZL ALI, M. PATANJALI SASTRI, MEHRCHAND MAHAJAN, B. K. MUKHERJEA, S. R. DAS AND N. CHANDRASEKHARA AIYAR, JJ.

Keshavan Madhava Menon .. *Appellant**

v.

The State of Bombay .. *Respondent.*

Constitution of India (1950), *Article* 13 (1)—*Interpretation—Proceedings instituted under section* 18 (1) *of the Indian Press (Emergency Powers) Act*, 1931, *before the commencement of the Constitution of India—If can be proceeded with after the Constitution came into force.*

In respect of a pamphlet published by a person in 1949 proceedings were started against him for an offence punishable under section 18 (1) of the Indian Press (Emergency Powers) Act and during the pendency of such proceedings the Constitution of India came into force. It was contended on behalf of the publisher that the relevant provisions of the Press (Emergency Powers) Act were inconsistent with the fundamental rights conferred by Article 19 (1) (*a*) of the Constitution and as such became void under Article 13 (1) of the Constitution after 26th January, 1950, and the proceedings against him could not be proceeded with.

Held (*Fazl Ali and Mukherjea, JJ., contra*) : Article 13 (1) has no retrospective effect but is wholly prospective in its operation. Further, it does not in terms make the existing laws which are inconsistent with the fundamental rights void *ab initio* or for all purposes. It has only the effect of nullifying or rendering all inconsistent existing laws ineffectual or nugatory and devoid of any legal force or binding effect only with respect to the exercise of fundamental rights on and after the date of the commencement of the Constitution. As it has no retrospective effect, if an act was done before the commencement of the Constitution in contravention of the provisions of any law which, after the Constitution, becomes void with respect to the exercise of any of the fundamental rights, the inconsistent law is not wiped out so far as the past act is concerned, for to say that it is, will be to give the law retrospective effect. There is no fundamental right that a person shall not be prosecuted and punished for an offence committed before the Constitution came into force. So far as the past acts are concerned the law exists notwithstanding that it does not exist with respect to the future exercise of fundamental rights. Accordingly the proceedings commenced under the Press (Emergency Powers) Act before the commencement of the Constitution are not affected by the Constitution coming into force and can be proceeded with.

Per *Fazl Ali.*—There can be no doubt that Article 13 (1) will have no retrospective operation and transactions which are past and closed and rights which have already vested will remain untouched. But with regard to inchoate matters which are still not determined when the Constitution came into force and as regards proceedings whether not yet begun or pending at the time of the enforcement of the Constitution and not yet prosecuted to a final judgment, a law which has been declared by the Constitution to be completely ineffectual can no longer be applied. If the law which made the act an offence has became completely ineffectual and nugatory, then neither can a charge be framed nor can the accused person be convicted. Accordingly, if the assumption that the relevant provisions of the Press (Emergency Powers) Act are inconsistent with the fundamental rights is correct, the publisher is entitled to a declaration that he cannot be convicted for the offence of which he is accused.

*Case No. IX of 1950. 22nd January, 1951.

Appeal under Article 132 (1) of the Constitution of India from the Judgment and Order, dated the 12th April, 1950, of the High Court of Judicature at Bombay in Criminal Application No. 229 of 1950.

A. S. R. Chari, Advocate, for Appellant.

M. C. Setalvad, Attorney-General for India (*G. N. Joshi*, Advocate, with him), for Respondent.

The Court delivered the following

JUDGMENTS: *Das, J.*—At all material times the petitioner, who is the appellant before us, was the Secretary of People's Publishing House, Ltd., a company incorporated under the Indian Companies Act with its registered office at 190-B, Khetwadi Main Road in Bombay. In September, 1949, a pamphlet entitled "*Railway Mazdooron ke khilaf Nai Zazish*" is alleged to have been published in Bombay by the petitioner as the Secretary of that company. Learned counsel for the petitioner states that the pamphlet was published as a "book" within the meaning of section 1 of the Press and Registration of Books Act (XXV of 1867) and that the provisions of that Act had been duly complied with. The Bombay Government authorities, however, took the view that the pamphlet was a "news sheet" within the meaning of section 2 (6) of the Indian Press (Emergency Powers) Act, 1931, and that as it had been published without the authority required by section 15 (1) of that Act, the petitioner had committed an offence punishable under section 18 (1) of the same Act. A prosecution under that Act was accordingly started against the petitioner in the Court of the Chief Presidency Magistrate, Bombay, and was registered as case No. 1102/P of 1949. During the pendency of the proceedings the Constitution of India came into force on 26th January, 1950. On 3rd March, 1950, the petitioner filed a written statement submitting, *inter alia*, that the definition of "news sheet" as given in section 2 (6) of the Indian Press (Emergency Powers) Act, 1931, and sections 15 and 18 thereof were *ultra vires* and void in view of Article 19 (1) (*a*) read with Article 13 and that the hearing of the case should be stayed till the High Court decided that question of law. This was followed up by a petition filed in the High Court on 7th March, 1950, under Article 228 of the Constitution, praying that the record of the case No. 1102/P of 1949 be sent for, that it be declared that sections 15 and 18 read with section 2 (6) and (10), in so far as they create liability for restrictive measure for a citizen are *ultra vires* of Article 19 (1) (*a*) and are, therefore, void and inoperative and that the petitioner be ordered to be acquitted. During the pendency of this petition the Chief Presidency Magistrate on 23rd March, 1950, framed a charge against the petitioner under section 18 of the Press (Emergency Powers) Act, 1931.

The petition under Article 228 was heard on 12th April, 1950, by a Bench of the Bombay High Court consisting of Chagla, C.J. and Bavdekar and Shah, JJ. Two questions were raised before the Bench, namely:—

(1) Whether sections 15 (1) and 18 (1) read with the definitions contained in sections 2 (6) and 2 (10) of the Indian Press (Emergency Powers) Act, 1931, were inconsistent with Article 19 (1) (*a*) read with clause (2) of that Article? and

(2) Assuming that they were inconsistent, whether the proceedings commenced under section 18 (1) of that Act before the commencement of the Constitution could nevertheless be proceeded with?

The High Court considered it unnecessary to deal with or decide the first question and disposed of the application only on the second question. The High Court took the view that the word "void" was used in Article 13 (1) in the sense of "repealed" and that consequently it attracted section 6 of the General Clauses Act which Act by Article 367 was made applicable for the interpretation of the Constitution. The High Court, therefore, reached the conclusion that proceedings under the Indian Press (Emergency Powers) Act, 1931, which were pending at the date of the commencement of the Constitution were not affected, even if the Act were inconsistent with the fundamental rights conferred by Article 19 (1) (*a*)

and as such became void under Article 13 (1) of the Constitution after 26th January, 1950. The High Court accordingly answered the second question in the affirmative and dismissed the petitioner's application. The petitioner has now come up on appeal before us on the strength of a certificate granted by the High Court under Article 132 (1) of the Constitution.

Learned counsel appearing in support of this appeal urged that the Indian Press (Emergency Powers) Act, 1931, was one of the many repressive laws enacted by an alien Government with a view to stifle the liberty of the Indian subjects and particularly of the Indian Press; that with the advent of independence the people of India began to breathe freely and by the Constitution which they gave unto themselves they took care to guarantee to themselves the fundamental rights of free citizens of a democratic republic and that Article 13 (1) of that Constitution brushed aside all vestiges of subordination which the tyranny of the alien rulers had imposed upon them and declared all laws inconsistent with the fundamental rights to be void as if they had never been passed and had never existed. It was, therefore, against the spirit of the Constitution, argued the learned counsel, that a free citizen of India should still continue to be persecuted under such a retrograde law which being inconsistent with the fundamental rights must be declared to be void. Learned counsel urged that it was not necessary for him to contend that such inconsistent laws became void *ab initio* or that all past and closed transactions could be reopened but he contended that on and from 26th January, 1950, when the Constitution came into force such inconsistent laws which became void could not be looked at for any purpose and far less could they be utilised for the purpose of framing a charge or punishing a free citizen. As the void law cannot be utilised any longer the pending prosecutions according to learned counsel must fall to the ground. To permit pending proceedings under a law which after the commencement of the Constitution has become void to proceed further, after the Constitution has taken effect, is to prolong the efficacy of the law notwithstanding that it has become void on and from the date the Constitution came into force and that is against the spirit of the Constitution.

An argument founded on what is claimed to be the spirit of the Constitution is always attractive for it has a powerful appeal to sentiment and emotion; but a Court of law has to gather the spirit of the Constitution from the language of the Constitution. What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not support that view. Article 372 (2) gives power to the President to adapt and modify existing laws by way of repeal or amendment. There is nothing to prevent the President, in exercise of the powers conferred on him by that Article, from repealing, say the whole or any part of the Indian Press (Emergency Powers) Act, 1931. If the President does so, then such repeal will at once attract section 6 of the General Clauses Act. In such a situation all prosecutions under the Indian Press (Emergency Powers) Act, 1931, which were pending at the date of its repeal by the President would be saved and must be proceeded with notwithstanding the repeal of that Act unless an express provision was otherwise made in the repealing Act. It is, therefore, clear that the idea of the preservation of past inchoate rights or liabilities and pending proceedings to enforce the same is not foreign or abhorrent to the Constitution of India. We are, therefore, unable to accept the contention about the spirit of the Constitution as invoked by the learned counsel in aid of his plea that pending proceedings under a law which has become void cannot be proceeded with. Further, if it is against the spirit of the Constitution to continue the pending prosecutions under such a void law, surely it should be equally repugnant to that spirit that men who have already been convicted under such repressive law before the Constitution of India came into force should continue to rot in jail. It is, therefore, quite clear that the Court should construe the language of Article 13 (1) according to the established rules of interpretation and arrive at its true meaning uninfluenced by any assumed spirit of the Constitution.

Article 13 (1) with which we are concerned for the purposes of this application is in these terms :—

"All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void."

It will be noticed that all that this clause declares is that all existing laws, *in so far as they are inconsistent* with the provisions of Part III shall, *to the extent of such inconsistency*, be void. Every statute is *prima facie* prospective unless it is expressly or by necessary implications made to have retrospective operation. There is no reason why this rule of interpretation should not be applied for the purpose of interpreting our Constitution. We find nothing in the language of Article 13 (1) which may be read as indicating an intention to give it retrospective operation. On the contrary, the language clearly points the other way. The provisions of Part III guarantee what are called fundamental rights. Indeed, the heading of Part III is "Fundamental Rights". These rights are given, for the first time, by and under our Constitution. Before the Constitution came into force there was no such thing as fundamental right. What Article 13 (1) provides is that all existing laws which clash with the exercise of the fundamental rights (which are for the first time created by the Constitution) shall to that extent be void. As the fundamental rights became operative only on and from the date of the Constitution the question of the inconsistency of the existing laws which those rights must necessarily arise on and from the date those rights came into being. It must follow, therefore, that Article 13 (1) can have no retrospective effect but is wholly prospective in its operation. After this first point is noted it should further be seen that Article 13 (1) does not in terms make the existing laws which are inconsistent with the fundamental rights void *ab initio* or for all purposes. On the contrary, it provides that all existing laws, in so far as they are inconsistent with the fundamental rights, shall be void to the extent of their inconsistency. They are not void for all purposes but they are void only to the extent they come into conflict with the fundamental rights. In other words, on and after the commencement of the Constitution no existing law will be permitted to stand in the way of the exercise of any of the fundamental rights. Therefore, the voidness of the existing law is limited to the future exercise of the fundamental rights. Article 13 (1) cannot be read as obliterating the entire operation of the inconsistent laws, or to wipe them out althogether from the Statute Book, for to do so will be to give them retrospective effect which, we have said, they do not possess. Such laws exist for all past transactions and for enforcing all rights and liabilities accrued before the date of the Constitution. Learned counsel for the appellant has drawn our attention to Articles 249 (3), 250, 357, 358 and 369 where express provision has been made for saving things done under the laws which expired. It will be noticed that each of those Articles was concerned with expiry of temporary statutes. It is well known that on the expiry of a temporary statute no further proceedings can be taken under it, unless the statute itself saved pending proceedings. If, therefore, an offence had been committed under a temporary statute and the proceedings were initiated but the offender had not been prosecuted and punished before the expiry of the statute, then, in the absence of any saving clause, the pending prosecution could not be proceeded with after the expiry of the statute by efflux of time. It was on this principle that express provision was made in the several Articles noted above for saving things done or omitted to be done under the expiring laws referred to therein. As explained above, Article 13 (1) is entirely prospective in its operation and as it was not intended to have any retrospective effect there was no necessity at all for inserting in that Article any such saving clause. The effect of Article 13 (1) is quite different from the effect of the expiry of a temporary statute or the repeal of a statute by a subsequent statute. As already explained, Article 13 (1) only has the effect of nullifying or rendering all inconsistent existing laws ineffectual or nugatory and devoid of any legal force or binding effect only with respect to the exercise of fundamental rights on and after the date of the commencement of the Constitution. It has no retrospective effect and if, there-

fore, an act was done before the commencement of the Constitution in contravention of the provisions of any law which, after the Constitution, becomes void with respect to the exercise of any of the fundamental rights, the inconsistent law is not wiped out so far as the past act is concerned, for to say that it is, will be to give the law retrospective effect. There is no fundamental right that a person shall not be prosecuted and punished for an offence committted before the Constitution came into force. So far as the past acts are concerned the law exists notwithstanding that it does not eixist with respect to the future exercise of fundamental rights. We, therefore, agree with the conclusion arrived at by the High Court on the second question, although on different grounds. In view of that conclusion, we do not consider it necessary to examine the reasons of the High Court for its conclusion. In our opinion, therefore, this appeal fails and is dismissed.

Fazl Ali, J.—I regret that I cannot agree with the view which the majority of my colleagues are inclined to take in this case.

The facts of the case are simple and will bring out the point to be decided. On the 9th December, 1949, the appellant was arrested and a prosecution was started against him under section 18 (1) of the Indian Press (Emergency Powers) Act (XXIII of 1931) in the Court of the Chief Presidency Magistrate at Bombay for publishing a pamphlet in Urdu entitled "Railway Mazdoorum Ke Khilaf Nai Sazish." The prosecution case was that the pamphlet was a news-sheet within the meaning of section 2 (6) of the Act and that since it had been published without the authority required by section 15 (1) of the Act, the appellant had committed an offence punishable under section 18 (1) of the Act. While the prosecution was pending, the Constitution of India came into force on the 26th January, 1950, and thereafter the appellant raised the contention that sections 2 (6), 15 and 18 of the Act were void, being inconsistent with Article 19 (1) (*a*) of the Constitution and therefore the case against him could not proceed. Having raised this contention, the appellant filed a petition in the High Court at Bombay under Article 228 of the Constitution asking the High Court to send for the record of the case and declare that sections 15 and 18 of the Indian Press (Emergency Powers) Act read with section 2 (6) and (10) thereof, were void and inoperative and the petitioner should be ordered to be acquitted. The petitition was heard by a Full Bench of the Bombay High Court, and the learned Judges constituting the Bench in deciding the point raised, assumed that the provisions of the Act impugned by the appellant were inconsistent with the fundamental right guaranteed by Article 19 (1) (*a*) of the Constitution of India, and held that Article 13 (1) had virtually the effect of repealing such provisions of existing laws as were inconsistent with any of the fundamental rights and that consequently under section 6 of the General Clauses Act, which is made applicable for the interpretation of the Constitution by Article 367, pending proceedings were not affected. The appellant's petition to the High Court having been dismissed, he preferred this appeal in the Supreme Court.

One of the points discussed elaborately by the learned counsel appearing for the parties in the course of their arguments was as to what was the effect upon pending proceedings when an Act was repealed or when a temporary Act expired. In Craies on Statute Law, the effect of the expiry of a temporary Act is stated to be as follows :—

"As a general rule, and unless it contains some special provision to the contrary, after a temporary Act has expired no proceedings can be taken upon it, and it ceases to have any further effect. Therefore, offences committed against temporary Acts must be prosecuted and punished before the Act expires, and as soon as the Act expires any proceedings which are being taken against a person will *ipso facto* terminate." (pp. 347-8, 4th Edn.).

This statement of law by Craies was referred to with approval and adopted by the Federal Court in *J. K. Gas Plant Manufacturing Co., (Rampur) Ltd., and others* v. *King Emperor*[1]. As to the effect of the repeal of an Act, the following passage from Craies' books seems to sum up the legal position as it obtained in England before the enactment of the Interpretation Act of 1889 :—

1. (1947) F.L.J. 71 : (1947) F.C.R. 141, 166 : (1947) 2 M.L.J. 402.

"When an Act of Parliament is repealed", said Lord Tenterden in *Surtees* v. *Ellison*[1] "it must be considered (except as to transactions past and closed) as if it had never existed. That is the general rule."

Tindal, C.J., states the exception more widely. He says (in *Kay* v. *Goodwin*[2]):

"The effect of repealing a statute is to obliterate it as completely from the records of the Parliament as if it had never been passed; and it must be considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law."

Again, Crawford in his book on "Statutory Construction" dealing with the general effect of the repeal of an Act states the law in America to be as follows:

"A repeal will generally, therefore, divest all inchoate rights which have arisen under the repealed statute, and destroy all accrued causes of action based thereon. As a result, such a repeal, without a saving clause, will destroy any proceeding, whether not yet begun, or whether pending at the time of the enactment of the repealing Act, and not already prosecuted to a final judgment so as to create a vested right." (pp. 599-600).

In a footnote relating to the cases which the learned author cites in support of the above proposition, he adds:

"See *Cleveland, etc., R. Co.* v. *Nunford (Ind.)*[3], where the repeal of a statute during the trial prevented a judgment from being rendered. Similarly, there can be no legal conviction for an offence, unless the act be contrary to law at the time it is committed; nor can there be a judgment, unless the law is in force at the time of the indictment and judgment. If the law ceases to operate, by its own limitation or by a repeal, at any time before judgment, no judgment can be given. Hence, it is usual in every repealing law to make it operate prospectively only, and to insert a saving clause, preventing the retroactive operation of the repeal and continuing the repealed law in force as to all pending prosecutions, and often as to all violations of the existing law already committed."

The author then proceeds to quote the following passage from *Wall* v. *Chesapeake & Ohio Ry. Company*[4]:

"It is well settled that if a statute giving a special remedy is repealed without a saving clause in favour of pending suits all suits must stop where the repeal finds them. If final relief has not been granted before the repeal went into effect, it cannot be after. If a case is appealed, and pending the appeal the law is changed, the appellate Court must dispose of the case under the law in force when its decision was rendered. The effect of the repeal is to obliterate the statute repealed as completly as if it had never been passed, and it must be considered as a law which never existed, except for the purposes of those actions or suits which were commenced, prosecuted and concluded while it was an existing law. Pending judicial proceedings based upon a statute cannot proceed after its repeal. This rule holds true until the proceedings have reached a final judgment in the Court of last resort, for that Court, when it comes to announce its decision, conforms it to the law then existing, and may therefore reverse a judgment which was correct when pronounced in the subordinate tribunal from whence the appeal was taken, if it appears that pending the appeal a statute which was necessary to support the judgment of the lower Court has been withdrawn by an absolute repeal." (p. 601).

It is well-known that formerly the practice in England used to be to insert in most of the repealing statutes a clause saving anything duly done or suffered under the repealed statutes and any pending legal proceedings or investigations. Ultimately, to dispense with the necessity of having to insert a saving clause in almost every repealing Act, section 38 (2) was inserted in the Interpretation Act, 1889, which provides that a repeal, unless the contrary intention appears, does not affect the previous operation of the repealed enactment or anything duly done or suffered under it, and any investigations, legal proceedings or remedies may be instituted, continued or enforced in respect of rights, liabilities and penalties under the repealed Act, as if the repealing Act had not been passed.

Crawford in his book to which I have referred adverts in these words to a similar difficulty which was experienced in America and to the manner in which it has been met:—

"Due to the numerous troublesome problems which constantly arose with the repeal of statutes, as well as to the numerous cases where hardship was caused, statutes have been enacted in several States expressly providing that the repeal of a statute shall not affect any rights, causes of action, penalties, forfeitures, and pending suits, accrued or instituted under the repealed statute."

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1. (1829) 9 B. & C. 750: 109 E.R. 278.
2. (1830) 6 Bing. 576: 130 E.R. 1403.
3. 197 N.E. 826.
4. 125 N.E. 20.

In India, the earliest attempt that was made to guard against the normal legal effect of a repeal is to be found in section 6 of Act I of 1868. This provision was further elaborated by section 6 of the General Clauses Act of 1897 which is on the same lines as section 38 (2) of the Interpretation Act of England. The position therefore now in India as well as in England is that a repeal has not the drastic effect which it used to have before the enactment of the Interpretation Act in England or the General Clauses Act in this country. But this is due entirely to the fact that an express provision has been made in those enactments to counteract that effect. Hence, in those cases which are not covered by the language of the General Clauses Act, the principle already enunciated will continue to operate. The learned Attorney-General had to concede that it was doubtful whether section 6 of that Act is applicable where there is a repeal by implication, and there can be no doubt that the law as to the effect of the expiry of a temporary statute still remains as stated in the books, because section 6 of the General Clauses Act and section 38 (2) of the Interpretation Act have no application except where an Act is repealed. It should be remembered that the soundness of the law which has been consistently applied to cases governed by statutes which have ceased to be in force, by reason of having been repealed or having expired, has never been questioned, and it cannot be brushed aside as if it embodied some archaic or obsolete rule peculiar only to the Common Law of England. It is the law which has been enunciated by eminent Judges both in England and in America and is based on good sense and reason.

I shall now proceed to consider what would be the correct legal position, when a 'provision of an existing law' is held to be void under Article 13 (1) of the Constitution. From the earlier proceedings before the Constituent Assembly, it appears that in the original draft of the Constitution, the words "shall stand abrogated" were used instead of "shall be void," in Article 13 (1), and one of the questions directly before the assembly was what would be the effect of the use of those words upon pending proceedings and anything duly done or suffered under the existing law. Ultimately, the Article emerged in the form in which it stands at present, and the words "shall stand abrogated" were replaced by the words "shall be void." If the words "stand abrogated" had been there, it would have been possible to argue that those words would have the same effect as repeal and would attract section 6 of the General Clauses Act, but those words have been abandoned and a very strong expression, indeed the strongest expression which could be used, has been used in their place. The meaning of the word "void" is stated in Black 's Law Dictionary (3rd Edn.) to be as follows :—

> "null and void ; ineffectual ; nugatory ; having no legal force or binding effect ; unable in law to support the purpose for which it was intended ; nugatory and ineffectual so that nothing can cure it ; not valid."

A reference to the Constitution will show that the framers thereof have used the word "repeal" wherever necessary (see Articles 252, 254, 357, 372 and 395). They have also used such words as "invalid" (see Articles 245, 255 and 276), "cease to have effect" (see Articles 358 and 372), "shall be inoperative," etc. They have used the word "void" only in two Articles, these being Article 13 (1) and Article 154, and both these Articles deal with cases where a certain law is repugnant to another law to which greater sanctity is attached. It further appears that where they wanted to save things done or omitted to be done under the existing law, they have used apt language for the purpose ; see for example Articles 249, 250, 357, 358 and 369. The thoroughness and precision which the framers of the Constitution have observed in the matters to which reference has been made, disinclines me to read into Article 13 (1) a saving provision of the kind which we are asked to read into it. Nor can I be persuaded to hold that treating an Act as void under Article 13 (1) should have a milder effect upon transactions not past and closed than the repeal of an Act or its expiry in due course of time. In my opinion, the strong sense in which the word "void" is normally used and the context in which it has been used are not to be completely ignored. Evidently, the framers of the Constitution did not approve of

the laws which are in conflict with the fundamental rights, and, in my judgment, it would not be giving full effect to their intention to hold that even after the Constitution has come into force, the laws which are inconsistent with the fundamental rights will continue to be treated as good and effectual laws in regard to certain matters, as if the Constitution had never been passed. How such a meaning can be read into the words used in Article 13 (1), it is difficult for me to understand. There can be no doubt that Article 13 (1) will have no retrospective operation, and transactions which are past and closed and rights which have already vested will remain untouched. But with regard to inchoate matters, which were still not determined when the Constitution came into force, and as regards proceedings whether not yet begun or pending at the time of the enforcement of the Constitution and not yet prosecuted to a final judgment, the very serious question arises as to whether a law which has been declared by the Constitution to be completely ineffectual can yet be applied. On principle and on good authority, the answer to this question would appear to me to be that the law having ceased to be effectual can no longer be applied. In *R* v. *Mawgan* (*Inhabitants*)[1] a presentment as to the non-repair of a highway had been made under 13 Geo. 3 C. 78, s. 24, but before the case came on to be tried, the Act was repealed. In that case, Lord Denman, C.J., said :

"If the question had related merely to the presentment, that no doubt is complete. But *dum loquimur*, we have lost the power of giving effect to anything that takes place under that proceeding". And Littledale, J., added :

"I do not say that what is already done has become bad, but that no more can be done."

In my opinion this is precisely the way in which we should deal with the present case.

It was argued at the Bar that the logical outcome of such a view would be to hold that all the convictions already recorded and all the transactions which are closed, should be reopened, but, in my opinion, to argue on these lines is to overlook what has been the accepted law for centuries, namely, that when a law is treated as dead, transactions which are past and closed cannot be revived and actions which were commenced, prosecuted and concluded whilst the law was operative cannot be reopened.

In the course of the arguments, a doubt was also raised as to what would be the effect in the case of an appeal pending when the Constitution came into force, from a conviction already recorded before the 26th January, 1950. The law applicable to such a situation is well-known and has been correctly summed up by Crawford in these words :—

"Pending judicial proceedings based upon a statute cannot proceed after its repeal. The rule holds true until the proceedings have reached a final judgment in the Court of last resort, for that Court, when it comes to announce its decision conforms it to the law then existing, and may therefore reverse a judgment which was correct when pronounced in the subordinate tribunal from whence the appeal was taken, if it appears that pending the appeal a statute which was necessary to support the judgment of the lower Court has been withdrawn by an absolute repeal."

I think I should at this stage deal briefly with two points which were raised in the course of the arguments in support of the opposite view. It was urged in the first place that without there being a saving clause to govern Article 13 (1), it can be so construed as to permit offences committed prior to the 26th January, 1950, to be punished. The argument has been put forward more or less in the following form. The law which is said to be in conflict with the fundamental rights was a good law until the 25th January, and, since Article 13 (1) is to be construed prospectively and not retrospectively, every act constituting an offence under the old law remains an offence and can be punished even after the 26th January. It seems to me that the same argument could be urged with reference to matters which constituted offences under a repealed Act or a temporary Act which has expired. But such an argument has never succeeded. The real question is whether a person who has not been convicted before the Act has ceased to

1. (1938) 8 A. & E. 496.

exist or ceased to be effectual can still be prosecuted under such an Act. The answer to this question has always been in the negative, and I do not see why a different answer should be given in the case of an Act which has become void, *i.e.*, which has become so ineffectual that it cannot be cured.

The second argument which also has failed to impress me is that if section 6 of the General Clauses Act does not in terms apply, the principle underlying that section should be applied. The answer to this argument is that the Legislature in its wisdom has confined that section to a very definite situation, and, though it was open to it to make the section more comprehensive and general, it has not done so. It is well-known that situations similar to those which arise by reason of the repeal of an Act have arisen in regard to Acts which have expired or Acts which have been declared to be void, and, though such situations must have been well-known to the Legislature, they have not been provided for. In these circumstances, I do not see how the very clear and definite provision can be enlarged in the manner in which it is attempted to be enlarged. Besides, I have not come across any case in which the principle underlying section 38 (2) of the Interpretation Act or section 6 of the General Clauses Act has been invoked or applied.

In the present case, we have to look at the state of the law at the time when the question arises as to whether a person has committed any offence. If we find that the law which made the Act an offence has become completely ineffectual and nugatory then neither can a charge be framed nor can the accused person be convicted. In my opinion, if the assumption on which the High Court has proceeded is correct, the appellant is entitled to a declaration that he cannot be convicted for the offence of which he is accused.

Mahajan, J.—The appellant is the secretary of the People's Publishing House Ltd., Bombay. In September, 1949, he published a pamphlet entitled "Railway Mazdoorum Ke Khilaf Nai Sazish." On the 9th December, 1949, he was arrested and a prosecution was launched against him under section 18 (1) of the Indian Press (Emergency Powers) Act (XXIII of 1931) in the Court of the Chief Presidency Magistrate at Bombay in respect of this pamphlet as it had been published without any authority as required under section 16 of the said Act. On the 8th March, 1950, an application was made on his behalf in the High Court of Judicature at Bombay under section 228 of the Constitution of India for quashing the proceedings started against him and it was contended that sections 16 and 18 of Act XXIII of 1931 were *ultra vires* of Part III of the Constitution of India and were thus void and had no effect whatsoever and no prosecution launched under these sections could be proceeded with after the coming into force of the Constitution. The High Court refused this application and held that the proceedings instituted against the appellant before the commencement of the Constitution could not be affected by the provisions of the Constitution that came into force on the 26th January, 1950. Dissatisfied with this decision, the appellant has preferred the present appeal to this court.

The sole point to decide in the appeal is whether proceedings instituted under section 18 (1) of the Indian Press (Emergency Powers) Act XXIII of 1931, before the commencement of the Constitution of India are affected by its provisions. The High Court has answered this question in the negative and, in my opinion, rightly.

I am in respectful agreement with the observations of the learned Chief Justice of Bombay that it is difficult to believe that the Constituent Assembly contemplated that with regard to the laws which it was declaring to be void under Article 13 all vested rights and all proceedings taken should be disturbed and affected by particular laws ceasing to be in force as a result of inconsistencies with the fundamental rights guaranteed to the citizens. It is not arguable and was not argued that Part III of the Constitution has any retrospective operation. The appellant was not possessed of any fundamental rights in September, 1949 when he published the pamphlet in question and his act clearly came within the mischief of the provisions of section 18 of Act XXIII of 1931 and he thus became liable to the penalties prescribed therein.

It was, however, contended by Mr. Chari, the learned counsel for the appellant, that the effect of the language employed in Article 13 (1) of the Constitution was that the proceedings commenced before the coming into force of the Constitution could not be continued after its commencement under the laws that became inconsistent with its provisions. For this proposition he placed reliance on the rule of construction stated in Maxwell on "Construction of Statutes" p. 404, which is to the following effect :—

"Where an Act expired or was repealed, it was formerly regarded, in the absence of provision to the contrary, as having never existed, except as to matters and transactions passed and closed. Where, therefore, a penal law was broken, the offender could not be punished under it if it expired before he was convicted, although the prosecution was begun while the Act was still in force."

This rule seems to be based on a statement of Tindal, C.J., in *Kay* v. *Goodwin*,[1]. The learned Chief Justice made the following observations :—

"I take the effect of repealing a statute to be, to obliterate it as completely from the records of Parliament as if it had never passed ; and it must be considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law."

This was the rule of the English Common Law which was applied in cases of statutes which were repealed and under this rule all pending actions and prosecutions could not be proceeded with after the repeal of the law under which they were started. This rule was however changed by the Interpretation Act of 1889, section 38. Therein it was enacted that unless the contrary intention appears, no repeal is to affect any investigation, legal proceeding, including the initiation of criminal proceedings, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed. A similar provision exists in India in section 6 of the General Clauses Act of 1868 and 1897. The High Court held that the provisions of Article 13 (1) were analogous to the repeal of a statute and therefore section 6 of the General Clauses Act had application to the construction of these provisions and that being so, the coming into force of the Constitution did not in any way affect the continuance of the proceedings that had been commenced against the appellant under the law that was in force at the time of the publication of the pamphlet. Mr. Chari contended that the High Court was in error in applying the provisions of section 6 of the General Clauses Act to the interpretation of Article 13 (1) of the Constitution inasmuch as the provisions of this Article were not analogous to repeal and did not amount to a repeal of the existing law. He contended that a repeal of the law could only be by the Legislature but that under Article 13 power had been given to the Court to declare any law inconsistent with the Constitution to be void ; in other words, the power given was larger in scope and effect than the power of repeal and the effect of the declaration that a certain statute was void as it was repugnant to the freedom guaranteed by the Constitution was to wipe out the statute altogether from the date of the coming into force of the Constitution and that nothing could be done under that statute with effect from the 26th January, 1950 and therefore the Court could not frame a charge under the law that was declared void, or pass a judgment of conviction against a person under a law that had been declared void. Mr. Chari went to the length of saying that a statute which was inconsistent with the Constitution became dead on the coming into force of the Constitution and under a dead statute no action could be taken whatsoever. He emphasised his contention by stressing the fact that freedoms guaranteed by Part III of the Constitution could not be tainted by keeping alive prosecutions and actions under laws framed by a foreign Government which were inconsistent with those freedoms. It was said that some of the laws which the Constitution intended to be declared void by the Court because of their repugnancy to the fundamental rights

1. (1830) 6 Bing. 576 : 130 E.R. 1403.

guaranteed to the citizen by the Constitution were those which a foreign Government had enacted to keep the people of this country under its domination and that to continue prosecutions under these laws after the coming into force of the Constitution would be wholly contrary and repugnant not only to the letter of the Constitution but also to its spirit. It was conceded that transactions finally closed under such laws could not be reopened but that prosecutions and actions which were still continuing should be stopped and further action concerning them would become illegal and would be contrary to the freedoms guaranteed by the Constitution. Reference was made to Articles 249,250, 357 and 358 and 369 to show that the scheme of the Constitution was that wherever it intended that the proceedings commenced under existing laws which became inoperative on the 26th January, 1950, were to continue after that date, apt phraseology had been used to indicate that intention but that in Article 13 no such saving words were used and therefore it must be presumed that the Constituent Assembly did not intend that proceedings taken under such laws were to be continued after the 26th January, 1950.

Article 13 (1) of the Constitution is in these terms :—

"All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they were inconsistent wtih the provisions of this Part, shall, to the extent of such inconsistency, be void."

The freedom guaranteed to the citizen which has application to the case of the appellant is in Article 19 (1) (a) and this Article is in these terms :—

"All citizens shall have the right to freedom of speech and expression."

It is admitted that after the 26th January, 1950, there has been no infringement of the appellant's right of freedom of speech or expression. In September, 1949, he did not enjoy either complete freedom of speech or full freedom of expression. It is in relation to the freedom guaranteed in Article 19 (1) of the Constitution to the citizen that the provisions of Article 13 (1) come into play. This Article does not declare any law void independently of the existence of the freedoms guaranteed by Part III. A citizen must be possessed of a fundamental right before he can ask the Court to declare a law which is inconsistent with it void ; but if a citizen is not possessed of the right, he cannot claim this relief. The appellant in the present case was not possessed of any fundamental right on the day that he published the pamphlet and in these circumstances the question is whether he can claim protection under the rights guaranteed to him on 26th January, 1950, for escaping the consequence of his act on any principles of construction of statutes. According to the contention of the learned counsel, the principles applicable to repealed statutes are not in terms applicable to such a case, whether they are to be found in the rules of the common law of England or whether they are contained in the Interpretation Act or the General Clauses Act. Those rules are applicable to cases either of repeal or to cases of a statute dying a natural death by efflux of time. None of those however have any application to the construction of statutes framed in languages like the one contained in Article 13 (1) of the Constitution. Besides the rule of construction which applies to repealed statutes or to temporary statutes our attention was not drawn to any other rule of construction under which a person who commits an offence against an Act during its existence as a law becomes unpunishable on its termination. Both on considerations of convenience and also on grounds of justice and reason I am inclined to think that penalties incurred under a law in force at the time when the act was committed would survive its extinction so that persons who violate its provisions might afterwards be punished. Persons who during the continuance of a statute have obtained rights under it cannot be affected by a declaration that the statute with effect from a certain date will become an inoperative statute. When in the case of repeal of a statute which according to Tindal, C.J., obliterates it completely from the records of Parliament as if it had never passed the common law rule has been abrogated by statute, it is difficult to apply that rule on any sentimental grounds at this date to the case of statutes which are declared void or declared to have no effect whatsoever after a certain date only. The expression " void " has no larger

effect on the statute so declared than the word "repeal". The expression "repeal" according to common law rule obliterates a statute completely as if it had never passed and thus operates retrospectively on past transactions in the absence of a saving clause or in the absence of provisions such as are contained in the Interpretation Act, 1889, or in the General Clauses Act, 1897; while a provision in a statute that with effect from a particular date an existing law would be void to the extent of the repugnancy has no such retrospective operation and cannot affect pending prosecutions or actions taken under such laws. There is in such a situation a necessity of introducing a saving clause and it does not need the aid of a legislative provision of the nature contained in the Interpretation Act or the General Clauses Act. To hold that a prospective declaration that a statute is void affects pending cases is to give it indirectly retrospective operation and that result is repugnant to the clear phraseology employed in the various Articles in Part III of the Constitution.

The contention of the learned Attorney-General that the phraseology employed in Article 13 (1) of the Constitution clearly indicates that there was no intention to give any retrospective operation to the provisions of Part III of the Constitution and that the declaration that laws repugnant to Part III of the Constitution are void only operates from 26th January, 1950, has, in my opinion, force. It seems clear that an existing statute in spite of a declaration by Court that it is void remains in force till the 25th January, 1950 and continues to remain on the statute book even after the 26th January, 1950, except that no effect can be given to any of its provisions which are repugnant to the fundamental rights guaranteed by the Constitution. The effect of Article 13 (1) is only prospective and it operates in respect to the freedoms which are infringed by the State subsequent to the coming into force of the Constitution but the past acts of a person which came within the mischief of the law then in force are not affected by Part III of the Constitution. The reference made by Mr. Chari to different Articles of this Constitution where saving clauses have been inserted to save pending proceedings or acts is not very helpful inasmuch as where a certain provision has a retrospective effect, then it is necessary to introduce a saving clause if things done in the past have to be saved from the retrospective effect of the statute; but where the provision is clearly not intended to be retrospective, then the necessity of saving clause does not arise. The provisions of the Constitution to which Mr. Chari made reference were of the nature that but for the saving clause the effect of them would be retrospective in character under the accepted canons of construction of statutes.

Mr. Chari's argument that it could not have been intended by the Constitution makers that prosecutions started under laws passed by a foreign power and which affect the freedoms guaranteed to the citizen under the Constitution in Part III were to be continued after the dawn of independence and after India had become a democratic Republic to a certain extent seems to me to be plausible; but on further thought I have come to the conclusion that this argument appeals more to the heart than to the head and is not based on any sound principle of construction of statutes. Under the accepted canons of construction of statutes, if a law has no retrospective operation of any kind whatsoever, then such a law cannot affect pending prosecutions or actions and the Constitution not being retrospective in its operation could not therefore in any way affect prosecutions started for offences that were complete under the law in force at the time they were committed. The cure for such an incongruous state of affairs and the relief for such situation lies with the Government and the Legislature and not with the Courts. If a case of sedition against an alien Government is continued after the coming into force of the Constitution, the Courts cannot decline to proceed with it and to pass some sentence howsoever lenient against an accused by placing a construction on the Constitution which gives it retrospective operation, but the Government of the Republic or its Legislature can always by executive or legislative action bring to a close all such distasteful proceedings and not only can it do so in the case of pending prosecutions but it can give

relief also to persons who have suffered under laws of sedition against an alien Government and are suffering terms of imprisonment in the jails of the Republic. If punishment for contravention of such laws cannot be given to offenders because decision in their case has been delayed beyond the 26th January, 1950, it will be highly unreasonable not to give relief and to let punishments continue in case of persons, the sentence against whom have already been passed under laws which were solely enacted to maintain the alien rule. Both cases, in my opinion, stand on the same footing and relief in those cases lies not with Courts but with the executive Government of the Republic. If Mr. Chari's argument that on the commencement of the Constitution on 26th January, 1950, all proceedings started under laws that became repugnant and inconsistent with the Constitution were to be stopped was accepted, it would lead to very strange results, and Mr. Chari had to concede that it would be so. Suppose a person was convicted of the offence of sedition or of an offence under one of the Safety Acts, the provisions of which are repugnant to the Constitution, but his appeal was pending in the High Court against his conviction, then, according to the contention of Mr. Chari, the Court has no power to hear the appeal because the law being void, no further action could be taken in the matter. The result would be that the Court would not be able to hear an appeal and to give relief to the accused if he had been erroneously convicted. If a Court cannot frame a charge or convict a person under a law that is repugnant to the Constitution equally it would not be entitled to continue any proceeding for the benefit of the accused under cover of such a law.

Great deal of emphasis was laid during the course of the argument on the meaning to be given to the word "void" and it was said that this word in its widest sense meant that the law declared void was void *ab initio*, *i.e.*, from the very inception of the law it was bad. If that meaning was given to this word, then it would mean that all laws existing on the 26th January, 1950, and which were declared void by Article 13 (1) because of their being repugnant to the Constitution were bad when they were passed by the Legislature, though at the same time the subject enjoyed no fundamental rights. It was sought to give to this word "void" the same wide meaning as was given to the word "repeal" by Tindal, C.J., in the case above mentioned. With every respect to the great Judge who administered the Common Law in England during the earlier period of British history and in all humility I venture to say that the rule evolved by them *qua* "repeal" was of an artificial nature. The dictum of the learned Chief Justice that a repeal of a statute obliterates it completely from the records of Parliament as if it had never passed is to my mind based on an extended meaning of that expression than its ordinary dictionary sense. When a statute has been in operation, say for a period of fifty years, people have suffered penalties under it or have acquired rights thereunder and the law has been enforced by Courts for such a long period, then to say that when it is repealed it is completely obliterated and that it never had any existence and was never passed by Parliament, is rather saying too much and is ignoring hard real facts and amounts to shutting one's eyes to the actualities of the situation. It would be more consonant with reason and justice to say that the law existed and was good at the time when it was passed but that since the date of its repeal it has no longer any effect whatsoever. The Parliament may however say in the repealing statute that it will have retrospective operation and it may also prescribe the limits of its retrospectivity and to that extent past transactions may be affected by it. Because the rule of common law evolved by the English Judges was not in consonance with reason and justice, a legislative practice was evolved under which each repealing statute contained a saving clause under which past transactions were not allowed to be affected by the repeal. Eventually the rule of Common law was completely abrogated by the enactment of the Interpretation Act, 1889. In India in the year 1868 section 6 of the General Clauses Act enacted what was later on enacted in England in the Interpretation Act and for over eighty years it is this rule of construction that has been adopted in this country, the rule being that past transactions, whether closed or inchoate, cannot be affected by the repeal of an earlier statute

or by the coming into effect of a new one. In my opinion, the rules contained in the General Clauses Act and in the English Interpretation Act is more in consonance with reason and justice and is also a rule of convenience and should be followed in this country, in preference to the rule evolved by the English Judges in the earlier part of English legal history. Be that as it may, it is unnecessary in this case to have resort either to the rule of common law or to the General Clauses Act as the language of Article 13 itself furnishes a solution to the problem.

Reference was also made to the rule of construction applicable to temporary statutes. In the case of such statutes, the rule of English law is that after the expiry of the life of the statute no action can be taken under the expired statute unless an intention can be gathered from its provisions to the contrary, but transactions already completed during the period that these statutes had the force of law are not in any way affected. That rule seems to be quite logical and is consonant with reason and justice. When the life of a statute is limited and it dies a natural death, then no question either of its retrospective or of prospective nature arises. If the intention of the statute was that anything done under it has to continue, then it will be allowed to continue ; otherwise nothing done under it will be continued after its natural death. Any rule applicable to construction of such a statute has no application to the interpretation of the Constitution of India and the reference to this rule, in my opinion, is not relevant for the decision of this matter.

Reference was also made to the rule of construction laid down by the American Courts in respect of statutes declared void because of their being repugnant to the Constitution of the United States of America. It is obvoius that if a statute has been enacted and is repugnant to the Constitution, the statute is void since its very birth and anything done under it is also void and illegal. The Courts in America have followed the logical result of this rule and even convictions made under such an unconstitutional statute have been set aside by issuing appropriate writs. If a statute is void from its very birth, then anything done under it, whether closed, completed, or inchoate, will be wholly illegal and relief in one shape or another has to be given to the person affected by such an unconstitutional law. This rule, however, is not applicable in regard to laws which were existing and were constitutional according to the Government of India Act, 1935. Of course, if any law is made after the 26th January, 1950, which is repugnant to the Constitution, then the same rule will have to be followed by Courts in India as is followed in America and even convictions made under such an unconstitutional law will have to be set aside by resort to exercise of powers given to this Court by the Constitution.

The only rule of construction applicable to the interpretation of Article 13 of the Constitution is the one that concerns the determination of the question whether a statute is intended to have any retrospective operation. If the well-known canons of construction on this point are applied, then it has to be held that Article 13 was not intended to have any retrospective effect whatever ; on the other hand, its language denotes that it recognized the validity of the existing laws up to the date of the commencement of the Constitution and even after its commencement except to the extent of their repugnancy to any provisions of Part III of the Constitution. On this construction of Article 13 it cannot affect any past transactions, whether closed or inchoate. Reference in this connection may be made to the provisions of Article 372 (2) of the Constitution. Under this Article the President has been given power to adapt existing laws and to bring them in accordance with the Articles of the Constitution by a process of amendment, repeal or adaptation. The President could have repealed the Press (Emergency Powers) Act and brought the law in accordance with the provisions of Part III of the Constitution and if he had used the powers of repeal given to him by this Article, the provisions of the General Clauses Act would have been immediately attracted to that situation and the pending prosecution of the appellant would have

to be continued in view of those provisions. If in that situation the Constitution contemplates the continuance of pending proceedings under existing laws, it becomes difficult to place a different interpretation on the phraseology employed in Article 13 (1) of the Constitution, than the one that is in accord with that situation. By the construction that I have placed on this Article that incongruous result is avoided.

In view of the decision above arrived at it seems unnecessary to pronounce on the alternative argument of the learned Attorney-General to the effect that the expression "void" used in Article 13 of the Constitution is synonymous with the word "repeal" and that it was an apt word used in the context to indicate the same intention. It was said that the word "repeal" was not used in the Article but instead the expression "void" was employed therein by the draftsmen in order to include within its ambit cases of custom and usage where such custom and usage was also repugnant to the provisions of Part III of the Constitution. It was also urged that by Article 13 (1) the Constitution in express terms repealed all laws inconsistent with its provisions and that the only power given to the court was to find out which of these laws was inconsistent with the provisions of Part III. The declaration that these laws were void or repealed was by the force of the provisions of Article 13 itself and did not result from the decision of the Courts. It is also unnecessary to examine the further argument of the learned Attorney-General that in any case since 1868 in this country the rule of construction of statutes is the one laid down by section 6 of the General Clauses Act, 1868, and that though in express terms that statute may not be applicable to the construction of Article 13 (1) of the Constitution, yet that rule is a rule of justice, equity and good conscience and has become a rule of common law in this country and should be applied even to cases where statutes become void by reason of their being repugnant to the Constitution.

For the reasons given above I see no force in this appeal and I would accordingly dismiss it.

Mukherjea, J.—I am in entire agreement with the view taken by my learned brother Fazl Ali, J., in his judgment and I concur both in his reasons and his conclusion.

Agent for Appellant : *P. G. Gokhale.*

Agent for Respondent : *P. A. Mehta.*

V.S. ——— *Appeal dismissed.*

[THE SUPREME COURT OF INDIA.]

(Original Jurisdiction.)

(Under Article 32 of the Constitution for a Writ in the nature of *certiorari* or prohibition.)

PRESENT :—H. J. KANIA, *Chief Justice*, S. FAZL ALI, M. PATANJALI SASTRI, B. K. MUKHERJEA AND S. R. DAS, JJ.

Ramjilal .. *Petitioner**

v.

The Income-tax Officer, Mohindar Garh .. *Respondent.*

Constitution of India (1950), *Articles* 14, 31, 32 *and* 265—*Difference in rates of assessment of income-tax by reason of pending proceedings being continued according to the laws of the integrating States prior to integration into the Pepsu State—Article* 14, *if infringed—Collection of taxes, if deprivation of property within the meaning of Article* 31—*Relative scope of Articles* 31 (1) *and* 265.

Nabha one of the States integrated in the Patiala and East Punjab States Union had no Income-tax Act prior to the integration while Kapurthala another State had its own Income-tax Act. After the integration, the residents of the Nabha State were assessed to income-tax under the law of the Pepsu Union, in respect of the year 2005 while the income of the residents of Kapurthala State

*Petition No. 135 of 1950. 12th January, 1950.

were assessed under the Kapurthala State law, the rates under which were lower than those fixed in the law of the Pepsu State as the proceedings against them were pending on 20th August, 1948 and as the pending proceedings have according to section 3 (1) of the Patiala and East Punjab States Union General Provisions (Administration) Ordinance, 2006, to be disposed of in accordance with the laws governing such proceedings in force in any such integrating State immediately before 20th August, 1948.

On a contention that such discrimination offends against the provisions of Article 14 of the Constitution.

Held : The discrimination, if any, was not brought about by the Ordinance, but by the circumstance that there was no Income-tax Act in Nabha State and consequently there was no case of assessment pending against any Nabha assessee. In any case, the provision that pending proceedings should be concluded according to the law applicable at the time when the rights or liabilities accrued and the proceedings commenced is a reasonable law founded upon a reasonable classification of the assessees which is permissible under the equal protection clause and to which no exception can be taken. There is no infringement of fundamental right under Article 14 in such a case.

Clause (1) of Article 31 must be regarded as concerned with deprivation of property otherwise than by the imposition or collection of tax, for otherwise Article 265 becomes wholly redundant. The Constitution has treated taxation as distinct from compulsory acquisition of property and has made independent provision giving protection against taxation save by authority of law. The protection against imposition and collection of taxes save by authority of law directly comes from Article 265 and is not secured by clause 1 of Article 31. Article 265 not being in Chapter III of the Constitution, its protection is not a fundamental right which can be enforced by an application to the Supreme Court under Article 32.

Bakshi Tek Chand, Senior Advocate (*Hardayal Hardy* and *Jindra Lal*, Advocates, with him), for Petitioner.

M. C. Setalvad, Attorney-General for India (*S. M. Sikri*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Das, J.—This is an application under Article 32 of the Constitution for appropriate orders for the protection of what the petitioner claims to be his fundamental rights guaranteed by Articles 14 and 31. This is said to be a test case for on its decision, we are told, depend the rights of numerous other persons whose interests are similar to those of the petitioner.

There is no serious controversy as to the facts material for the purposes of this application. They are shortly as follows : On 5th May, 1948, the then Rulers of eight Punjab States including Patiala and Nabha with the concurrence and guarantee of the Government of India entered into a covenant agreeing to unite and integrate their territories in one State with a common executive, legislature and judiciary by the name of Patiala and East Punjab States Union, hereinafter compendiously referred to as the Pepsu. By Article III (6) of the covenant the then Ruler of Patiala became the first President or Raj Pramukh of the Council of Rulers and he is to hold the office during his lifetime. Article VI of the covenant is as follows :

"(1) The Ruler of each Covenanting State shall, as soon as may be practicable, and in any event not later than the 20th August, 1948, make over the administration of his State to the Raj Pramukh, and thereupon

(*a*) all rights, authority and jurisdiction belonging to the Ruler which appertain, or are incidental to the Government of the Covenanting State shall vest in the Union and shall hereafter be exercisable only as provided by this covenant or by the Constituion to be framed thereunder ;

(*b*) all duties and obligations of the Ruler pertaining or incidental to the Government of the Covenanting State shall devolve on the Union and shall be discharged by it ;

(*c*) all the assets and liabilities of the Covenanting State shall be the assets and liabilities of the Union ; and

(*d*) the military forces, if any, of the Covenanting State shall become the military forces of the Union."

Article X provides for the formation of a Constituent Assembly to frame a constitution of a unitary type for the Union within the framework of the covenant and the Constitution of India. This Constituent Assembly was also to function as the interim Legislature of the Union until an elected Legislature came into being. The proviso to clause (2) of that Article runs as follows :

"Provided that until a Constitution framed by the Constituent Assembly comes into operation after receiving the assent of the Raj Pramukh, the Raj Pramukh shall have power to make and promulgate Ordinances for the peace and good Government of the Union or any part thereof, and any Ordinance so made shall, for the space of not more than six months from its promulgation have the like force of law as an Act passed by the Constituent Assembly; but any such Ordinance may be controlled or superseded by any such Act."

This Union was inaugurated on 15th July, 1948, and the Raj Pramukh thereafter took over the administration of the different Covenanting States. The Administration of Nabha State was taken over by the Raj Pramukh on 20th August, 1948. On the same day, the Raj Pramukh, in exercise of the powers vested in him, promulgated an Ordinance (No. I of 2005) called the Patiala and East Punjab States Union Administration Ordinance, 2005. The following provisions of this Ordinance are relevant for our purpose:

"1. (2) It shall extend to the territories included in the Covenanting States on and from the date on which the administration of any of the said State or States has been or is made over to the Raj Pramukh.

2. * * * * * *

3. As soon as the administration of any Covenanting State has been taken over by the Raj Pramukh as aforesaid, all laws, Ordinances, Acts, Rules, Regulations, Notifications, Hidayats and Firmans-i-Shahi having force of law in Patiala State on the date of commencement of this Ordinance shall apply *mutatis mutandis* to the territories of the said State and with effect from that date all laws in force in such Covenanting State immediately before that date shall be repealed:

Provided that proceedings of any nature whatsoever pending on such date in the Courts or offices of any such Covenanting State shall, notwithstanding anything contained in this Ordinance or any other Ordinance, be disposed of in accordance with the laws governing such proceedings in force for the time being in any such Covenanting State."

Section 6 provides for the adaptation of the laws, etc., enforced under section 3 and, amongst other things, any reference in these laws, etc., to the Patiala State and the like was to be construed as a reference to the State of the Union. A Notification (No. 35, dated 27-5-05/11-9-1948) was issued over the signature of the Revenue Secretary notifying that the Patiala Income-tax Act of 2001 and the Rules thereunder had come into force in the various Covenanting States from 20th August, 1948, thereby repealing the law or laws in force in that behalf in those States before that date, except as to pending proceedings. It may be mentioned here that prior to that date there was no law in the Nabha State imposing income-tax on the subjects of that State. On 14th November, 1948, the Commissioner of Income-tax issued a notification (No. 4 dated 29th July, 2005) intimating that persons belonging to the Covenanting States of Nabha and Nalagarh would be assessed to income-tax under the Patiala Income-tax Act, 2001. It was mentioned that persons of those States whose income reached the taxable limit "should henceforward keep regular and proper accounts for purposes of audit by the Income-tax Department." On 2nd February, 1949, Ordinance I of 2005 was repealed and replaced by Ordinance No. XVI of 2005 promulgated by the Raj Pramukh and called the Patiala and East Punjab States Union General Provisions (Administration) Ordinance, 2006. Section 3 (1) runs as follows:

"3. (1) As from the appointed day, all laws and rules, regulations, bye-laws and notifications made thereunder, and all other provisions having the force of law, in Patiala State on the said day shall apply *mutatis mutandis* to the territories of the Union and all laws in force in the other Covenanting States immediately before that day shall cease to have effect:

Provided that all suits, appeals, revisions, applications, reviews, executions and other proceedings or any of them, whether Civil or Criminal or Revenue, pending in the Courts and before authorities of any Covenanting States shall, notwithstanding anything contained in this Ordinance, be disposed of in accordance with the laws governing such proceedings in force in any such Covenanting State immediately before the appointed day."

By section 2 (*a*) the "appointed day" was defined as meaning the 5th day of Bhadon, 2005, corresponding to 20th August, 1948. There was a section providing for adaptation similar to section 6 of the Ordinance I of 2005. There was another Ordinance to which reference has to be made, namely, Ordinance No. I of 2006, called the Finance Ordinance promulgated on 13th April, 1949, which came into

force on that very date. Section 5 of that Ordinance introduced several amendments to the Patiala Income-tax Act, 2001. It recast sections 3 and 34 of that Act and introduced a new section as section 23-B. Section 6 of that Ordinance runs thus :

"6. For the assessment year beginning on the 1st day of Baisakh, 2006, that is to say, in respect of the accounting the income, profits and gains of the previous year ending on the last day of Chet, 2005,—

(*a*) income-tax shall be charged at the rates specified in Part I of the Second Schedule to this Ordinance, and

(*b*) rates of super-tax shall, for the purposes of section 55 of the Patiala Income-tax Act, 2001, be specified in Part II of the Second Schedule to this Ordinance."

It is in this setting that the facts leading to the present petition have to be considered.

The petitioner is a resident of Ateli in the district of Mohindargarh now in Pepsu but which formerly formed part of the Nabha State. The petitioner has been carrying on his business at Ateli for a number of years under the name and style of Raghunath Rai Ram Parshad. He never paid any income-tax as no such tax was imposed by any law in the Nabha State. On 20th October, 1949, the petitioner was served *with* a notice under sections 22 (2) and 38 of the Patiala Income-tax Act, 2001, requiring him to submit a return for the Income-tax year 2006 (13-4-1949 to 12-4-1950) disclosing his income during the previous year (13-4-1948 to 12-4-1949). The petitioner on 4th December, 1949, filed his return for the year 2006 and on 14th February, 1950, he was assessed to income-tax. On 23rd May, 1950, the petitioner received a notice under section 34 calling upon him to file his return for the year ending the last day of Chet, 2005, *i.e.*, for the year 13th April, 1948 to 12th April, 1949. In this return he had to specify his income of the previous year, namely, 2004 (*i.e.*, 13th April, 1947 to 12th April, 1948). It appears that the petitioner along with other assessees of Ateli and Kanina submitted a petition before the Income-tax Officer on 9th July, 1950, asking him not to proceed with the assessment for the year 2005 but on 13th July, 1950, the Income-tax Officer assessed him to the best of his judgment under section 34 (4) read with section 22 (4) of the Income-tax Act. The petitioner along with other assessees similarly situated moved the Income-tax Commissioner and the Central Board of Revenue, New Delhi, but without any success. No formal appeal under the Patiala Income-tax Act appears to have been filed by the petitioner against assessments for either of the two years 2005 and 2006. On 10th August, 1950, the petitioner filed his present petition before this Court under Article 32 of the Constitution praying that a writ in the nature of a writ of *certiorari* be issued for quashing the assessments of the petitioner's income accrued in the years 2004 and 2005 and other ancillary reliefs. During the pendency of this petition the Income-tax authorities have issued a notice under section 46 intimating that penalty will be imposed if the tax was not paid up.

The contention of the petitioner in the first place is that he has been denied the fundamental right of equality before the law and the equal protection of the laws guaranteed to him by Article 14 of the Constitution. His grievances are formulated in paragraphs 10 and 11 of his petition. It is said that while the people of Kapurthala which is included in Pepsu have been asked to pay income-tax for the period prior to 20th August, 1948, at the old rate fixed by the Kapurthala Income-tax Act which was lower than the rate fixed by the Patiala Income-tax Act, 2001, the people of Nabha who had not to pay any income-tax prior to 20th August, 1948, at all have been made liable to pay at the higher Patiala rate and that such discrimination offends against the provisions of Article 14. This charge is refuted by paragraph 10 of the affidavit of Sardar Gurbax Singh, the Additional Director of Inspection (Income-tax), New Delhi, who was formerly the Commissioner of Income-tax, Punjab and Pepsu, which has been filed in opposition to the present petition. It is there stated that for the assessment year 2005, in Kapurthala the assessees whose cases were pending on 20th August, 1948, were

assessed under the Kapurthala Income-tax Act at rates fixed thereunder but that for the assessment year 2006 the provisions of the Patiala Income-tax Act and the rates prescribed thereunder were uniformly applied in all areas of the Pepsu, including Kapurthala. This allegation which is not denied in the affidavit filed by the petitioner in reply must be taken as correct. The assessment of Kapurthala assessees for the year 2005 at the old Kapurthala rate was obviously made under the proviso to section 3 of Ordinance No. I of 2005, which was reproduced in the proviso to section 3 (1) of the Ordinance No. XVI of 2006 and both of which required all pending proceedings to be completed according to the law applicable to those proceedings when they were initiated. No case of assessment was pending as against any Nabha assessee on 20th August, 1948, for there was no Income-tax Act in Nabha prior to that date and, therefore, there could be no occasion for completing any pending proceedings against any of such assessees. In the premises, there can be no grievance by them on the score of discrimination. The discrimination, if any, was not brought about by the two Ordinances, but by the circumstance that there was no Income-tax Act in Nabha and consequently there was no case of assessment pending against any Nabha assessees. In any case the provision that pending proceedings should be concluded according to the law applicable at the time when the rights or liabilities accrued and the proceedings commenced is a reasonable law founded upon a reasonable classification of the assessees which is permissible under the equal protection clause and to which no exception can be taken. In our opinion the grievance of the alleged infringement of fundamental right under Article 14 is not well founded at all.

Dr. Tek Chand appearing in support of the petition next contends that the administration of Nabha State having been taken over by the Raj Pramukh only on 20th August, 1948 and the Patiala laws including the Patiala Income-tax Act, 2001, having been brought into operation on and from 20th August, 1948, the assessment of tax on the petitioner's income which accrued prior to 20th August, 1948, was wholly illegal and not authorised by the said Ordinances and the State by insisting on collecting the tax so illegally assessed was threatening to invade the petitioner's fundamental rights to property guaranteed by Article 31 (1) of the Constitution.

Article 31 (1) runs as follows :

"(1) No person shall be deprived of his property save by authority of law."

It will be noticed that clause (1) reproduces sub-section (1) of section 299 of the Government of India Act, 1935, without the words "in British India". Reference has next to be made to Article 265 which is in Part XII, Chapter I, dealing with "Finance". That Article provides that no tax shall be levied or collected except by authority of law. There was no similar provision in the corresponding chapter of the Government of India Act, 1935. If collection of taxes amounts to deprivation of property within the meaning of Article 31 (1) then there was no point in making a separate provision again as has been made in Article 265. It, therefore, follows that clause (1) of Article 31 must be regarded as concerned with deprivation of property otherwise than by the imposition or collection of tax, for otherwise Article 265 becomes wholly redundant. In the United States of America the power of taxation is regarded as distinct from the exercise of police power or eminent domain. Our Constitution evidently has also treated taxation as distinct from compulsory acquisition of property and has made independent provision giving protection against taxation save by authority of law. When Dr. Tek Chand was asked if that was not the correct position, he did not advance any cogent or convincing answer to refute the conclusion put to him. In our opinion the protection against imposition and collection of taxes save by authority of law directly comes from Article 265, and is not secured by clause (1) of Article 31. Article 265 not being in Chapter III of the Constitution, its protection is not a fundamental right which can be enforced by an application to this Court under Article 32. It is not our purpose to say that the right secured by Article 265 may not be enforced. It may certainly be enforced by adopting

proper proceedings. All that we wish to state is that this application in so far as it purports to be founded on Article 32 read with Article 31 (1) to this Court is misconceived and must fail.

The whole of Dr. Tek Chand's argument was founded on the basis that protection against imposition and collection of taxes save by authority of law was guaranteed by Article 31 (1) and his endeavour was to establish that the Pepsu Ordinances could not, in law, and did not, on a correct interpretation of them, impose any income-tax retrospectively, that the Income-tax Officer, on an erroneous view of the law had wrongly assessed the tax on income accrued prior to 20th August, 1948, and that consequently the petitioner was being threatened with deprivation of property otherwise than by authority of law. In the view we have taken, namely, that the protection against imposition or collection of taxes save by authority of law is secured by Article 265 and not by Article 31 (1), the questions urged by Dr. Tek Chand do not really arise and it is not necessary to express any opinion on them on this application. Those questions can only arise in appropriate proceedings and not on an application under Article 32. In our judgment this application fails on the simple ground that no fundamental right of the petitioner has been infringed either under Article 14 or under Article 31 (1) and we accordingly dismiss the petition with costs.

Agent for Petitioner : *Naunit Lal.*

Agent for Respondent : *P. A. Mehta.*

V.S. *Application dismissed.*

[THE SUPREME COURT OF INDIA.]

(Criminal Appellate Jurisdiction.)

PRESENT :—H. J. KANIA, *Chief Justice*, S. FAZL ALI, M. PATANJALI SASTRI, B. K. MUKHERJEA, S. R. DAS AND N. CHANDRASEKHARA AIYAR, JJ.

The State of Bombay .. *Appellant**

v.

Atma Ram Shridhar Vaidya .. *Respondent.*

Constitution of India (1950), *Article* 22 (5) *and* (6) *and Preventive Detention Act* (*IV of* 1950)—*Scope and extent of the rights of a person detained in preventive detention—Communication of grounds—Requirements as to—Supplemental communications, if and when valid.*

Per *Kania, C.J., Fazl Ali, Mukerjea and Chandrasekhara Aiyar, JJ* : Preventive detention is not by itself considered an infringement of any of the fundamental rights mentioned in Part III of the Constitution. This is subject to the limitations prescribed in clause (5) of Article 22 of the Constitution. That clause requires two things to be done for the person against whom the order is made. The detained person has to be furnished with "the grounds on which the order has been made" and which has to be done "as soon as may be". He has also to be afforded "the earliest possible opportunity of making a representation against the order". Although both these rights are separate and are to be exercised at different times, they are still connected with each other. While there is a connection between the obligation on the part of the detaining authority to furnish grounds and the right given to the detained person to have the earliest opportunity to make the representation, the test to be applied in respect of the contents of the grounds for the two purposes is quite different. For the first the test is whether it is sufficient to satisfy the authority and for the second, whether it is sufficient to enable the detained person to make the representation at the earliest opportunity. The two rights cannot be treated as one indivisible right. The two rights are connected by the word "and". Furthermore, the use of the words "as soon as may be" with the obligation to furnish the grounds of the order of detention, and the fixing of another time limit, *viz.*, "the earliest opportunity for making the representation" makes the two rights distinct. The second right as it is right of objection, has to depend first on the service of the grounds on which the conclusion (*i.e.*) satisfaction of the Government about the necessity of making the order is based To that extent and that extent alone, the two are connected. But when grounds which have a rational connection with the ends mentioned in section 3 of the Preventive Detention Act are supplied, the first condition is satisfied. If the grounds are not sufficient to enable the person detained to make a representation he can rely on his second right and if he likes he may ask for particulars which will enable him to make the representation. On an infringement of these two rights the detained person has a right to approach the Court and complain that there has been an infringement of his fundamental right and even if the infringement of the second part of the right under Article 22 (5) is established

*Case No. 22 of 1950. 25th January, 1951.

he is bound to be released by the Court. To treat these two rights mentioned in Article 22 (5) as one is neither proper according to the language used, nor according to the purpose for which the rights are given. By reason of the fact that clause (5) of Article 22 forms part of Part III of the Constitution, its provisions have the same force and sanctity as any other provision relating to fundamental rights.

Apart from the duties mentioned above, there exists no express provision contemplating a second communication from the detaining authority to the person detained. While the authorities must discharge the duty in furnishing the grounds for the order of detention "as soon as may be" and also provide "the earliest opportunity to the detained person to make the representation", the number of communications from the detaining authority to the detenu may be one or more and they may be made at intervals, provided the two parts of the aforesaid duty are discharged in accordance with the wording of clause (5). So long as the later communications do not make a new ground, their contents are no infringement of the two procedural rights of the detenu mentioned in the clause. They may consist of a narration of facts or particulars relating to the grounds already supplied. But in doing so, the time factor in respect of the second duty, *viz.*, to give the detained person the earliest opportunity to make a representation, cannot be overlooked.

While the constitution gives the Government the privilege of not disclosing in public interest facts which it considers undesirable to disclose, by the words used in Article 22 (5) there is a clear obligation to convey to the detained person materials (and the disclosure of which is not necessary to be withheld) which will enable him to make a representation.

From the fact that clause (6) of Article 22 gives a right to the authorities to withhold facts which they consider not desirable to be disclosed in the public interest, it does not follow that what is not stated or considered to be withheld on that ground must be disclosed and if not disclosed, there is a breach of a fundamental right.

Per *Patanjali Sastri, J.*—There is nothing in Article 22 (5) to warrant the view that the grounds on which the order of detention has been made must be such that, when communicated to the person detained, they are found by a Court of law to be sufficient to enable him to make what the Court considers to be an adequate representation. The combined effect of clauses (5) and (6) of Article 22 is to require the detaining authority, to communicate to the person affected only such particulars as that authority and not a Court of law, considers sufficient to enable the said person to make a representation. It cannot be said that clause (5) deals with two distinct and independent matters. The collocation in the same clause of the right to be informed of the grounds of detention and the right to make a representation indicate that the grounds communicated are to form the basis of the representation and, indeed, are intended mainly, if not solely, for that purpose. To suggest that apart from those grounds any right of making a representation imports, by necessary implication, a further obligation to give such details and particulars as would render that right effective is not to construe the clause in its natural meaning but to stretch it by the process of implication, so as to square with one's preconceived notions of justice and fairplay. It is not the province of the Court to examine the sufficiency of the grounds for the purpose of making a representation, a matter left entirely to the discretion of the executive authority.

While clause (5) does not allow the authority, after making the order of detention and communicating the grounds of such order, to put forward fresh grounds in justification of that order, there is nothing in that clause to preclude the authority furnishing particulars or details relating to the grounds originally communicated, or the person under detention availing himself of such particulars and making a better or a further representation.

Per *Das, J.*—There is no doubt some correlation between the two parts of Article 22 (5). To say that clause (5) itself indicates that the grounds must be such as will enable the detenu to make a representation is to read into clause (5) something which is not there. If the sufficiency of the grounds of detention is not justiciable at the initial stage when the order is made, it is wholly illogical to say that the intention of the Constitution is to make the sufficiency of the same grounds justiciable as soon as they are communicated to the detenu.

On a plain reading of clause (5) there is no justification for assuming that a second communication of particulars is contemplated either under the first part or under the second part of clause (5). This does not, however, mean that the authority may not supply particulars either *suo motu* or on the application of the detenu. Clause (5) imposes no constitutional obligation on the authority to supply particulars so as to remove the vagueness of the grounds or to enable the detenu to make a representation and non-supply of further particulars does not constitute an infraction of any fundamental right.

Appeal under Article 132 (1) of the Constitution of India against the Judgment and Order dated the 1st September, 1950, of the High Court of Judicature at Bombay in Criminal Application No. 807/50.

M. C. Setalvad, Attorney-General for India (*G. N. Joshi*, Advocate, with him), for Appellant.

A. S. R. Chai and *Bawa Shiv Charan Singh*, Advocates, for Respondent.

The Court delivered the following

JUDGMENTS: *Kania, C.J.* (*Fazl Ali, Mukherjea and Chandrasekhara Ayyar, JJ.*, agreeing with him).—This is an appeal from a judgment of the High Court at Bombay, ordering the release of the respondent who was detained in custody under a detention order made under the Preventive Detention Act (IV of 1950). The respondent was first arrested on the 18th of December, 1948, under the Bombay Public Security Measures Act, 1948 (Bombay Act IV of 1947), but was released on the 11th of November, 1949. He was arrested again on the 21st of April, 1950, under the Preventive Detention Act, 1950, and on the 29th of April, 1950, grounds for his detention were supplied to him. They were in the following terms:

"That you are engaged and are likely to be engaged in promoting acts of sabotage on railway and railway property in Greater Bombay."

The respondent filed a *habeas corpus* petition on the 31st of July, 1950, in which after reciting his previous arrest and release, in paragraphs 6 and 7 he mentioned as follows:—

"(6) On his release the applicant left Bombay and stayed out of Bombay, that is in Ratlam and in Delhi.

(7) On 20th April, 1950, he returned to Bombay and was immediately arrested as stated above."

He contended that the sole aim of the Government in ordering his detention was not the preservation of public order or the security of the State, but the locking up of active trade unionists who belonged to the All India Trade Union Congress. He contended that the ground is

"delightfully vague and does not mention when, where or what kind of sabotage or how the applicant promoted it."

He further urged that the ground gave no particulars and therefore was not a ground as required to be furnished under the Preventive Detention Act, 1950. He stated that the present appellant acted *mala fide*, for a collateral purpose, outside the scope of the Act, and that the applicant's detention in any event was illegal and *mala fide*. When this petition was presented to the Court on the 9th of August, 1950, it directed the issue of a notice to the Commissioner of Police. Pending the disposal of the Rule, on the 26th of August, 1950 the Commissioner of Police sent a communication to the respondent as follows:

"In pursuance of section 7 of the Preventive Detention Act, 1950 (Act IV of 1950) and in continuation of my communication, No. 227, dated the 29th April, 1950, the following further particulars are hereby communicated to you in connection with the grounds on which a detention order has been made against you under sub-section (1) of section 3 of the said Act:—

That the activities mentioned in the grounds furnished to you were being carried on by you in Greater Bombay between January 1950 and the date of your detention; and

In all probability you will continue to do so.

If, in view of the particulars now supplied, you wish to make a further representation against the order under which you are detained, you should address it to the Government of Bombay and forward it through the Superintendent of Arthur Road Prison, Bombay."

On the 30th of August, 1950, the Commissioner of Police filed an affidavit against the petition of the respondent in which it was stated that the objectionable activities were carried on by the applicant between the months of January, 1950, and the date of detention. It further stated that in or about the month of January, 1950, there was a move for a total strike on the railways in India in the month of March, 1950, and the applicant was taking prominent part to see that the strike was brought about and was successful. As a means to make the strike successful and bring about total cessation of work on all railways, the applicant and his associates were advocating sabotage on railways and railway property in Greater Bombay. He further stated that reliable materials were put before him of the respondent being engaged in such activities by experienced police officers. He added that although the railways strike in the month of March did not materialise, the idea of bringing about such strike as soon as convenient continued to be entertained and the present respondent was actively engaged in bringing about such a strike in the near future. He then stated that the disclosure of further facts relating to the activities

of the detenu was against public interest. In para. 6 there was a specific denial that the respondent, after his release in November, 1949, and till 20th of April, 1950, was out of Bombay. It was stated that he used to go out of Bombay at times but during the major part of the period he was in the city of Bombay.

When the matter came up before a Bench of the High Court the respondent's petition was granted. In the judgment of the Court, Chagla, C.J., observed:

"It is clear by reason of the view we have taken in several cases under section 491 of the Criminal Procedure Code, that this is not a ground which would enable the detenu to make a representation to which he is entitled both under the Act and under the Constitution."

After noticing the affidavit of the Commissioner of Police, it was further observed :

"We appreciate the fact that, after our decision was given, Government decided to place all the materials before us so that we should be satisfied that what influenced the detaining authority in making the order was not any ulterior motive but that ample materials were at the disposal of the detaining authority which would justify the applicant's detention. We have looked at this affidavit and we have also looked at the particulars furnished to us by Mr. Chudasama. If these particulars had been furnished at the time when the grounds were furnished on the 29th of April, 1950, very likely we would have come to the conclusion that the grounds were such as would have led the detenu to know exactly what he was charged with and to make a proper representation."

The judgment is however based on the following observation of the Chief Justice :

"A new and important question arises for our consideration ; and that is whether it is permissible to the detaining authority to justify the detention by amplifying and improving the grounds originally furnished . . . . . The only grounds which we have to consider and which were furnished in the purported compliance of Article 22 (5) were the grounds furnished to the detenu on the 29th of April, 1950 ; and if these grounds were not such as to enable the detenu to make a proper representation, then there was a violation of the fundamental right and a contravention of the statutory provisions. That violation and that contravention cannot be set right by the detaining authority by amplifying or improving the grounds already given. As we said before, the point of time at which we have to decide whether there was a compliance or not with the provisions of Article 22 (5) is the 29th of April, 1950, when the grounds were furnished, and not when further and better particulars were given on the 26th of August, 1950."

The learned Attorney-General, appearing for the appellant, has strenuously objected to this line of approach.

As the question of vagueness of grounds for the order of detention and the question whether supplementary grounds could be furnished after the grounds were first given to the detenu have arisen in various High Courts, we think it right that the general principles should be properly appreciated. The Constitution of India has given legislative powers to the States and the Central Government to pass laws permitting preventive detention. In order that a legislation permitting preventive detention may not be contended to be an infringement of the Fundamental Rights provided in Part III of the Constitution, Article 22 lays down the permissible limits of legislation empowering preventive detention. Article 22 prescribes the minimum procedure that must be included in any law permitting preventive detention and as and when such requirements are not observed the detention, even if valid *ab initio*, ceases to be "in accordance with procedure established by law" and infringes the fundamental right of the detenu guaranteed under Articles 21 and 22 (5) of the Constitution. In that way the subject of preventive detention has been brought into the chapter on Fundamental Rights. In the present case we are concerned only with clauses (5) and (6) of Article 22 which run as follows :—

"22. (5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose."

It has to be borne in mind that the legislation in question is not an emergency legislation. The powers of preventive detention under this Act of 1950 are in

addition to those contained in the Criminal Procedure Code, where preventive detention is followed by an inquiry or trial. By its very nature, preventive detention is aimed at preventing the commission of an offence or preventing the detained person from achieving a certain end. The authority making the order therefore cannot always be in possession of full detailed information when it passes the order and the information in its possession may fall far short of legal proof of any specific offence, although it may be indicative of a strong probability of the impending commission of a prejudicial act. Section 3 of the Preventive Detention Act therefore requires that the Central Government or the State Government must be satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to (1) the defence of India, the relations of India with foreign powers, or the security of India, or (2) the security of the State or the maintenance of public order, or (3) the maintenance of supplies and services essential to the community or..... it is necessary so to do, make an order directing that such person be detained. Acccording to the wording of section 3 therefore before the Government can pass an order of preventive detention it must be satisfied with respect to the individual person that his activities are directed against one or other of the three objects mentioned in the section, and that the detaining authority was satisfied that it was necessary to prevent him from acting in such a manner. The wording of the section thus clearly shows that it is the satisfaction of the Central Government or the State Government on the point which alone is necessary to be established. It is significant that while the objects intended to be defeated are mentioned, the different methods, acts or omissions by which that can be done are not mentioned, as it is not humanly possible to give such an exhaustive list. The satisfaction of the Government, however, must be based on some grounds. There can be no satisfaction if there are no grounds for the same. There may be a divergence of opinion as to whether certain grounds are sufficient to bring about the satisfaction required by the section. One person may think one way, another the other way. If, therefore, the grounds on which it is stated that the Central Government or the State Government was satisfied are such as a rational human being can consider connected in some manner with the objects which were to be prevented from being attained, the question of satisfaction except on the ground of *mala fides* cannot be challenged in a court. Whether in a particular case the grounds are sufficient or not, according to the opinion of any person or body other than the Central Government or the State Government, is ruled out by the wording of the section. It is not for the court to sit in the place of the Central Government or the State Government and try to determine if it would have come to the same conclusion as the Central or the State Government. As has been generally observed, this is a matter for the subjective decision of the Government and that cannot be substituted by an objective test in a court of law. Such detention orders are passed on information and materials which may not be strictly admissible as evidence under the Evidence Act in a court, but which the law, taking into consideration the needs and exigencies of administration, has allowed to be considered sufficient for the subjective decision of the Government.

An order having been so permitted to be made, the next step to be considered is, has the detained person any say in the matter ? In the chapter on Fundamental Rights, the Constitution of India, having given every citizen a right of freedom of movement, speech, etc., with their relative limitations prescribed in the different Articles in Part III, has considered the position of a person detained under an order made under a Preventive Detention Act. Three things are expressly considered. In Article 22 (5) it is first considered that the man so detained has a right to be given as soon as may be the grounds on which the order has been made. He may otherwise remain in custody without having the least idea as to why his liberty has been taken away. This is considered an elementary right in a free democratic State. Having received the grounds for the order of detention, the next point which is considered is,

" but that is not enough ; what is the good of the man merely knowing grounds for his detention if he cannot take steps to redress a wrong which he thinks has been committed either in belief in the grounds or in making the order."

The clause therefore further provides that the detained person should have the earliest opportunity of making a representation against the order. The representation has to be against the order of detention because the grounds are only steps for the satisfaction of the Government and on which satisfaction the order of detention has been made. The third thing provided is in clause (6). It appears to have been thought that in conveying the information to the detained person there may be facts which cannot be disclosed in the public interest. The authorities are therefore left with a discretion in that connection under clause (6). The grounds which form the basis of satisfaction when formulated are bound to contain certain facts, but mostly they are themselves deductions of facts from facts. That is the general structure of Article 22, clauses (5) and (6) of the Constitution.

The question arising for discussion is what should be stated in the grounds. It is argued that whatever may be stated or omitted to be stated, the ground cannot be vague ; that the Constitution envisages the furnishing of the grounds once and therefore there is no occasion for furnishing particulars or supplemental grounds at a later stage ; and that Article 22 (5) does not give the detained person a right to ask for particulars, nor does it give the authorities any right to supplement the grounds, once they have furnished the same. In our opinion much of the controversy is based on a somewhat loose appreciation of the meaning of the words used in the discussion. We think that the position will be clarified if it is appreciated in the first instance what are the rights given by Article 22 (5). The first part of Article 22, clause (5) gives a right to the detained person to be furnished with " the grounds on which the order has been made " and that has to be done " as soon as may be." The second right given to such person is of being afforded " the earliest opportunity of making a representation against the order." It is obvious that the grounds for making the order as mentioned above, are the grounds on which the detaining authority was satisfied that it was necessary to make the order. These grounds therefore must be in existence when the order is made. By their very nature the grounds are conclusions of facts and not a complete detailed recital of all the facts. The conclusions drawn from the available facts will show in which of the three categories of prejudicial acts the suspected activity of the particular person is considered to fall. These conclusions are the " grounds " and they must be supplied. No part of such " grounds " can be held back nor can any more " grounds " be added thereto. What must be supplied are the " grounds on which the order has been made " and nothing less. The second right of being afforded the " earliest opportunity of making a representation against the order " is not confined to only a physical opportunity by supplying paper and pen only. In order that a representation can be made the person detained must first have knowledge of the grounds on which the authorities conveyed that they were satisfied about the necessity of making the detention order. It is therefore clear that if the representation has to be intelligible to meet the charges contained in the grounds, the information conveyed to the detained person must be sufficient to attain that object. Ordinarily, the " grounds " in the sense of conclusions drawn by the authorities will indicate the kind of prejudicial act the detenu is suspected of being engaged in and that will be sufficient to enable him to make a representation setting out his innocent activities to dispel the suspicion against him. Of course if the detenu is told about the details of facts besides the grounds he will certainly be in a better position to deal with the same. It is significant that the clause does not say that the " grounds " as well as details of facts on which they are based must be furnished or furnished at one time. The law does not prescribe within what time after the grounds are furnished the representation could be made. The time in each case appears deliberately unprovided for expressly, because circumstances vary in each case and make it impossible to fix a particular time for the exercise of each of these two rights.

It thus appears clear that although both these rights are separate and are to be exercised at different times, they are still connected with each other. Without getting information sufficient to make a representation against the order of detention it is not possible for the man to make the representation. Indeed the right will be only illusory but not a real right at all. The right to receive the grounds is independent but it is thus intentionally bound up and connected with the right to make the representation. Although these two rights are thus linked up, the contingency of further communication between the furnishing of the grounds on which the order is made and the exercise of the right of representation granted by the second part of that clause is not altogether excluded. One thing is clear from the wording of this clause and that is that after the grounds are once conveyed to the detenu there can be no addition to the grounds. The grounds being the heads, from which the Government was satisfied that it was necessary to pass the order of detention, there can be no addition to those grounds because such additional grounds will be either the grounds which were not elements to bring about the satisfaction of the Government or if they were such grounds there has been a breach of the provision of the first part of Article 22 (5), as those grounds for the order of detention were not conveyed to the detained person " as soon as may be."

This, however, does not mean that all facts leading to the conclusion mentioned in the grounds must be conveyed to the detained person at the same time the grounds are conveyed to him. The facts on which the conclusion mentioned in the grounds are based must be available to the Government but there may be cases where there is delay or difficulty in collecting the exact data or it may not be convenient to set out all the facts in the first communication. If the second communication contains no further conclusion of fact from facts, but only furnishes all or some of the facts on which the first mentioned conclusion was founded it is obvious that no fresh ground for which the order of detention was made is being furnished to the detained person by the second communication which follows some time after the first communication. As regards the contents of that communication therefore the test appears to be whether what is conveyed in the second communication is a statement of facts or events, which facts or events were already taken into consideration in arriving at the conclusion included in the ground already supplied. If the later communication contains facts leading to a conclusion which is outside the ground first supplied, the same cannot be looked into as supporting the order of detention and therefore those grounds are " new " grounds. In our opinion that is the more appropriate expression to be used. The expression ' additional grounds ' seems likely to lead to confusion of thought.

The next point to be considered is the time factor. If a second communication becomes necessary, when should it be made? Clause 22 (5) lays down two time factors. The first is that the grounds should be supplied " as soon as may be ". This allows the authorities reasonable time to formulate the grounds on the materials in their possession. The time element is necessarily left indeterminate because activities of individuals tending to bring about a certain result may be spread over a long or a short period, or a larger or a smaller area, or may be in connection with a few or numerous individuals. The time required to formulate the proper grounds of detention, on information received, is bound to vary in individual cases. There is no doubt that no express words are used to suggest a second communication from the authority to the detained person. But having regard to the structure of the clause dealing with the two rights connected by the word " and ", and the use of the words " as soon as may be " and " earliest opportunity " separately, indicating two distinct time factors, one in respect of the furnishing of grounds and the other in respect of the making of the representation, the contingency of a second communication after the grounds are furnished, is not excluded. However the second communication should not be liable to be charged as not being within the measure " as soon as may be ". Secondly, it must not create a new ground on which satisfaction of the Government could be suggested

to have been arrived at. In our opinion, if these two conditions are fulfilled, the objection against a later communication of details or facts is not sufficient to cause an infringement of the provision made in Article 22 (5). The question has to be approached from another point of view also. As mentioned above, the object of furnishing grounds for the order of detention is to enable the detenu to make a representation, *i.e.*, to give him an opportunity to put forth his objections against the order of detention. Moreover, " the earliest opportunity " has to be given to him to do that. While the grounds of detention are thus the main factors on which the subjective decision of the Government is based, other materials on which the conclusions in the grounds are founded could and should equally be conveyed to the detained person to enable him to make out his objections against the order. To put it in other words, the detaining authority has made its decision and passed its order. The detained person is then given an opportunity to urge his objections which in cases of preventive detention comes always at a later stage. The grounds may have been considered sufficient by the Government to pass its judgment. But to enable the detained person to make his representation against the order, further details may be furnished to him. In our opinion, this appears to be the true measure of the procedural rights of the detained person under Article 22 (5).

It was argued that under Article 22 (6) the authorities are permitted to withhold facts which they consider not desirable to be disclosed in the public interest. It was argued that therefore all other facts must be disclosed. In our opinion that is not the necessary conclusion from the wording of Article 22 (6). It gives a right to the detaining authority not to disclose such facts, but from that it does not follow that what is not stated or considered to be withheld on that ground must be disclosed and if not disclosed, there is a breach of a fundamental right. A wide latitude is left to the authorities in the matter of disclosure.

They are given a special privilege in respect of facts which are considered not desirable to be disclosed in public interest. As regards the rest, their duty is to disclose facts so as to give the detained person the earliest opportunity to make a representation against the order of detention.

On behalf of the respondent, it was argued that if the grounds of detention are vague or insufficiently clear there will result a failure to give him the earliest opportunity to make a representation against the order of detention and that defect in its turn must affect the satisfaction on which the order of detention was made. It was argued that just as a ground which is completely irrelevant, and therefore, in law is no ground at all, could not satisfy any rational person about the necessity for the order, a vague ground which is insufficient to enable the detenu to make a representation would similarly make the order of detention based on it, void. In our opinion, this argument is unsound. Although the ground may be good there may be a certain indefiniteness in its statement. Proceeding on the footing that there is some connection, *i.e.*, the ground by itself is not so convincingly irrelevant and incapable of bringing about satisfaction in any rational person, the question whether such ground can give rise to the satisfaction required for making the order is outside the scope of the inquiry of the Court. On the other hand, the question whether the vagueness or indefinite nature of the statement furnished to the detained person is such as to give him the earliest opportunity to make a representation to the authority is a matter within the jurisdiction of the Court's inquiry and subject to the Court's decision. The analogy sought to be drawn between a ground which can have no connection whatsoever with the order and a ground which on its face has connection with the order but is not definite in its statement, is clearly faulty. The extreme position, on the other hand, that there is no connection between the ground to be furnished and the representation to be made by the detained person under Article 22 (5) is equally unsound, when the object in furnishing the ground is kept in mind. The conferment of the right to make a representation necessarily

carries with it the obligation on the part of the detaining authority to furnish the grounds, *i.e.*, materials on which the detention order was made. In our opinion, it is therefore clear that while there is a connection between the obligation on the part of the detaining authority to furnish grounds and the right given to the detained person to have an earliest opportunity to make the representation, the test to be applied in respect of the contents of the grounds for the two purposes is quite different. As already pointed out, for the first, the test is whether it is sufficient to satisfy the authority. For the second, the test is, whether it is sufficient to enable the detained person to make the representation at the earliest opportunity.

The argument advanced on behalf of the respondent mixes up the two rights given under Article 22 (5) and converts it into one indivisible right. We are unable to read Article 22 (5) in that way. As pointed out above, the two rights are connected by the word " and ". Furthermore, the use of the words " as soon as may be " with the obligation to furnish the grounds of the order of detention, and the fixing of another time limit, *viz.*, the earliest opportunity, for making the representation, makes the two rights distinct. The second right, as it is a right of objection, has to depend first on the service of the grounds on which the conclusion, *i.e.*, satisfaction of the Government about the necessity of making the order, is based. To that extent and that extent alone, the two are connected. But when grounds which have a rational connection with the ends mentioned in section 3 of the Act are supplied, the first condition is satisfied. If the grounds are not sufficient to enable the detenu to make a representation, the detenu can rely on his second right and if he likes may ask for particulars which will enable him to make the representation. On an infringement of either of these two rights the detained person has a right to approach the Court and complain that there has been an infringement of his fundamental right and even if the infringement of the second part of the right under Article 22 (5) is established he is bound to be released by the Court. To treat the two rights mentioned in Article 22 (5) as one is neither proper according to the language used, nor according to the purpose for which the rights are given.

The contention that the grounds are *vagus* requires some clarification. What is meant by vague? Vague can be considered as the antonym of ' definite '. If the ground which is supplied is incapable of being understood or defined with sufficient certainty it can be called vague. It is not possible to state affirmatively more on the question of what is vague. It must vary according to the circumstances of each case. It is however improper to contend that a ground is necessarily vague if the only answer of the detained person can be to deny it. That is a matter of detail which has to be examined in the light of the circumstances of each case. If on reading the ground furnished it is capable of being intelligently understood and is sufficiently definite to furnish materials to enable the detained person to make a representation against the order of detention it cannot be called vague. The only argument which could be urged is that the language used in specifying the ground is so general that it does not permit the detained person to legitimately meet the charge against him because the only answer which he can make is to say that he did not act, as generally suggested. In certain cases that argument may support the contention that having regard to the general language used in the ground he has not been given the earliest opportunity to make a representation against the order of detention. It cannot be disputed that the representation mentioned in the second part of Article 22 (5) must be one which on being considered may give relief to the detained person.

The argument that supplementary grounds cannot be given after the grounds are first given to the detenu, similarly requires a closer examination. The adjective " supplementary " is capable of covering cases of adding new grounds to the original grounds, as also giving particulars of the facts which are already mentioned, or of giving facts in addition to the facts mentioned in the

ground to lead to the conclusion of fact contained in the ground originally furnished. It is clear that if by "supplementary grounds" is meant *additional* grounds, *i.e.*, conclusions of fact required to bring about the satisfaction of the Government, the furnishing of any such additional grounds at a later stage will amount to an infringement of the first mentioned right in Article 22 (5) as the grounds for the order of detention must be before the Government before it is satisfied about the necessity for making the order and all such grounds have to be furnished *as soon as may be*. The other aspects, *viz.*, the second communication (described as supplemental grounds) being only particulars of the facts mentioned or indicated in the grounds firstly supplied, or being additional incidents which taken along with the facts mentioned or indicated in the ground already conveyed *lead to the same conclusion of the fact*, (which is the ground furnished in the first instance) stand on a different footing. These are not new grounds within the meaning of the first part of Article 22 (5). Thus, while the first mentioned type of "additional" grounds cannot be given after the grounds are furnished in the first instance, the other types even if furnished after the grounds are furnished as soon as may be, but provided they are furnished so as not to come in conflict with giving the earliest opportunity to the detained person to make a representation, will not be considered an infringement of either of the rights mentioned in Article 22 (5) of the Constitution.

This detailed examination shows that preventive detention is not by itself considered an infringement of any of the fundamental rights mentioned in Part III of the Constitution. This is, of course, subject to the limitations prescribed in clause (5) of Article 22. That clause, as noticed above, requires two things to be done for the person against whom the order is made. By reason of the fact that clause (5) forms part of Part III of the Constitution, its provisions have the same force and sanctity as any other provision relating to fundamental rights. As the clause prescribes two requirements, the time factor in each case is necessarily left fluid. While there is the duty on the part of the detaining authority to furnish grounds and the duty to give the detained person the earliest opportunity to make a representation which obligations, as shown above, are correlated, there exists no express provision contemplating a second communication from the detaining authority to the person detained. This is because in several cases a second communication may not be necessary at all. The only thing which emerges from the discussion is that while the authorities must discharge the duty in furnishing grounds for the order of detention "as soon as may be" and also provide "the earliest opportunity to the detained person to make the representation", the number of communications from the detaining authority to the detenu may be one or more and they may be made at intervals, provided the two parts of the aforesaid duty are discharged in accordance with the wording of clause (5). So long as the later communications do not make out a new ground, their contents are no infringement of the two procedural rights of the detenu mentioned in the clause. They may consist of a narration of facts or particulars relating to the grounds already supplied. But in doing so the time factor in respect of the second duty, *viz.*, to give the detained person the earliest opportunity to make a representation, cannot be overlooked. That appears to us to be the result of clause (5) of Article 22.

In numerous cases that have been brought to our notice, we have found that there has been quite an unnecessary obscurity on the part of the detaining authority in stating the grounds for the order. Instead of giving the information with reasonable details, there is a deliberate attempt to use the mimimum number of words in the communication conveying the grounds of detention. In our opinion, this attitude is quite deplorable. We agree with the High Court of Bombay in its observation when it says :

"In all the matters which have come up before us we have been distressed to find how vague and unsatisfactory the grounds are which the detaining authority furnished to the detenu ; and we are compelled to say that in almost every case we have felt that the grounds could have been ampler and fuller without any detriment to public interest."

While the Constitution gives the Government the privilege of not disclosing in public interest facts which it considers undesirable to disclose, by the words used in Article 22 (5) there is a clear obligation to convey to the detained person materials (and the disclosure of which is not necessary to be withheld) which will enable him to make a representation. It may be noticed that the Preventive Detention Act may not even contain machinery to have the representation looked into by an independent authority or an advisory board. Under these circumstances, it is but right to emphasize that the communication made to the detained person to enable him to make the representation should, consistently with the privilege not to disclose facts which are not desirable to be disclosed in public interest, be as full and adequate as the circumstances permit and should be made as soon as it can be done. Any deviation from this rule is a deviation from the intention underlying Article 22 (5) of the Constitution. The result of this attitude of some detaining authorities has been that applying the tests mentioned above, several communications to the detained persons have been found wanting and the orders of detention are pronounced to be invalid.

Having regard to the principles mentioned above, we have to consider whether the judgment of the High Court is correct. We have already pointed out that the summary rejection by the High Court of the later communication solely on the ground that all materials in all circumstances must be furnished to the detenu when the grounds are first communicated, is not sound. We have indicated the circumstances and conditions under which the later communication may or may not be considered as falling within the purview of Article 22 (5) of the Constitution.

In dealing with the position when the grounds were first communicated, the High Court held as follows :

> " This is not a ground which would enable the detenu to make a representation to which he is entitled both under the Act and under the Constitution."

In this case the later communication of the 26th August, 1950, was made after the respondent filed his petition and it appears to have been made to controvert his allegation that he was never in Bombay between January and April, 1950, as alleged in his affidavit. After taking into consideration this communication it was observed by Chagla, C.J., that if these particulars had been furnished on 29th April, 1950, very likely the Court would have rejected the petition. The Court set the respondent free only because of its view that after 29th April, no further communication was permissible. In our opinion, this view is erroneous. We think that on the facts of the present case therefore the respondent's petition should have been dismissed. We therefore allow the appeal.

Patanjali Sastri, J.—While I concur in the order proposed by my Lord that this appeal should be allowed, I regret I find myself unable to agree with him on the true meaning and effect of Article 22 clause (5) which is reproduced in section 7 of the Preventive Detention Act, 1950 (hereinafter referred to as " the Act "). Put shortly, the question that falls to be decided is : Is it within the competence of the Court to examine the grounds communicated to a person detained under the Act, with a view to see if they are sufficient in its opinion to enable him to make a representation to the detaining authority against the order, and if they are not, to direct his release ?

It is now settled by the decision of the majority in *Gopalan's case*[1] that Article 21 is applicable to preventive detention except in so far as the provisions of Article 22 (4) to (7) either expressly or by necessary implication exclude its application, with the result that a person cannot be deprived of his personal liberty, even for preventive purposes, " except according to procedure established by law ". Part of such procedure is provided by the Constitution itself in clauses (5) and (6) of Article 22 which read as follows :

1. (1950) S.C.J. 174 : (1950) S.C.R. 88 : (1950) 2 M.L.J. 42.

" (5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose."

If this procedure is not complied with, detention under the Act may well be held to be unlawful, as it would then be deprivation of personal liberty which is not in accordance with the procedure established by law. The question accordingly arises as to what are the requirements of Article 22 (5) and whether they have been complied with in the present case?

On behalf of the respondent it is urged that the clause provides two safeguards for the person ordered to be detained, namely, that (1) the grounds of his detention should be communicated to him as soon as may be, and (2) he should be given the earliest opportunity of making a representation against the order. As there is to be no trial in such cases, the right of making a representation affords it is said the only opportunity to the person detained to repel the accusation brought against him and establish his innocence. It is the communication of the grounds of detention that is expected to give him notice of what he is to meet by making a representation. The grounds must, therefore, it is submitted, give sufficient indication of the nature and extent of the information on which action has been taken against him and must contain sufficient particulars of the time and place of the acts charged, so as to enable him to make his representation effective as far as it is in his power to do so. If the grounds are vague and do not disclose the substance of the information on which the detention has been based, there would be no real compliance with the procedure prescribed by Article 22 (5), and the detention must, it is claimed be unlawful. In other words, the sufficiency of the grounds for the purpose of enabling the person detained to make an effective representation against the order of detention is, in every case, a justiciable issue.

It must now be taken as settled by the decision of this Court in *Gopalan's case*[1], which on this point was unanimous, that section 3 of the Act is constitutional and valid notwithstanding that it leaves it to the " satisfaction " of the executive government to decide whether action under the Act is to be taken or not against any particular person or persons. The learned Chief Justice pointed out (at page 121) that action by way of preventive detention must be based largely on suspicion, and quoted the remark of Lord Finlay in *Rex* v. *Halliday*[2], that a Court is the least appropriate tribunal to investigate the question whether circumstances of suspicion exist warranting the restraint on a person. Dealing with a similarly worded provision of the Central Provinces and Berar Public Safety Act, 1948, the Federal Court declared in another unanimous judgment, that

" The language clearly shows that the responsibility for making a detention order rests upon the provincial executive as they alone are entrusted with the duty of maintaining public peace; and it would be a serious derogation from that responsibility if the Court were to substitute its judgment for the satisfaction of the executive authority and, to that end, undertake an investigation of the sufficiency of the materials on which such satisfaction was grounded. . . . . The Court can, however, examine the grounds disclosed by the Government to see if they are relevant to the object which the legislation has in view, namely, the prevention of acts prejudicial to public safety and tranquillity, for 'satisfaction' in this connection must be grounded on material which is of rationally probative value "—*Machindar Shivaji Mahar* v. *The King*[3].

These decisions clearly establish, what indeed is plain from the nature of the measure, that preventive detention is a form of precautionary police action, to be employed on the sole responsibility of the Executive Government whose discretion is final, no recourse being permitted to a Court of law by way of review or justification of such action except on allegations of *mala fides* or irrational conduct.

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1. (1950) S.C.J. 174 : (1950) S.C.R. 88 : (1950) 2 M.L.J. 42.
2. (1917) A.C. 260, 269.
3. (1949-50) F.C.R. 827, 831-32.

When the power to issue a detention order has thus been made to depend upon the existence of a state of mind in the detaining authority, that is, its "satisfaction", which is a purely subjective condition, so as to exclude a judicial enquiry into the sufficiency of the grounds to justify the detention, it seems to me to be wholly inconsistent with that scheme to hold that it is open to the Court to examine the sufficiency of the same grounds to enable the person detained to make a representation, for, be it noted, the grounds to be communicated to the person detained are the "grounds on which the order has been made." Indeed, the logical result of the argument advanced by the respondent's counsel would be to invalidate section 3 of the Act in so far as it purports to make the satisfaction of the government the sole condition of a lawful detention, for, if clause (5) of Article 22 were to be construed as impliedly authorising a judicial review of the grounds of detention to see if they contain sufficient particulars for making a representation, then, the subjective condition prescribed in section 3 would be inconsistent with that clause and therefore void. When this was pointed out to counsel he submitted that the decision in *Gopalan's case*[1] as to the constitutionality of section 3 required re-consideration in the light of his arguments based on Article 22, clause (5). Although the clause was not then considered from this point of view, it came in for a good deal of discussion in connection with section 14 of the Act and the present argument must, in my opinion, be rejected because it runs counter to that decision.

Apart from this aspect of the matter, I am not much impressed with the merits of the argument. While granting, in view of the structure and wording of clause (5), that the grounds communicated to the person detained are to form the basis of his representation against the order, I am unable to agree with what appears to be the major premise of the argument, namely, that clause (5) contemplates an inquiry where the person detained is to be formally charged with specific acts or omissions of a culpable nature and called upon to answer them. As pointed out by Lord Atkinson in *Rex* v. *Halliday*[2], preventive detention being a precautionary measure,

> "it must necessarily proceed in all cases to some extent on suspicion or anticipation as distinct from proof",

and it must be capable of being employed by the Executive Government in sudden emergencies on unverified information supplied to them by their police or intelligence officers. If the Government, acting honestly and in good faith, make an order being "satisfied" on such information, however lacking in particulars, that a person should be detained in the public interest, as they have been empowered by Parliament to do, then all that Article 22 (5) requires of them is to communicate as soon as may be the grounds which led to the making of the order, to the person concerned, and to give him the earliest opportunity of making any representation which he may wish to make on the basis of what is communicated to him. If such communication is made and such opportunity is given, the detaining authority will have complied with the procedure prescribed by the Constitution, and the person under detention cannot complain that he has been deprived of his personal liberty otherwise than in accordance with the procedure established by law. I can find nothing in Article 22, clause (5) to warrant the view that the grounds on which the order of detention has been made must be such that, when communicated to the person detained, they are found by a Court of law to be sufficient to enable him to make what the Court considers to be an adequate representation. The right to be produced before a Magistrate and to consult and be defended by a legal practitioner is expressly denied by the Constitution itself to a person under preventive detention [*vide* Article 22 (1), (2) and (3)] and this Court held in *Gopalan's case*[1] that there was nothing in the Constitution to entitle him to a hearing even before the detaining authority. All this underlines the executive character of the function exercised by the authority which does not in any way embark on a judicial or quasi-judicial inquiry. In such circumstances the representation which the

1. (1950) S.C.J. 174 : (1950) S.C.R. 88 : (1950) 2 M.L.J. 42. 2. (1917) A.C. 260, 275.

person detained is allowed to make to the Government, which is constituted the judge in its own cause, cannot be assumed to be similar in scope or purpose to a defence against a formulated charge in a Court of law. The argument, therefore, that the right of making a representation should be made effective in the sense that such person should be enabled to defend himself successfully if possible, and, for that purpose, the detaining authority should communicate to him the necessary particulars on pain of having the order quashed if such particulars are not furnished, proceeds on a misconception of the true position.

Perhaps the most cogent reason for rejecting the argument is to be found in the language and provision of clause (6) of Article 22. "Nothing in clause (5)", that is to say, neither the right to be informed of the "grounds" of detention nor the right to make a "representation" shall "require" the detaining authority to disclose facts which the authority "considers" should not be disclosed in the public interest. In other words, clause (5) should not be taken to import an *obligation* to provide particulars which the authority is given an absolute discretion to furnish or withhold. I cannot understand how it can be claimed, in the face of clause (6), that it is incumbent on the Executive Government to communicate particulars which a Court of law considers necessary to enable the person detained to make a representation. It cannot be compulsory to furnish what the authority is given an uncontrolled power to decide to give or to refuse. The combined effect of clauses (5) and (6) is, to my mind, to require the detaining authority, to communicate to the person affected only such particulars as that authority and not a Court of law, considers sufficient to enable the said person to make a representation.

It is worthy of note that in the well-known English case of *Liversidge* v. *Anderson*[1], the existence of a similar privilege was regarded as a "very cogent reason" for holding that the words "If the Secretary of State has reasonable cause to believe" did not raise a justiciable issue as to the existence of such cause as an objective fact. Viscount Maugham observed :

"It is beyond dispute that he can decline to disclose the information on which he has acted on the ground that to do so would be contrary to the public interest, and that this privilege of the Crown cannot be disputed. It is not *ad rem* on the question of construction to say in reply to this argument that there are cases in which the Secretary of State could answer the attack on the validity of the order for detention without raising the point of privilege. It is sufficient to say that there must be a large number of cases in which the information on which the Secretary of State is likely to act will be of a very confidential nature. That must have been plain to those responsible in advising His Majesty in regard to the Order in Council, and it constitutes, in my opinion, a very cogent reason for thinking that the words under discussion cannot be read as meaning that the existence of 'reasonable cause' is one which may be discussed in a Court which has not the power of eliciting the facts which in the opinion of the Secretary of State amount to 'reasonable cause'."

There was considerable discussion as to the meaning of the words "grounds" and "representation" used in clause (5). These are words of very wide connotation, and, in the view I have expressed, it is unnecessary to define them. It may, however, be noted that clauses (5) and (6) are not mutually exclusive in the sense that, when clause (6) is invoked, clause (5) ceases to be applicable. When, therefore, the detaining authority withholds the material facts under clause (6) and communicates to the person detained the grounds of detention, which in that case must be necessarily vague, it would still be communicating to him the "grounds" on which the order has been made, and such representation as the person may wish to make on the basis of that communication would still be a "representation", within the meaning of clause (5). This shows that no precise connotation can be attributed to the terms "grounds" and "representation" as used in clause (5), for in certain cases at least, the one can be vague and the other inadequate from the point of view of the person detained and, on a question of construction they need not be different in other cases.

It was suggested in the course of the argument that clause (5) dealt with two distinct and independent matters, namely, (1) the communication of the grounds of detention, and (2) the affording of an opportunity to

1. (1942) A.C. 206.

make a representation against the detention, and that the grounds communicated need not have any necessary relation to the representation provided for. The right to make a representation, it was said, imported, by implication, an independent obligation on the part of the authority to furnish the person detained with sufficient particulars and details of the accusation against him apart from and in addition to the obligation expressly imposed on the authority to communicate the grounds on which the order has been made, for the reason that without such particulars no adequate or effective representation could be made against the order, and though the sufficiency of the grounds on which the order was based had been held not to be open to judicial examination, there was no reason why the sufficiency of the further communication implied in the provision for representation should not be justiciable. The different time-limits fixed for the performance of the duties imposed by clause (5) on the detaining authority are said to support this argument. The construction suggested is, in my opinion, strained and artificial and cannot be accepted. The collocation in the same clause of the right to be informed of the grounds of detention and the right to make a representation against it indicate, to my mind, that the grounds communicated are to form the basis of the representation and, indeed, are intended mainly, if not solely, for that purpose. To suggest that, apart from those grounds, any right of making a representation imports, by necessary implication, a further obligation to give such details and particulars as would render that right effective is, in my opinion, not to construe the clause in its natural meaning but to stretch it by the process of implication, so as to square with one's preconceived notions of justice and fairplay. No support for this construction can be derived from the provision of distinct time limits for the communication of the grounds and the affording of opportunity for representation, as that can be explained by the different degrees of urgency required in the two cases. The grounds are to be communicated "as soon as may be" which means as soon as possible and imports a much higher degree of urgency than what is implied in affording the "earliest opportunity" which, I take it, means affording writing and communication facilities to the person under detention as soon as he is ready and desires to make the representation.

While clause (5) does not allow the authority, after making the order of detention and communicating the grounds of such order, to put forward fresh grounds in justification of that order, I can find nothing in that clause to preclude the authority furnishing particulars or details relating to the grounds originally communicated, or the person under detention availing himself of such particulars and making a better or a further representation. Nor is there anything to prevent such person from asking for, or the authority from providing, further and better particulars of those grounds where it is in a position to do so. But the attempt in these and similar proceedings has always been not to secure the necessary particulars but to shift the arena of the contest to the Court which, as Lord Finlay remarked in the case already referred to, is the least appropriate tribunal for investigating what must largely be matters of suspicion and not proof and which, for that very reason, might afford the relief hoped for without being in possession of all the facts.

Reference was made to the decisions of several High Courts dealing with the necessity of furnishing particulars of the grounds of detention. But those decisions turned on the provisions of the various Provincial Public Safety Acts which were passed before the commencement of the Constitution and which, in most cases, specifically provided for the communication of particulars. Those decisions are of no assistance to the respondent as neither in Article 22 nor in the Act is there any express provision that particulars of the grounds of detention should be given to the person detained.

Our attention was called to the decision of this Court in *Ishwar Das* v. *The State* as an instance where this Court considered the grounds of detention to be vague and directed the release of the petitioner in that case from detention under

the Act. As pointed out in the brief judgment in that case, no arguments were addressed on the point and the case was disposed of on the view *prima facie* supported by the decisions already referred to that, if the grounds were too general and vague to enable the person under detention to make a representation, he was entitled to be released. No value can therefore be attached to that decision as a precedent.

In the course of the debate it was repeatedly urged that this Court should be jealous in upholding the liberty of the subject which the Constitution has guaranteed as a fundamental right and must not adopt a construction of Article 22 (5) which would rob the safeguards provided therein of all their efficacy. I am profoundly conscious of the sanctity which the Constitution attaches to personal liberty and other fundamental rights and of the duty of this Court to guard against inroads on them by the Legislature or the executive. But when, as has been stated, the Constitution itself has authorised preventive detention and denied to the subject the right of trial before a Court of law and of consulting or being defended by a legal practitioner of his choice, providing only certain procedural safeguards, the Court could do no more than construe the words used in that behalf in their natural sense consistently with the nature, purpose and scheme of the measure thus authorised, to ascertain what powers are still left to the Court in the matter. It is in this light that I have endeavoured to construe clause (5) and, for the reasons indicated above, I have come to the conclusion that it is not the province of the Court to examine the sufficiency of the grounds for the purpose of making a representation, a matter left entirely to the discretion of the executive authority. An argument in support of the liberty of the subject has always a powerful appeal but the Court should, in my opinion, resist the temptation of extending its jurisdiction beyond its legitimate bounds.

Das, J.—This appeal from a decision of the Bombay High Court raises a very important question as to the sufficiency of the grounds of an order of detention under the Preventive Detention Act, 1950. The question depends, for its answer, on a correct interpretation of clauses (5) and (6) of Article 22 of our Constitution which have been reproduced in section 7 of the Act. A similar question has also been raised in another appeal filed in this Court by one hundred detenus from the decision of a Bench of the Calcutta High Court, being Case No. 24 of 1950, *Tarapada and others* v. *The State of West Bengal*[1]. As the view I have taken as to the true meaning and effect of the relevant provisions of the Constitution and of the Act has not commended itself to the majority of my colleagues, I express it with a certain amount of diffidence arising out of the high regard I have for their opinions.

Under section 3 (1) (*a*) of the Act the authority concerned can make an order of detention only if he is satisfied that, with a view to preventing a person from acting in a manner prejudicial to one or more of the matters referred to in sub-clauses (i), (ii) and (iii) of clause (*a*), an order should be made. What materials will engender in the mind of the authority the requisite satisfaction under section 3 (1) of the Act will depend on the training and temperament and the habitual mental approach of the person who is the authority to make the detention order. The authority concerned may be a person who will not derive the requisite satisfaction except on very precise and full informations amounting almost to legal proof or he may be a person equally honest who will be so satisfied on meagre information which may appear to others to be very vague or even nebulous. If the authority is a person of the first mentioned type, then the "grounds" on which he will make the order will necessarily be more precise and fuller in particulars than the "grounds" on which an order may be made by the authority who is a person of the second mentioned type. The "grounds" on which the authority who is a person of the first mentioned type makes an order of detention create no difficulty, for such grounds are quite precise and ample, and,

1. (Since reported) 1951 S.C.J. 233.

when communicated to the detenu, will clearly enable him to appreciate the reasons for his detention and to make his representation. We are, however, concerned with the " grounds " on which an order of detention may be made by the authority who is a person of the second mentioned type who may derive the requisite satisfaction from the conclusions which he may draw from the available information, which may not be precise or ample but on which, having regard to his source of information, the authority may honestly feel safe to rely and to act. This last mentioned type of " grounds " will, in the following discussion, be referred to as " vague grounds ". The question for our decision is whether an order of detention made in good faith on such " vague grounds " is valid when it is made and whether, if valid when made, becomes invalid because these very grounds, when communicated to the detenu are found to be insufficient to enable him to make a representation.

The first question urged by the learned counsel for the detenu is that an order of detention made upon grounds which are too vague to enable the detenu to make a representation against the order is bad *ab initio*. The argument is thus formulated. Article 22 (5) requires two things, namely, first, that the authority making the order of detention shall, as soon as may be, communicate to the detenu the grounds on which the order has been made and, secondly, that the authority shall afford him the earliest opportunity to make a representation against the order. The two requirements are correlated. The object of the communication of the grounds according to the argument, is to enable the detenu to make a representation against the order of detention and the combined effect of the two constitutional requirements is that the grounds on which the order is made must be such as will, when communicated to the detenu, enable him to make a representation. If the grounds communicated are too vague being devoid of particulars, then no representation can be made on the basis of them and if no representation can be made on the basis of these grounds, no order of detention could properly have been made on those grounds for it is the grounds on which the order had been made that have to be communicated to the detenu so as to enable him to make a representation. The argument, shortly put, is that the implied requirement that the grounds must be such as will enable the detenu to make a representation also indicates the quality or attribute of the grounds on which the order of detention may be made. Whether the grounds satisfy the requirements of Article 22 (5) is not left to the subjective opinion of the authority which makes the order of detention but an objective test is indicated, namely, that the grounds must be such as will enable the detenu to make a representation which quite clearly makes the matter justiciable. If the Court finds that no representation may be made on account of the vagueness of the grounds, the Court must also hold that the order made on such vague grounds cannot be sustained. The next step in the argument is that the provisions of the Preventive Detention Act, 1950 (Act IV of 1950), which was passed after the Constitution came into effect must be read in the light of Article 22 (5) as construed above. So read, the satisfaction of the authority referred to in section 3 of the Act cannot be the subjective satisfaction of the authority, for the satisfaction must be founded on grounds which, when communicated later on, will enable the detenu to make a representation which postulates an objective test. This involves that section 3 (1) (*a*) of the Act should be read as if the words " on grounds which, when communicated to him, will enable him to make a representation such as is mentioned in section 7 of this Act " occurred after the words " if satisfied with respect to any person " and before the words " that with a view ". If such interpolation of words be not permissible according to accepted canons of construction then it must be held that in so far as section 3 of the Act makes an order of detention dependent on the subjective satisfaction of the authority, the section is unconstitutional, being repugnant to the provisions of Article 22 (5) and the necessary intendment thereof. The argument so formulated is attractive but on closer scrutiny will be found to be unsound. Before the Constitution came into force there were laws for the maintenance of public security in almost all the Provinces and in those

laws there were provisions similar to the provisions of section 3 of the Preventive Detention Act, 1950. It was held in many cases that in the absence of bad faith and provided the grounds on which the authority founded its satisfaction had a reasonable relation or relevancy to the object which the legislation in question had in view, the satisfaction of the authority was purely subjective and could not be questioned in any Court of law. The decision of the Federal Court in *Machindar Shivaji Mahar* v. *The King*[1] is one of such decisions. Vagueness of the grounds on which satisfaction of the authority is founded cannot be treated as on the same footing as the irrelevancy of the grounds, unless the vagueness be such as may, by itself, be cogent evidence in proof of bad faith. If the grounds are relevant to the objects of the legislation and if there is no proof of bad faith, then mere vagueness of the grounds cannot vitiate the satisfaction founded on them. The satisfaction being subjective, the Court cannot arrogate to itself the responsibility of judging the sufficiency or otherwise of the grounds. It is true that at the time those decisions were given the Constitution had not come into force and there were no fundamental rights, but these well-established principles were recognised and adopted by all members of this Court in *Gopalan's case*[2] which came up for consideration after the Constitution had come into force. In that case it was held unanimously that under section 3 of the Preventive Detention Act, 1950, the satisfaction of the authority was purely subjective and could not, in the absence of proof of bad faith, be questioned at all and that section 3 was not unconstitutional. It is true that the arguments now advanced were not advanced in exactly the same form on that occasion, but that fact makes no difference, for the arguments have no force as they are founded on the assumption that the grounds on which an order may be made must be such as will, when communicated, be sufficiently full and precise so as to enable the detenu to make a representation. I find no warrant for such an assumption. Indeed, the fact that this Court has held that section 3 of the Act which makes the satisfaction of the authority a purely subjective matter is not unconstitutional clearly destroys the cogency of the argument formulated as hereinbefore stated. The decision in *Gopalan's case*[2] as to the validity of section 3 of the Act makes it impossible to accept this argument.

It is next urged that even if the initial order was not invalid when made because satisfaction was a purely subjective matter for the authority alone and the Court cannot consider or pronounce upon the sufficiency of the grounds on which the satisfaction was based, nevertheless, the continuance of the detention becomes unlawful if the same grounds when communicated, be found to be vague and devoid of particulars so as to render the making of a representation by the detenu somewhat difficult. The argument is that although the vagueness of the grounds is not justiciable at the initial stage when the order is made and so the order cannot be said to be invalid *ab initio*, the same vagueness of the ground is nevertheless justiciable at the later stage when they are communicated, so that if vagueness renders the making of a representation difficult the continuance of the detention at once becomes illegal. Under Article 21 no person can be deprived of his life or personal liberty except according to procedure established by law. As explained in *Gopalan's case*[2], procedure established by law means procedure enacted by the Legislature, *i.e.*, State-made procedural law and not any rule of natural justice. It was pointed out that the implication of that Article was that a person could be deprived of his life or personal liberty provided such deprivation was brought about in accordance with procedure enacted by the appropriate Legislature. Having so provided in Article 21, the framers of our Constitution proceeded to lay down certain procedural requirements which, as a matter of constitutional necessity, must be adopted and included in any procedure that may be enacted by the Legislature and in accordance with which a person may be deprived of his life or personal liberty. Those requirements are set forth

1. (1949) F.C.R. 827 at p. 831. (1950) S.C.R. 88.
2. (1950) S.C.J. 174 : (1950) 2 M.L.J. 42 :

in Article 22 of the Constitution. A perusal of the several clauses of that Article will show that the constitutional requirements of procedure which must be incorporated in any law for preventive detention relate to a stage after the order of detention is made under section 3 of the Preventive Detention Act, 1950. The order of detention being thus in accordance with procedure enacted by law which is not inconsistent with any of the provisions of Part III of the Constitution applicable to that stage the order of detention cannot be questioned unless there is proof of bad faith, either direct or indirect. We have, therefore, to consider whether the detention validly brought about becomes unlawful by reason of subsequent non-compliance with the procedural requirements laid down in clause (5) of Article 22, for if there is such non-compliance, the detenu from that moment must be held to be deprived of his liberty otherwise than in accordance with procedure established by law and will, therefore, be entitled to be released.

I am prepared to concede that there is some correlation between the two parts of Article 22 (5), namely, the communication of the grounds on which the order has been made and the making of the representation by the detained person. The Constitution insists on the communication of the grounds on which the detention order has been made for some purpose. That purpose obviously is to apprise the detenu of the reasons for the order of his detention. The communication of the grounds will necessarily enable him, first, to see whether the grounds are at all relevant to the object sought to be secured by the Act. If they are not then they were no grounds at all and no satisfaction could be founded on them. The very irrelevancy of the grounds will be a cogent proof of bad faith on the part of the authority so as to make the order itself invalid. In the next place, the disclosure of the grounds will tell the detenu in which class his suspected activities have been placed and whether he is entitled to the benefit of having his case scrutinised by the Advisory Board. Finally, the communication of the grounds on which the order has been made will tell him generally the reasons for his detention, and will, therefore, be helpful to the detained person in making his representation which is also provided for in the latter part of clause (5). The fact that there is correlation between the two parts of clause (5) does not, however, carry us any further. There is no warrant for assuming that the grounds to be communicated to the detenu are to be a formal indictment or a formal pleading setting forth a charge or a case with meticulous particularity nor is there any warrant for the assumption that the representation has to be in the nature of a defence or written statement specifically dealing with the charge or the case. Indeed, the idea of a trial is foreign to the law of preventive detention. The very fact that the provisions of clauses (1) and (2) of Article 22 do not apply to preventive detention clearly excludes the idea of a trial before a tribunal. As I have said, the grounds will generally indicate the conclusions drawn by the appropriate authority with respect to the suspected activities of any particular person and those grounds, when communicated, will enable the detenu to make a representation, for he can easily refer to and set forth his real activities and represent that all his activities are innocent and cannot possibly give rise to the suspicion indicated in the grounds. To say that clause (5) itself indicates that the grounds must be such as will enable the detenu to make a representation is to read into clause (5) something which is not there. It is a re-statement of the first argument in a new form and is fallacious. In the first place, clause (5) does not in terms say that the authorities shall communicate such grounds as will enable the detenu to make a representation. In the second place, the decision in *Gopalan's case*[1] militates against this argument, for if the sufficiency of the grounds is not justiciable at the initial stage when the order is made, as held in that case, it is wholly illogical to say that the intention of the Constitution is to make the sufficiency of the same grounds justiciable as soon as they are communicated to the detenu. As altready stated, an order made upon satisfaction founded on vague grounds is quite valid, if the vagueness is not proof of bad faith. Under clause (5) the authority is to

1. (1950) S.C.J. 174 : (1950) 2 M.L.J. 42 : (1950) S.C.R. 88.

communicate the grounds on which the order has been made. This will let the detenu know what operated on the mind of the authority when it made the order. If the grounds were vague it is the vague grounds that must be communicated, for it was upon those vague grounds that the order had been made. That is the express provision of the first part of clause (5). This being the express requirement, the implication that the grounds communicated must be sufficient to enable the detenu to make a representation cannot be read into the clause, for that will militate against the express requirement. If the order had been made on vague grounds but the authority is to communicate precise and well-formulated grounds which will be sufficient for the detenu to make a representation, then the communication will not be of grounds on which the order was made but of something more than what is expressly required. The express provision must exclude such an inconsistent implied provision. Again, clause (6) of Article 22 gives the authority the right to claim privilege against disclosure of facts in public interest. Non-disclosure of facts will necessarily make the grounds, as communicated, extremely vague and devoid of particulars. If the construction of clause (5) which is contended for by the detenu's counsel were correct, then the vagueness of the grounds resulting from the non-disclosure of facts under clause (6) will entitle the detenu to be released, for that vagueness also will render the making of a representation impossible or difficult. That will mean that the claim of privilege given to the authority by clause (6) of Article 22 is wholly meaningless and ineffective, and will defeat its very purpose, for the privilege cannot be claimed except at the peril of releasing the detenu. Obviously that cannot be the intention. It must, therefore, be held that the vagueness of grounds resulting from non-disclosure of facts under clause (6) will not invalidate the order of detention, which was initially valid, on the ground that no representation can be made on the basis of such vague grounds. In that case by claiming privilege under clause (6) the authority can frustrate the claim of justiciability of the sufficiency of the grounds. Further, why should the vagueness of grounds otherwise brought about stand on a different footing? Clause (5) cannot mean one thing when the privilege is claimed and mean quite the opposite thing when no such privilege is claimed under clause (6). The initial order is not justiciable. The claim of privilege is not justiciable. Why should it be assumed that the sufficiency of grounds for the purpose of making a representation was intended to be justiciable? I see no logical reason for making an assumption which will introduce an objective test in a matter which is *prima facie* intended to be purely subjective.

The argument is then re-stated in the following further modified form Clause (5) of Article 22 imposes two obligations on the authority making an order of detention, namely, (i) that the authority shall, as soon as may be, communicate the grounds on which the order has been made and (ii) that the authority shall afford the earliest opportunity to the detenu to make a representation against the order. If the order was made as a result of satisfaction derived in good faith but upon grounds which may be vague, the order will be perfectly good and cannot be challenged in any Court. Communication of such grounds, even if they are vague, will satisfy the first obligation imposed upon the authority. Under the latter part of clause (5) the authority is also under the obligation to afford the earliest opportunity to the detenu to make a representation. If the grounds on which the order has been made were vague, then the second part of clause (5), independently and without reference to the first part of clause (5), impliedly imposes on the authority an obligation to rectify the defect of vagueness by supplying particulars so as to enable the detenu to make a representation. Supplying of particulars, the argument concludes, is implicit in the second part of clause (5), for without such particulars the detenu is not afforded the opportunity to make a representation. I am unable to accept this line of argument. Under the first part of clause (5) the grounds on which the order has been made have to be supplied 'as soon as may be'. The measure of time indicated by the words 'as soon as may be' must obviously run from the date of detention. Likewise, the latter part of clause (5)

requires affording the detenu the earliest opportunity to make a representation. From what *terminus a quo* is the period indicated by the phrase "earliest opportunity" to begin to run? If that is also to run from the date of the detention, then the two periods under the two parts of clause (5) must necessarily coincide and, therefore, the question of supplying further particulars after the grounds are supplied cannot arise. On the other hand, the natural meaning of the words of the latter part of clause (5), to my mind, is that the period connoted by the phrase the "earliest opportunity" begins to run from the time the detenu expresses his desire or intention to make a representation. The making of a representation is the right of the detenu. To make or not to make a representation is his choice. Therefore, it is only when he decides to make a representation and expresses his desire or intention to make a representation that the earliest opportunity is to be afforded to him to make the desired or intended representation. Now, if the time is to run after the expression of desire or intention on the part of the detenu to make a representation, then the earliest opportunity to be afforded to the detenu can only mean affording him all physical facilities to carry out his desire or intention, for the detenu has decided to make his representation without any further particulars. According to the language used in the latter part of clause (5), there is no express provision for supplying particulars. Suppose the grounds on which the order was made and which were communicated to the detenu under the first part were quite precise and sufficient to enable the detenu to make a representation, then affording him the earliest opportunity to make the representation can only mean giving him all physical facilities to do so, *e.g.*, by supplying him with paper, pen and ink and when the representation has been drawn up by him by forwarding the same with due despatch. In such a case there is no question of supplying further and better particulars. Suppose, again, that the grounds on which the order has been made and which have been communicated to the detenu are regarded by the authority to be quite precise and sufficient for making a representation, is the authority to anticipate that the detenu may find these grounds insufficient or that being moved in that behalf the Court may consider them insufficient and then, as soon as the detenu expresses his desire or intention to make a representation, is the authority to keep quiet and take the risk of the Court releasing the detenu for the vagueness of the grounds or is he to tell the detenu "just wait a little; I think the grounds which I have communicated to you are quite precise and sufficient; lest you or the Court find the grounds insufficient for making a representation, I shall supply you with further and better particulars so as to enable you to make the representation"? The position thus stated is unreal on the face of it. In my opinion, on a plain reading of clause (5) there is no justification for assuming that a second communication of particulars is contemplated either under the first part or under the second part of clause (5). This does not, however, mean that the authority may not supply particulars either *suo motu* or on the application of the detenu. All that I say is that clause (5) imposes no constitutional obligation on the authority to supply particulars so as to remove the vagueness of the grounds or to enable the detenu to make a representation and non-supply of further particulars does not constitute an infraction of any fundamental right.

It is said that clause (5) of Article 22 construed in the way suggested above, would render that clause nugatory for it will then really guarantee no fundamental right at all. I respectfully differ from this view for the criticism does not appear to me to be well founded. Communication of the grounds, even if vague, will none the less be helpful to the detenu in the several ways I have already mentioned and, therefore, the right to have the grounds on which the order has been made communicated to him is a valuable right which has been recognised as a fundamental right. Likewise, the right to make a representation is a valuable right which is guaranteed by the Constitution. These rights remain unaffected. If the provisions of clause (5) of Article 22 of our Constitution on a correct interpretation thereof are found to be inadequate for the protection of the liberty of the detenus it is their misfortune. The Constitution which the people have given unto them

selves is the supreme law and must be upheld and obeyed whether or not one likes its provisions, inhibitions and necessary implications. The Court can only draw the attention of the Parliament to the lacuna or defect, if any, in the Constitution and in the Act so that the lacuna may be supplied or the defect remedied in the constitutional way.

Our attention has been drawn to a number of cases where under various Provincial laws and before the Constitution the different High Courts have directed the release of the detenu on the basis of the vagueness of the grounds. Those decisions are, however, distinguishable because they were based on legislation which required the communication not only of grounds but also of particulars. The omission from our Constitution of the provision for communicating the particulars in addition to the grounds which were to be found in those laws is significant, for it may be deliberate. Apart from this, however, those decisions do not appear to me to have any bearing on the correct interpretation of our Constitution or of the Preventive Detention Act. In *Iswar Das* v. *The State*, the question was not raised or argued as it was made clear in the judgment itself.

In view of what I have stated above, I am of the opinion that as the grounds originally communicated to the detenu were relevant to the objects which the Act had in view and as there is no proof of *mala fides*, the obligations cast upon the authorities under Article 22 (5) which have been reproduced in section 7 of the Preventive Detention Act have been fully complied with. Even according to the views expressed by the majority of my colleagues I would be prepared to hold that the particulars subsequently supplied along with the grounds originally supplied fully enable the detenu to make his representation. In my opinion there has been no contravention of the fundamental rights of the detenu. I would, therefore, allow this appeal and reverse the decision of the Bombay High Court.

Agent for Appellant :—*P. A. Mehta.*

Agent for Respondent :—*V. P. K. Nambiyar.*

G.R./V.S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT : MR. JUSTICE SATYANARAYANA RAO.

Thalagadadivi Saty Venkata Subba Rao .. *Appellant**

v.

Yellapragada Ananda Rao and another .. *Respondents.*

Madras Hereditary Village Offices Act (III of 1895), Sections 10 and 21—Scope—Dismissal of village munsif—"Bar order" under section 10 (4) disqualifying member of undivided family of dismissed officer till the latter's death, if obligatory or discretionary—Order of dismissal put in execution by registering minor son of dismissed person as headman of the village and appointing a deputy for him—If can be interfered with by the Collector under revisional jurisdiction under section 3, Madras Subordinate Collectors and Revenue Malversation (Amendment) Regulation (VII of 1828)—Civil suit to set aside a void order cancelling earlier order conferring a right to office—If barred under section 21 of Madras Act, III of 1895—Civil Procedure Code (V of 1908), Section 9—Scope.

X, a Hindu who was a village munsif, was dismissed by the Revenue Divisional Officer from service on 21st April, 1932 as he was found guilty of misappropriation of Government money. The office was held by the family in hereditary right. The order of dismissal merely stated "I therefore dismiss him from service and order that during his lifetime no undivided member of his family should succeed to the post". The Revenue Divisional Officer followed up the order by registering *X*'s son *Y* who was then a minor aged 16 years as the headman of the village in place of the dismissed *X* and also appointed as his deputy a Muhammadan following the procedure laid down in sub-section (5) of section 10 of the Madras Hereditary Village Offices Act. The Sub-Divisional Officer subsequently modified that order by appointing *Y*'s maternal grandfather as his deputy. By 1937 *Y* attained majority and completed all the tests required for qualifying himself to the post. He also became divided from his father. He applied to the Deputy Collector praying that he should be permitted to enter upon his duties. The Deputy Collector sought the advice of the District Collector who felt that the officer who dismissed *X* from service should have given a direction under sub-section (4) of section 10 and should not have registered the minor as entitled to the office. Ultimately the Collector

* Second Appeal No. 2024 of 1947. 1st December, 1950.

cancelled on 27th November, 1937, the order registering *Y* as entitled to succeed *X* to the office. *Y* took up this matter through various stages up to the Board of Revenue and even applied for a review of the order by the Collector, but was unsuccessful. A suit by *Y* subsequently for getting the orders of the Collector set aside, was unsuccessful. There was an appeal to the Collector who revised the order of the Revenue Divisional Officer dismissing *X* purporting to act under the powers assumed to have been conferred upon him by Madras Subordinate Collectors and Revenue Malversation (Amendment) Regulation, VII of 1828. The order directed that until the death of *X* the duties of the office shall be performed by some person duly qualified under section 10 (1) who is not an undivided member of the family of *X*. There were in the usual course appeals to the Board of Revenue and to Government but to no purpose.

On 20th November, 1943, *Y* filed a suit for a declaration that the orders of the District Collector were illegal and *ultra vires* impleading his maternal grandfather and the Province of Madras as defendants.

Held: (i) The powers of revision under the third paragraph of section 3 of the Madras Subordinate Collectors and Revenue Malversation (Amendment) Regulation, VII of 1828, is conferred to interfere with the order in the manner provided by the section only before the order is carried into execution. If once an order is carried into execution, it is but natural that the Collector should not undo what has been done by his subordinate whether the proceedings come to his notice by virtue of a general direction or a particular direction. In the present case the order of the Revenue Divisional Officer of the 21st April 1932 was given effect to and acted upon by registering the minor *Y* and even appointing a deputy for him and later by modifying that order by appointing *Y's* maternal grandfather as a deputy. The order registering the minor under section 10 (5) of the Act was valid on the basis that there was no "bar order" under section 10 (4) and the deputy could not have acted otherwise.

Accordingly the Collector had no jurisdiction to make the orders cancelling the registration of *Y* under section 10 (5) of the Act and making a fresh "bar order" under section 10 (4) disqualifying members of *X's* family from holding office till *X's* death.

Section 10 (4) of Madras Act, III of 1895, does not make it obligatory on the Revenue Divisional Officer to issue the direction contemplated by that sub-section but vests in him a discretion.

(ii) If once a person validly appointed to a post either as karnam or as headman but by reason of a subsequent order which was passed by a Revenue authority without jurisdiction he is deprived of the right which was recognised and accepted by the authorities concerned at a previous stage, it would be open to the aggrieved person to institute a suit to have the legality of the order, which had the effect of depriving him of that which was previously secured, tested in a Civil Court. The basis on which such suits are held to be cognisable by a Civil Court is that if once the order which was passed without jurisdiction by the revenue authorities is got rid of by a declaration by the Civil Court, the plaintiff's right to the office held by him under a valid order which was negatived by a later void order, would automatically be restored. If on the other hand the plaintiff's right in substance and effect is founded on section 10 of Act, III of 1895, he cannot get out of the statutory bar under section 21 of the Act and agitate his rights in the Civil Court.

Appeal against the decree of the Court of the Subordinate Judge of Masulipatnam in Appeal Suit No. 11 of 1946, preferred against the Decree of the Court of the District Munsiff of Masulipatnam in Original Suit No. 607 of 1943.

Challa Rama Rao and *M. Appa Rao* for Appellant.

The Government Pleader (*P. Satyanarayana Raju*) for Respondents.

The Court delivered the following

JUDGMENT.—In this second appeal, the plaintiff-appellant seeks in substance a declaration that two orders of the District Collector, Krishna, dated the 27th November, 1937, and 31st July, 1942, are illegal and *ultra vires*. In the suit he also prayed for a mandatory injunction directing the District Collector, Krishna, to recognise the plaintiff as the permanent headman of the village of Thalagadadivi but that prayer is now out of the case and is not pressed. From 1937 the plaintiff was making unsuccessful attempts to assume charge as headman of the village after he had attained majority and qualified himself to the post. His right to the headmanship was recognised in 1933 during his minority and he was registered under section 10 (5) of the Madras Hereditary Village Offices Act as the person entitled to succeed to the office. The plaintiff's father, Mallikharjuna Prasada Rao was the village munsiff of Thalagadadivi till he was dismissed from service on 21st April, 1932, as he was found guilty of misappropriation of Government money amounting to over Rs. 1,000. The office was held by the family in hereditary right. The Revenue Divisional Officer who dismissed him from service by his proceedings dated 21st April, 1932, Ex. P-1, did not conform to the procedure applicable under section 10 (4) of the Act. That sub-section empowers the collector

to direct when a vacancy had occurred and when the holder of the office is dismissed or suspended, that until the death or return to duty of such last holder, the duties of the office shall be performed by some person duly qualified under sub-section (1) who is not an undivided member of the family of the dismissed or suspended officer. The disability, if imposed by a direction under this section, continues until the death of the dismissed holder. If a vacancy is caused by the dismissal of the holder of the office under section 10 (4) and if the collector did not think fit to issue a direction contemplated by section 10 (4), the vacancy has to be filled up under sub-section (6) as if the dismissed holder died at that moment; in other words, when there is no direction imposing a disability on an undivided member of the family of the dismissed office holder, such undivided member if he is otherwise entitled to hold the office is entitled to be appointed to fill up the vacancy under sub-section (6) of section 10. The direction actually given in Ex. P-1 was not in terms of section 10 (4). He merely stated there as follows:

"I therefore dismiss him from service and order that during his lifetime no undivided member of his family should succeed to the post."

This direction means that if the person entitled to succeed to the office at the time the vacancy had occurred becomes divided from the family, he should be entitled to succeed to the post. The Revenue Divisional Officer who can be assumed to have understood the import of the order he passed on the 21st April, 1932, followed up this order by registering the plaintiff who was then a minor aged 16 as the headman of the village in place of the dismissed Mallikarjuna Prasada Rao and also appointed as his deputy a Muhammadan following the procedure laid down in sub-section (5) of section 10. This conduct of the Revenue Divisional Officer makes it clear that he did not intend by his order of the 21st April, 1932, to impose a disability on the undivided member to succeed to the post under sub-section (6) of section 10 as the plaintiff could be recognised and registered as the successor to the office under that sub-section only if there was no direction contemplated and permitted by section 10 (4). What is more, the same Revenue Divisional Officer subsequently modified his order dated 9th January, 1933, Exhibit P-2 registering the minor plaintiff as the successor to the office and appointing a deputy by a subsequent order of 1st May, 1933, Exhibit P-3. In place of the Muhammadan deputy whom he appointed under the previous order, he appointed the plaintiff's maternal grandfather, the first defendant in the present suit as his deputy. These two orders make it abundantly clear that the order of the Revenue Divisional Officer in Exhibit P-1 was not intended to be a direction imposing a disability or what is styled in the revenue language a "bar order". Under section 10 (4) the Revenue Divisional Officer is not bound to issue a direction in exercise of his discretion and this view receives support from the language of sub-section (6) which clearly contemplates that if the collector did not issue a direction under sub-section (4), the vacancy can be filled up as if it was caused by the death of the last holder. By 1937 the plaintiff attained majority and completed all the tests required for qualifying himself to the post. He also became divided from his father and this fact is now beyond dispute. By his application dated 28th May, 1937, Ex. P-7 to the Deputy Collector, he prayed that he should be permitted to enter upon his duties. The Deputy Collector seems to have sought the advice of the District Collector in the matter as the Revenue Divisional Officer at that time was a different person from the officer who passed the earlier orders, Exs. P-1, P-2 and P-3. The Collector of Krishna seems to have felt that the Revenue Divisional Officer who dismissed the plaintiff's father from service should have given a direction under sub-section (4) of section 10 and should not have registered the minor as entitled to the office overlooking the fact that section 10 (4) does not make it obligatory on the Revenue Divisional Officer to issue the direction contemplated by that sub-section but vests in him a discretion. The Collector of Kistna issued a notice to the plaintiff on 5th November, 1937, Ex. D-1, calling upon him to show cause why the order registering him as headman of the village should not be cancelled as being illegal. This notice was served on the plaintiff who appeared before the Collector by a pleader to present his

case. But the Collector cancelled on 27th November, 1937, by Ex. P-8, the order registering the plaintiff under section 10 (5) as entitled to succeed to the office. This order of the Collector was based on his view that the order of the Revenue Divisional Officer in Ex. P-1 was wrong and that he should have passed a "bar order" without filling up permanently the vacancy under the provisions of sub-sections (2) or (3) of section 10 as that question would arise only after the death of the dismissed holder. He thought that the registry of the minor as heir was void *ab initio* and was inoperative. The plaintiff took up this matter through various stages up to the Board of Revenue and even applied for a review of the order by the Collector but was unsuccessful. He then filed a suit under section 13 of the Act on 25th November, 1940, substantially for getting the orders of the Collector set aside. That suit which was ill-conceived and was without jurisdiction was of course unsuccessful though it was found by the Deputy Collector who tried the suit that the partition pleaded by the plaintiff was true. There was an appeal against the decision of the Deputy Collector to the Collector. In disposing of the appeal and dismissing it, the Collector followed the somewhat extraordinary procedure of revising the order passed by the Revenue Divisional Officer in Ex. P.-1 and in doing so, he purported to act under the powers assumed to have been conferred upon him by Regulation VII of 1828. The order that was passed was in these terms:

> "In the interest of the administration, I direct under section 10 (4) of Act III of 1895, that until the death of the dismissed village munsif the duties of the office shall be performed by some person duly qualified under section 10 (1) who is not an undivided member of the family of the dismissed village munsif."

There were in the usual course appeals to the Board of Revenue and to Government but to no purpose.

On the 20th November, 1943, the plaintiff launched the present suit for the reliefs already stated impleading as parties to the suit, the deputy, his maternal grandfather as the first defendant and the Province of Madras as the second defendant. Both the defendants supported the two cancellation orders passed by the Collector of Krishna as valid and also raised the further plea that the Civil Court had no jurisdiction to entertain the suit as its jurisdiction was barred by section 21 read with section 13 of the Act. The District Munsiff who tried the suit found on the merits in favour of the plaintiff but thought that he had no jurisdiction to entertain the suit. On appeal the learned Subordinate Judge held on both the points against the plaintiff. Hence this second appeal.

The validity of the orders of the Collector of Krishna and the jurisdiction of the Civil Court to entertain the suit, has been hotly contested on both sides, *i.e.*, by the Government and the plaintiff and counsel on both sides argued the two questions with considerable ability and learning.

The order of the Collector of Krishna cancelling the registration was assumed by the District Munsiff as having been made without notice to the plaintiff. If this fact were true, the order would be invalid as it is an elementary principle of the law that no order to the prejudice of a person should be made without giving an opportunity to him of making his defence. This is based on the maxim *audi alteram partem* and is a principle of natural justice—see *Satyanarayana* v. *Venkataramayya*[1]; but it has been brought to my notice by the learned Government Pleader that in fact a notice was issued by the Collector before cancelling the order on 5th November, 1937, Ex. D-1 and I find from an endorsement on that notice that the plaintiff was served. What is more, it is admitted by this very plaintiff in Ex. D-2, the plaint filed by him under section 13 of the Act, that he had received such a notice and that he had appeared by pleader to represent his case before the District Colllector who thereafter passed the order of 27th November, 1937. The order, therefore, cannot be attacked on the ground on which it was held to be invalid by the learned District Munsiff.

1. (1947) 1 M.L.J. 313 : I.L.R. 1948 Mad. 91.

The point that was pressed on behalf of the appellant however, was that the Collector of Krishna had no jurisdiction to revise the order under the Madras Subordinate Collectors and Revenue Malversation (Amendment) Regulation, VII of 1828. That Regulation was intended to declare the powers of Subordinate and Assistant Collectors in charge of particular divisions of districts and to confer upon them the powers of Collectors granted by the Regulations then in force and thereafter to be enacted. The Regulation also empowered the Collector to delegate his functions at his discretion in the manner provided by section 3. The third paragraph of section 3 contains the provision conferring upon the Collector of the District power of revision to control the action of the Subordinate and Assistant Collectors. It reads as follows :

"The proceedings of Subordinate and Assistant Collectors acting under the preceding clauses shall be subject, in all cases, and in the fullest manner, to the superintendence, control and revision of the Collector, who shall have power either to direct, *generally*, that the proceedings of any of his Subordinates or Assistants shall be regularly submitted to himself *before the decision, order or sentence is carried into execution* and to confirm, modify or annul them or issue any further orders in the cases, as he may see fit ; *or in any particular* case to direct that the decision, order or sentence of any of his Subordinates or Assistants shall *not be carried into execution*, and to pass such further orders as he may see fit" (the italics are mine).

The power conferred under this paragraph is of a twofold character. The Collector under this clause may direct generally that the proceedings of any of his Subordinates and Assistants shall be regularly submitted to himself before the decision, order or sentence is carried into execution and if so submitted, he is empowered to confirm, modify or annul those proceedings or even may issue any further orders in the case as he may think fit. Instead of making a general direction he may require that in a particular case the decision, order or sentence of any of his Subordinates or Assistants shall not be carried into execution and he may pass such further orders as he may think fit. In either case, it should be noticed that the power is conferred to interfere with the order in the manner provided by the section only before the order is carried into execution. If once an order is carried into execution, it is but natural that the Collector should not undo what has been done by his Subordinate. The power, therefore, cannot obviously be exercised after the order of his Subordinate has been carried into execution whether the proceedings come to his notice by virtue of a general direction or a particular direction. That this Regulation is not a dead letter is clear from the decision of a Bench of this Court in *Srinivasa Iyengar* v. *Jagannatha Aiyangar*[1]. In that case there was no question of the order sought to be revised having been executed before it was altered in revision by the Collector. The Collector in a matter in which there was no right of appeal interfered and reversed the order of the Revenue Divisional Officer in a matter arising under the Madras Hereditary Village Offices Act. The order was justified on the ground that though the Collector could not entertain an appeal and interfere with the order of the Revenue Divisional Officer in the exercise of his appellate jurisdiction, was certainly entitled to reverse the order in the exercise of his revisional jurisdiction under Regulation VII of 1828. In the present case, the Order of the 21st April, 1932, was given effect to and acted upon by registry of the minor and even appointing a deputy for him—*vide* Exs. P-2 and P-3. The order registering the minor under section 10 (5) of the Act was acted upon by appointing a deputy and then later by modifying that order by appointing the first defendant as a deputy. Therefore, during all these years till the cancellation in 1937, and later on by the Collector in 1942, the two orders were in force and were treated as valid. The deputy functioned only as the deputy of the minor. He could so function only if the order registering the minor under section 10 (5) was valid on the basis that there was no bar order under section 10 (4) and the deputy could not have acted otherwise. The Collector, therefore, could not have exercised and had no jurisdiction to exercise his power of revision when once the orders were put in execution. I am therefore clearly of opinion that the Collector of Krishna had no jurisdiction to make the two orders, one in 1937 and the other

1. (1938) 2 M.L.J. 488.

in 1942 cancelling the registration of the minor under section 10 (5) of the Act and making a fresh bar order under section 10 (4). These orders therefore are wholly without jurisdiction and are null and void.

The next important question is whether the present suit is maintainable in the Civil Court. Under section 9, Civil Procedure Code, Civil Courts have

"jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."

The point for consideration therefore is whether under the provisions of the Madras Hereditary Village Offices Act, the present suit is barred. Under section 21 of the Act :

"No Civil Court shall have authority to take into consideration or decide any claim to *succeed* to any of the offices specified in section 3 or any question as to the rate or amount of the emoluments of any such office, or except as provided in proviso (ii) to sub-section (1) of section 13, any claim to recover the emoluments of any such office".

Notwithstanding the generality of the language of section 21, the jurisdiction of the Civil Court is taken away only in cases in which such jurisdiction is conferred on the Revenue Court under section 13. Section 21 therefore must be read with section 13—See *Muvvula Seetham Naidu* v. *Doddi Ramu Naidu*[1] followed in *Sahadeva Reddi* v. *Lingappa Asari*[2] (the reference to 33 Madras in 20 Law Weekly is not accurate. The decision was reported in 33 Madras at page 208 and not 308). This takes one back to section 13 to find out the nature and the class of suits in respect of which jurisdiction has been conferred on the Revenue Court under the section. Sub-section (1) of section 13 is in these terms :

"Any person may sue before the Collector for any of the village offices specified in section 3 or for recovery of the emoluments of any such office, on the ground that he is entitled under sub-section (2) or (3) of section 10 of the Madras Proprietary Estates Village Service Act, 1894 or under sub-section (2) or (3) of section 10 or sub-section (2) or (3) of section 11 or section 12 of this Act, as the case may be, to hold such office and enjoy such emoluments ; or being a minor, may sue before the Collector to be registered as heir of the last holder of any such office."

It has now been authoritatively decided by a Full Bench of this Court in *Ranga Reddi* v. *Maram Reddi*[3], that the word 'succeed' in section 21 should be understood in its ordinary sense of succession strictly so called as it was used in the same sense in section 10 (5). The word should receive the same construction throughout the Act and when so interpreted, section 21 does not bar a suit for a declaration that a person is rightful holder of an office newly created under section 6 (1) of the Act. The right to the office in such a case is not based on succession and the new office has to be filled by the Collector under section 6 (1) of the Act by selecting a person from among the persons whom the Collector may consider best qualified from among the families of the last holder of the offices which have been abolished. Section 10 relates to offices forming class (1) in section 3, section 11 to offices in a proprietary estate forming class (3) in section 3 and section 12 to class (4) in section 3. Whenever therefore a person basing his claim to succeed to the office rests his right in respect of offices forming class (1) [and the present suit relates to an office in class (1)] and seeks to recover the office or the emoluments attached to such office on the ground that he is entitled to so succeed under sub-section (2) or (3) of section 10 must institute his suit in the Revenue Court under section 13. On the Revenue Court therefore an exclusive jurisdiction is conferred to try the right claimed and to give him the appropriate relief. Appeals against the decision of the Collector and even a second appeal to the Revenue Board in some cases are provided by section 23 of the Act. The decision in such a suit is binding and is final and cannot be questioned in a Civil Court. The jurisdiction of the Revenue Court in these matters is analogous to the jurisdiction of the Revenue Court to try suits for rent under the provisions of the Madras Estates Land Act. A decision of a Court of exclusive jurisdiction is binding on the Civil Court. Suits for declaration, therefore, that the ultimate decree in a suit filed under section 13 do not lie as the jurisdiction of the Civil Court in such matters is barred under section 21

1. (1909) 20 M.L.J. 91 : I.L.R. 33 Mad. 208.
2. (1924) I.L.R. 48 Mad. 781 : 20 L.W. 451.
3. (1938) 1 M.L.J. 552 : I.L.R. 1938 Mad. 841 (F.B.).

of the Act, and even apart from section 21, on general principles a decision of a Court of exclusive jurisdiction is binding on the parties to it and cannot be questioned in a collateral proceeding. If, however, the tribunal created by section 13 (1) of the Act acts without jurisdiction there would be a right of suit in the Civil Court to an aggrieved person as for example where the Revenue Board purporting to exercise its second appellate jurisdiction in matters where no such second appeal lies, reverses the decision of the appellate Court. It will be noticed that in the proviso to section 23 a second appeal is provided for against the decisions arising out of a suits under section 13 only in respect of the offices of head of the village and village accountant to the Board of Revenue. The decisions in *Venkatasubbayya* v. *The Secretary of State for India in Council*[1], and *Venkata Sastri* v. *Umamaheswara Venkata Jagannatha Rao*[2], are instances in which the final decision arising in a suit under section 13 (1) of the Act was not allowed to be questioned in a Civil Court. Gentle, C.J., in the last of the cases recognised an exception in cases where the tribunal created under section 13 (1) of the Act acted without jurisdiction for he observed at page 552,

"I think it desirable to add that, if the tribunal created by section 13 (1) of the Act did in fact act without jurisdiction, then there would still be a right, inspite of section 21, for the aggrieved person to come to this Court if he could show that the special tribunal had acted without jurisdiction".

So long as the plaintiff in the action does not rest his claim in the suit in the Civil Court for the office on the ground that he is entitled under sub-section (2) or (3) of section 10, the bar under section 21 does not operate and does not come into play as in respect of claims to office or emoluments resting on section 10 (2) or (3) alone. The Revenue Court is given exclusive jurisdiction under the Act. If once a person is validly appointed to a post either as karnam or as headman but by reason of a subsequent order which was passed by a revenue authority without jurisdiction he is deprived of the right which was recognised and accepted by the authorities concerned at a previous stage, it would be open to the aggrieved person to institute a suit to have the legality of the order which had the effect of depriving him of that which was previously secured tested in a Civil Court. The basis on which such suits are held to be cognizable by a Civil Court is that if once the order which was passed without jurisdiction by the revenue authorities is got rid of by a declaration by the Civil Court, his right to the office held by him under a valid order which was negatived by a later void order, would automatically be restored. The decisions have recognised the right of the person aggrieved by an *ultra vires* order to institute a suit for a bare declaration. This principle was established by the Judicial Committee in the well known case of *Robert Fischer* v. *The Secretary of State for India in Council*[3]. The decision no doubt was under a different Act but the principle established by that decision is applicable to all similar situations and is stated by Lord Macnaghten at page 282 :

"If the so-called cancellation is pronounced void the order of the Government falls to the ground and the decision of the Collector stands good and operative as from the date on which it was made. The validity of the decision is not impaired or affected merely by destruction or mutilation of the entry in the Collector's book. Cancellation in obedience to illegal commands of the Government can have no more effect than cancellation made at the dictation of a lawless mob which the officer in charge has no power to resist".

This principle was applied to a case under the Hereditary Village Offices Act by Wallace, J., in *Subba Rao* v. *The Secretary of State*[4] and Beasley, C.J., and Bardswell, J., in Letters Patent Appeal against that decision in *The Secretary of State for India in Council* v. *Subba Rao*[5]. In that case the order of the Collector suspending a Karnam who had a hereditary right to the office was modified into an order of dismissal by the Board of Revenue in second appeal. The second appeal was incompetent and the Board had no jurisdiction to alter the order of suspension made by the Collector into one of dismissal. It was held that a suit for a declaration that the order made by the Board of Revenue was invalid and *ultra vires* was maintainable

1. (1938) 1 M.L.J. 539.
2. (1947) 2 M.L.J. 256 : I.L.R. (1948) Mad. 548.
3. (1898) L.R. 26 I.A. 16 : I.L.R. 22 Mad. 270.
4. (1929) 58 M.L.J. 698.
5. (1933) 65 M.L.J. 186 : I.L.R. 56 Mad. 749.

in a Civil Court and that even a suit for a bare declaration was competent. To a similar effect is an earlier decision of Madhavan Nair, J., (as he then was) in *Venkataraghaviah* v. *Chenchu Subbiah*[1], where the learned Judge pointed out that if the suit is based on section 10 (2) or (3) of the Act, then alone the jurisdiction of the Civil Court is barred and not otherwise. Wadsworth, J., applied the principle of *Subba Rao* v. *Secretary of State for India in Council*[2], and the *Secretary of State for India in Council* v. *Subba Rao*[3], to a case where a village munsiff who was lawfully appointed has been unlawfully threatened with ejection by an official act and the learned Judge held that a suit in the Civil Court to protect his right to the office and for a declaration that the order which purported to affect his rights was *ultra vires* and void was maintainable—see *Duraisami Reddi* v. *The Secretary of State for India in Council*[4]. Section 5 of the Board of Revenue Regulation which was pointed out both in *Secretary of State for India in Council* v. *Subba Rao*[3], and by Wadsworth, J., in the decision above cited does not give the Board of Revenue power to set aside a statutory order passed by one of his subordinates particularly when the statute itself provided a remedy for rectifying the error. Of course, as pointed out by Somayya, J., in *Narasimha Rao* v. *Venkataramana Rao*[5], a person by a trick of pleading cannot get out of the statutory bar but one has to see the substance of the claim. If his claim was already recognised and that right was sought to be affected by a subsequent illegal order then it would be open to him to come to a Civil Court for a declaration that the right recognised earlier should be protected by granting a declaration in cases where the subsequent order was without jurisdiction and was *ultra vires*. If, on the other hand, his right in substance and in effect is founded on section 10 he cannot get out of the statutory bar and agitate his rights in the Civil Court.

I have come to the conclusion that the two later orders of the Collector are without jurisdiction as he had no power to revise these orders under Regulation VII of 1828. In the light of the principles above discussed, it follows that the present suit by the plaintiff in a Civil Court is maintainable and he is entitled to the declaration asked for. The result is that the second appeal is allowed and there will be a decree in favour of the plaintiff granting a declaration that the two orders of the Collector are *ultra vires* and without jurisdiction and the plaintiff is entitled to his costs throughout.

No leave.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AYYAR.

O. A. O. A. M. Muthiah Chettiar .. *Petitioner**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-Tax Act (XI of 1922) section 33-A (2)—Application for revision of assessment order of Income-tax officer—Limitation—If commences from the date of the passing of the order sought to be revised or date when it was communicated to the assessee—Refusal of commissioner to entertain revision application on a wrong view as to limitation—Writ of mandamus*—If can issue to direct him to entertain and dispose of the application according to law.*

If a person is given a right to resort to the remedy to get rid of an adverse order within a prescribed time, limitation should not be computed from a date earlier than that on which the party aggrieved actually knew of the order or had an opportunity of knowing the order and therefore must be presumed to have knowledge of the order.

In a case falling under sub-section (2) of section 33-A of the Income-tax Act, the party aggrieved has got to take the steps of applying for revision and he is allowed a period of one year from the date of the order. The provision is certainly in the nature of a time limit for the application for revision. The "date of the order" does not not mean the date when the officer passed the order but the date

1. A.I.R. 1931 Mad. 502.
2. (1929) 38 M.L.J. 698.
3. (1933) 65 M.L.J. 186 : I.L.R. 56 Mad. 749.
4. (1939) 2 M.L.J. 6.
5. (1941) 2 M.L.J. 439.

* C.M.P. No. 2282 of 1950. 17th November, 1950.

when such order was either communicated to the party or the date when it was pronounced or published in such manner that the party must be deemed to have had such notice of it or the date of such pronouncement or publication.

The Secretary of State for India in Council v. *Gopisetti Narayanaswami Naidu Garu*, (1910) I.L.R. 34 Mad. 151 and *Swaminathan* v. *Lakshmanan*, (1929) 59 M.L.J. 585 : I.L.R. 53 Mad. 491, relied on.

Firm of Mohan Lal Hardeo Das v. *Commissioner of Income-Tax, Bihar and Orissa*. (1929) I.L.R. 9 Pat. 172, not followed.

Where the Income-tax Commissioner has on a wrong construction of section 33-A (2) of the Income-tax Act refused to entertain an application for revision (made within one year of the communication but beyond one year of passing of the order) there is no adequate remedy under the Income-tax Act and a writ of *mandamus* can be issued to direct the Commissioner to entertain and dispose of the application by the petitioner under any of the provisions of the Income-tax Act.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* to the Commissioner of Income-tax, Madras, directing him to entertain the application under section 33-A, I. T. R., 145 of 48-49 and to dispose of it in accordance with law.

R. Kesava Aiyangar for Petitioner.

C. S. Rama Rao Sahib for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The applicant was assessed to income-tax by the Income-tax Officer, Cuddalore circle, South Arcot district, by his order dated 4th February, 1948. He filed an application before the Commissioner of Income-tax under section 33-A (2) of the Act for revision of this order dated 18th February, 1949. The application was rejected *in limine* by the Commissioner on the ground that the revision petition was barred by time. According to the petitioner, the order sought to be revised was received by him only on 24th February, 1948. He has filed this application for the issue of a writ of *mandamus* to the Commissioner of Income-tax, Madras, directing him to entertain his application and to dispose of it in accordance with law, because according to him the application was within time as it was filed within one year from the date of the receipt of the assessment order by him.

The only question on the merits which falls for decision is whether the one year has to be computed from the date when the order was signed by the Income-tax Officer, or the date when it was communicated to the petitioner, or the date, if there be any, on which the petitioner had the opportunity of coming to know of the order. The learned advocate for the petitioner relied on a catena of decisions of this Court of which it is sufficient to refer to two, namely, *Secretary of State for India in Council* v. *Gopisetti Narayanaswami Naidu Garu*[1] and *Swaminathan* v. *Lakshmanan*[2] which support his contention that the date of the order does not mean the date when the officer passed the order but the date when such order was either communicated to the party or the date when it was pronounced or published in such a manner that the party must be deemed to have had notice of it or the date of such pronouncement or publication. The learned Judges in *Secretary of State for India in Council* v. *Gopisetti Narayanaswami Naidu Garu*[1], were no doubt faced with the difficulty of straining the language which *prima facie* does not import a date different from the date when the order is actually passed. In *Firm of Mohan Lal* v. *Commissioner of Income-tax, Bihar and Orissa*[3], a Bench of the Patna High Court, without referring to the decisions of this Court, arrived at a conclusion which undoubtedly is supported by the *prima facie* meaning of the language used in the statute. We see no reason to disregard the consistent course of authority in this Court on this point.

Mr. Rama Rao Sahib, learned counsel for the Income-tax Department, contended that the rule laid down in the two Madras decisions above cited is not an invariable and inflexible rule applying to the provisions relating to appeals and revisions made in every enactment, and that each such provision in a particular

1. (1910) I.L.R. 34 Mad. 151.
2. (1929) 59 M.L.J. 585 : I.L.R. 53 Mad. 491.
3. (1929) I.L.R. 9 Pat. 172.

enactment should be construed having regard to the general scheme of that enactment and taking into account the history of legislation in respect of the subject-matter of that enactment. He placed strong reliance on the fact that there had been amendments of the Income-tax Act and with regard to certain rights of appeal the amendments had specifically provided that time should be computed from the date of the receipt of the order sought to be appealed against, but there was no such amendment introduced in section 33-A. It is not for us to consider why the language of section 33-A (2) was not altered. The only question which we have to decide is whether there is anything in the reasoning of the learned Judges in *Secretary of State for India in Council* v. *Gopisetti Narayanaswami Naidu Garu*[1] and *Swaminathan* v. *Letchmanan*[2], which makes the application of the rule laid down by them dependent on the provisions of a particular statute. We think there is none. On the other hand, we consider that the rule laid down by the learned Judges in the above two decisions—and we are taking the same view—is based upon a salutary and just principle, namely, that if a person is given a right to resort to the remedy to get rid of an adverse order within a prescribed time, limitation should not be computed from a date earlier than that on which the party aggrieved actually knew of the order or had an opportunity of knowing the order and therefore must be presumed to have had knowledge of the order. We do not agree with Mr. Rama Rao Sahib on the length of the period prescribed for filing an appeal or a revision petition or a suit has any bearing on the question. In *Secretary of State for India in Council* v. *Gopisetti Narayanaswami Naidu Garu*[1] the period was one year. In *Swaminathan* v. *Letchmanan*[2] the period was thirty days.

Mr. Rama Rao Sahib further contended that the provisions in sub-section (2) of section 33-A is really not a provision prescribing a time limit for the exercise of the right of the party aggrieved but it imposes a limit to the exercise of revisional powers by the Commissioner and therefore time must be computed from the date when the order was actually passed. Plausible though this argument may be, so far as sub-section (1) of section 33-A is concerned, we are of opinion that it is not sound so far as the right given to the party aggrieved under sub-section (2) is concerned. In a case falling under sub-section (1) the Commissioner acts of his own motion. There is no question of the aggrieved party invoking his jurisdiction. There can be no occasion to apply the rule enunciated in *Secretary of State for India in Council* v. *Gopisetti Narayanaswami Naidu Garu*[1]. It may be said that the Commissioner's power to call for the record ceases with the lapse of one year from the date of the order by the subordinate authority. But in a case falling under sub-section (2) the party aggrieved has got to take the steps of applying for revision and he is allowed one year from the date of the order. The provision is, therefore, certainly in the nature of a time limit for the application for revision.

Mr. Rama Rao Sahib raised two objections to the maintainability of the application. One objection was that a writ of *mandamus* cannot be issued in respect of any proceedings under the Indian Income-tax Act because the Act is a complete Code in itself providing for adequate remedies for aggrieved assessees. It is quite true that the Income-tax Act does contain several provisions for appeals and revisions and reference. If the petitioner had sought to obtain from this Court any relief which he would have been entitled to obtain under any of the provisions of the Income-tax Act, then certainly we would have no hesitation in holding that this Court would not exercise its power to issue prerogative writs to give such relief to an assessee. But this application is not made to obtain any of the reliefs which the assessee might obtain under the provisions of the Income-tax Act. This application is only to direct the Commissioner to entertain an application provided by the Act itself on the ground that he has been improperly denied that right. The relief which he seeks at our hands is only a direction to the Commissioner to entertain and dispose of the application according to law. This relief the petitioner

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1. (1910) I.L.R. 34 Mad. 151.
2. (1929) 59 M.L.J. 585 : I.L.R. 53 Mad. 491.

cannot obtain under any of the provisions of the Income-tax Act. We therefore see no substance in this objection.

The other objection is based on the long delay in making the application. The order of the Commissioner rejecting the petitioner's application for revision was made on 5th April, 1949, while the application for the issue of a writ of *mandamus* was made about a year after that date. We have held that though there is no period of limitation as such prescribed for application for the issue of prerogative writs, long delay can be one of the grounds for refusing to grant an application for the issue of such writs. In this case, however, we think there are circumstances which should make us take a more lenient view. Though wrongly advised, the applicant appears to have sought some remedy from the Central Board of Revenue, of course, unsuccessfully. Having regard to this fact, we do not consider that the delay should prevent the party from obtaining the relief to which we have found he is entitled. We think that disallowance of the costs of the petition would amply provide for the justice of the case.

As the Commissioner of Income-tax has on a wrong construction of section 33-A (2) of the Act refused to entertain the application made by the party for a revision of the assessment made by the Income-tax Officer, a writ of *mandamus* will issue to him to take the application on file and dispose of it in accordance with law. As already observed, there will be no order as to costs.

K.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Kattikoolathil Mammu .. *Petitioner* *

v.

Vinayaka Kamath and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rule 89—Holding any interest—Meaning of—Attaching creditor—Right to make a deposit.

The words 'holding any interest' in Order 21, rule 89 of the Civil Procedure Code, substituted for the words "holding an interest therein by virtue of the title acquired before such sale" is intended to give a more beneficent and wider right than was contemplated before.

A person who has attached property has certainly got interest in seeing that the property is not alienated or otherwise transformed and so an attaching creditor has got an interest in the property sufficient to enable him to make the deposit contemplated under Order 21, rule 89.

Case-law reviewed.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Munsif Court, Taliparamba, dated 22nd November, 1948, in and made in R.E.A. No. 496 of 1948, in R.E.P. No. 508 of 1947, in O.S. No. 5 of 1946.

A. Achuthan Nambiar for Petitioner.

The Government Pleader (*P. Satyanarayana Raju*) and *K. Sanjeeva Kamath* for Respondents.

The Court delivered the following

JUDGMENT.—In *Vootla Viriah* v. *Tadepalli Subba Rao*[1] following the observations of Spencer and Venkatasubba Rao, JJ., in *Dhanammal* v. *Veeraraghava Naidu*[2] Horwill, J. and myself have laid down that the word "interest" in Order 21,

* C.R.P. No. 894 of 1949. 1st December, 1950.

1. (1949) 1 M.L.J. 316 at 318.

2. (1922)44 M.L.J. 325.

rule 89 has got a very wide import and should be construed very liberally. Any inchoate right which a party may have over a property may be sufficient interest to enable him to apply under Order 21, rule 89. Mr. Achuthan Nambiar contended that attachment of property does not confer any interest on the attaching creditor, except that if the property is alienated by the act of parties, such alienation will have no precedence over the attachment. He invites my attention to the observations in *Krishnaswami Mudaliar* v. *Official Assignee, Madras*[1], where it is observed that an order of attachment merely restrains a debtor's debtor from paying to the debtor the money attached and restrains the debtor from receiving the same. In *Narayana* v. *Pappayi*[2], there is an observation that it has frequently been held that mere attachment of property does not create any interest in the property and therefore it follows that the expression "affected by the sale" should not be construed as if the words were "having an interest in the property". That mere attachment does not create interest in property is also seen from the decisions in *Krishnama Naicker* v. *Sivaswami Chettiar*[3] and *Manickka Chettiar* v. *Official Assignee, Madras*[4]. It is also evident from section 64, Civil Procedure Code, that what the attachment prohibits is either payment of the money by the debtor's debtor or the alienation of the property. It has to be observed that Order 21, rule 89, has undergone some transformation. The words originally were "holding an interest therein by virtue of the title acquired before such sale". Now those words have been altered and the words "holding any interest" have been substituted. It seems to me that the substitution is intended to give a more beneficient and wider right than was contemplated before. A person who has attached property has certainly got interest in seeing that the property is not alienated or otherwise transformed. I am inclined to hold that an attaching creditor has got an interest in the property sufficient to enable him to make the deposit contemplated under Order 21, rule 89.

In such circumstances the decision of the lower Court is right and the Civil Revision Petition is dismissed. No costs.

K.C. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

M. A. Venkatachalam Chettiar .. *Petitioner* *

Essential Supplies (Temporary) Powers Act (XXIV of 1946), Section 7 (1) and Madras Cloth (Dealers) Control Order, 1948, clause 4 (1)—Clause prohibiting sale of a particular cloth as a condition in licence—Violation of the condition—If an offence

Where a retail dealer in cloth was issued a licence and a particular clause introduced into it prohibited him from selling B. and C. Mill cloth and in contravention of it he sold cloth of the description given in the prohibited clause,

Held, that the licence cannot contain such a condition and the prosecution for violating such a condition cannot stand.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying the High Court to revise the order of the Court of the Additional First Class Magistrate at Tanjore, dated 10th September, 1948, in S.T.O. No. 455 of 1949.

M. Ranganatha Sastri for Petitioner.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) for the State.

The Court made the following

ORDER.—The petitioner was convicted for an offence under section 7 (1) of Act XXIV of 1946 read with clause 4 (1) of the Madras Cloth (Dealers) Control Order 1948 and sentenced to a fine of Rs. 200.

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1. (1903) 13 M.L.J. 278 : I.L.R. 26 Mad. 673 at 678.
2. (1927) 53 M.L.J. 229 at 232.
3. (1943) 2 M.L.J. 281.
4. (1944) 1 M.L.J. 116.

* Cr.R.C. No. 1608 of 1949. (Cr.R.P. No. 1523 of 1949).

1st December, 1950.

The petitioner has been issued a retail licence but in the licence issued a clause was added prohibiting him from selling B. and C. Mill cloth. The conviction now is for violating this condition and selling 3/4 yard to P.W. 3 and 2½ yards to P.W. 4. This sale is said to have been effected between 3rd March, 1949, and 10th March, 1949; but on application already made, the petitioner got permission to sell B. and C. Mill cloth also, by order, dated 15th March, 1949. However the authorities still chose to prosecute the petitioner though such cases do not need to be brought to Court as they are purely of a technical nature. But the petitioner having been convicted, the point is raised whether such a clause as prohibiting him to sell B. and C. Mill cloth can be introduced in the licence. The licence is in form II appended to the Madras Cloth (Dealers) Control Order of 1948.

A perusal of the form will clearly show that such a clause cannot find a place in the licence. If it is to be mentioned it can only be in column 6. But column 6 has two clauses, both of which cannot apply to this restriction. It is significant to note that in the form provided in the Madras Cloth (Dealers) Control Order of 1948, clause (*a*) of Column 6, specifically refers to the kind of cloth to which the business is confined. The absence of such a clause in the form provided for in the Order of 1948 clearly shows that this cannot be a condition of licence issued under the Order of 1948. But in the Order of 1948, under clause 14, a direction may be given not to sell or deliver any cloth of a specified description except to such person or persons. Whether a total prohibition of sale of B. and C. Mill cloth will fall within such a direction is doubtful in view of the decisions in *Municipal Corporation of the City of Toronto* v. *Virgo*[1] and *Attorney-General of Ontario* v. *Attorney-General of Dominion and another*[2]. The American cases reported at page 69 of volume 23 of the Encyclopedia of Law and Procedure lend support to the view that a power to "regulate", "licence", or "tax" the sale of intoxicating liquors does not confer authority to adopt an Ordinance totally prohibiting such a sale. However, the prosecution in this case is not for violating the provisions of clause 14 but only for violating the condition of licence. I have held that the licence cannot contain such a condition. The prosecution for violating such a condition cannot therefore stand. The conviction and sentence are set aside and the petitioner is acquitted. The fine, if paid, will be refunded.

K.C. *Petition allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AYYAR.

S. N. Komaraswami Gounden .. *Petitioner* *

Civil Procedure Code (V of 1908)—Section 151 and Madras Buildings (Lease and Rent Control) Act (XV of 1946)—Amendment by the Appellate Tribunal of mistake as to the door number of the house in the order of the Rent Controller—Jurisdiction.

It may be that section 151, Civil Procedure Code, by itself does not apply to proceedings under the Madras Buildings (Lease and Rent Control) Act, 1946. But a quasi-judicial tribunal like the Rent Controller or the Appellate Tribunal has an inherent power to set right mistakes made by inadvertance so long as the amendment does not amount to a review of the adjudication already made. Hence, the Appellate Tribunal would be justified in correcting a mistake as to the door number of the house concerned when in fact both the parties knew to which property the proceedings related.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in C.M.P. No. 2158 of 1950 in C.M.A. No. 50 of 1950 on the file of the Court of the Subordinate Judge, Coimbatore, and quash the order, dated 7th November, 1950 and made therein.

S. R. Subrahmaniam for Petitioner.

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1. (1896) A.C. 88.
2. (1896) A.C. 348.

* C.M.P. No. 1160 of 1950.

22nd November, 1950.

The order of the Court was delivered by

The Chief Justice.—There are no merits in this application. There was an application for eviction of the petitioner from the premises of which he was in occupation and he failed in both the Courts. In execution of the order of eviction it turned out that the premises of which the petitioner is admittedly in occupation and which admittedly belongs to the landlord was given a wrong door number. So, the landlord filed an application for amendment of the description of the property by correcting the door number. The learned Subordinate Judge, who was the Appellate Tribunal, has directed an amendment of the petition, the order of the lower Court and the order of the Appellate Tribunal. This application is to quash this order.

It was contended by the learned counsel for the petitioner that the application was made under section 151 of the Civil Procedure Code which did not apply and also that the landlord should have approached the Rent Controller and not the Appellate Tribunal for an amendment, even assuming that he was entitled to that relief. We see no substance in either of these contentions. It may be that section 151 of the Civil Procedure Code by itself does not apply to proceedings under the Madras Rent Control Act, XV of 1946. But we are of opinion that a quasi-judicial tribunal like the Rent Controller or the Appellate Tribunal has an inherent power to set right mistakes made by inadvertence so long as the amendment does not amount to a review of the adjudication already made. In this case it is not denied that both the landlord and the tenant knew to which property the proceedings related. In fact, when the Rent Controller passed an order of eviction against the petitioner, he filed an appeal to the Appellate Tribunal presumably on the assumption that the proceedings related to the house which he was occupying. It does not lie in his mouth to oppose the present application for amendment. It is true that an amendment of both the orders of the Rent Controller and the Appellate Tribunal was not necessary, because the order of the Rent Controller was merged in the order of the Appellate Tribunal, but we see nothing wrong in making such a direction out of abundant caution.

The application is dismissed.

V.S. ——— *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AYYAR.

Pelisetti Venkatasubba Rao .. *Petitioner* *

v.

The State of Madras, represented by the Secretary of the Local-Self Government Department .. *Respondent.*

Madras District Municipalities Act (V of 1920), section 40 (1)—Removal of chairman——Finality of the opinion of Government—High Court if and when can quash order of Government.

Under section 40 (1) of the Madras District Municipalities Act, it is the opinion of the Provincial Government that is decisive on the question whether a chairman or vice-chairman of a Municipality is or is not guilty of any of the charges levelled against him. It is not the province of the High Court, or for the matter of that any Court, to record its opinion on such a matter. Therefore unless a chairman who has been removed is able to convince the High Court that the Government have not formed an opinion on materials placed before them, or that they formed the opinion on materials entirely irrelevant to the charges levelled against him, or that the Government acted fraudulently in exercise of their power under that section, the High Court cannot quash the order of the Provincial Government removing him.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records and to quash the proceedings of the Secretary, Local Self Government Department, Government of Madras, Fort St. George, Madras, in the G.O. Mis. No. 593, dated 15th March, 1950 Local Administration Department.

*C.M.P. No. 2797 of 1950. 16th November, 1950.

R. Venkatasubba Rao, P. Ramachandra Rao and *P. Babula Reddy* for Petitioner.

The Government Pleader (*P. Satyanarayana Raju*) on behalf of the State of Madras.

The Order of the Court was pronounced by

The Chief Justice.—This is an application for the issue of a *writ of certiorari* to quash the order of the Local Government removing the petitioner from his office of chairman of the Municipality of Palacole. The order was passed by the Government on 15th March, 1950, under section 40 of the Madras District Municipalities Act. Under section 40 (1) of that Act

> "The Provincial Government may, by notification, remove any chairman or vice-chairman who, in their opinion, wilfully omits or refuses to carry out or disobeys the provisions of this Act or any rules, by-laws, regulations or lawful orders issued thereunder or abuses the powers vested in him".

Under sub-section (2) the Government, before passing an order of removal, is bound to give the chairman concerned an opportunity for explanation, and the notification issued under sub-section (1) shall contain a statement of the reasons of the Government for the action taken. It is not denied that an opportunity was given to the petitioner for explanation. From a perusal of the order it is also clear that it does contain a statement of the reasons of the Government for the action taken. It cannot also be denied that the reasons given, namely, that the petitioner failed to convene the requisitioned meeting and arbitrarily disallowed the resolutions moved by certain councillors without recording the relevant proceedings in the Minutes Book would come within the provision of section 40, sub-section (1) and would be valid reasons for removal.

The learned counsel for the petitioner contended that the two charges which in the opinion of the Government justified his removal were not really made out. We have pointed out more than once that it is not the province of this Court, or for the matter of that any Court, to record its opinion as to whether a chairman is or is not guilty of any of the charges levelled against him. Under section 40, sub-section (1) it is the opinion of the Provincial Government that is decisive on the matter. Therefore, unless the petitioner is able to convince us that the Government have not formed an opinion on materials placed before them, or that they formed the opinion on materials entirely irrelevant to the charges levelled against him, or that the Government acted fraudulently in exercise of their power under that section, this Court cannot quash the order of the Provincial Government removing a chairman or vice-chairman of any Municipality. The learned counsel took considerable time to convince us as regards the first ground that he had reasons for failing to convene the requisitioned meeting. As we have heard him at such length, we may say that he has utterly failed to convince us that the petitioner was right in having failed to convene the requisitioned meeting. In our opinion, rule 3, sub-rule (1) of Schedule III of the Act in the most unambiguous terms makes it incumbent on the chairman to convene a meeting provided three things are satisfied, namely, that the requisition is by not less than a third of the members then on the council, and it specifies the day (not being a public holiday) when the meeting is to be held, and it specifies the purpose for which the meeting is to be held. The requisition has to be delivered during office hours to the chairman or other person mentioned in that rule at least ten clear days before the day of the meeting. It was not denied by the petitioner that all the requirements of rule 3 (1) were satisfied. The chairman was therefore bound to convene the meeting. Whether any resolution passed at that meeting would be valid or not valid because of other provisions of the Act, and what work could be transacted at that meeting are all beside the point. These things do not concern the chairman in any way so far as his obligation under rule 3 (1) is concerned. Once the conditions laid down in that rule are satisfied, the chairman has no other option but to convene the meeting. It is true that sub-rule (2) of rule 3 provides what is to happen if the chairman failed to do his duty, but that provision certainly cannot help the chairman when proceedings are taken against him under section 40 of the Act.

Learned counsel for the petitioner also contended that the other charge, namely, of not recording relevant proceedings in the Minutes Book, has not been made out, but there is no substance in this contention. There appears to be no doubt that the Minutes did not contain any record of the resolutions sought to be moved by some of the councillors and which apparently were not allowed to be moved by the petitioner.

As we have already mentioned, it is not for us to say if the Provincial Government should or should not have removed the petitioner. We can only interfere if the Government in removing the petitioner have contravened any of the material provisions of the Act. That we certainly cannot say. The application has no merits and therefore must be and is hereby dismissed with costs.

V.S. ——— *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Gnanaprakasam Fernanda .. *Petitioner* *

v.

M. S. Ratnasami Nadar .. *Respondent.*

Civil Procedure Code (V of 1908), section 151—Stay of execution—Inherent power to grant time.

Stay of execution of a decree for eviction was sought among other grounds, on the ground that it will be very hard for the petitioner and other persons, who have built houses, if they are suddenly bundled out of the plots after dismantling the houses and thrown into the streets and that they must be given at least some time to find suitable accommodation elsewhere. The trial Court refused the prayer on the ground that it had no power to grant the prayer under section 151, Civil Procedure Code or under any other provision of law.

Held : There is nothing in law preventing a Court from giving a short time in the exercise of its inherent powers, under section 151, Civil Procedure Code or otherwise.

Time granted by the High Court in the exercise of its inherent powers.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsif, Tuticorin, dated 5th August, 1950 in E.A. No. 302 of 1950 in O.S. No. 11 of 1947, etc.

C. R. Pattabhiraman and *C. S. Rajappa* for Petitioner.

S. Ramachandra Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—These are three connected Civil Revision Petitions against the order of the District Munsif of Tuticorin, dated 5th August, 1950, refusing stay of execution and delivery of the suit plots to the decree-holder, Ratnasami Nadar, in E.P. No. 302 of 1950 in O.S. No. 11 of 1947 on the ground that he had no powers to do so under section 151 of the Civil Procedure Code or under any other provision of law. In these three petitions, it has been urged that nearly 70 houses have been built on the suit plots, and also a church and that it will be very hard for the poor petitioners and other persons, who have built the houses, if they are suddenly bundled out of the plots after dismantling the houses and thrown into the streets and that they must at least be given some time to find suitable accommodation elsewhere especially as the Government are taking land acquisition proceedings for acquiring these very plots for the petitioners and others involved. I agree with the lower Court that there is no reason whatever for staying eviction indefinitely as the appellate Court's judgment in A.S. No. 80 of 1948 was delivered as long as 10th December, 1948, and second appeals have not yet been filed. But, on the other hand, I have no doubt whatever that this is a case where some little time ought to be given to the petitioners for finding suitable accommodation elsewhere before bundling them out of this site and I consider the request of the learned counsel for the petitioners for time to be given till the 1st of February, 1951, to be reasonable. I see nothing in law preventing a Court from giving such short time

*C.R.P. Nos. 1273, 1274 and 1275 of 1950. 14th December, 1950.
C.M.P. Nos. 7881, 7882 and 7883 of 1950.

in the exercise of its inherent powers, under section 151 of the Civil Procedure Code or otherwise. Of course, I cannot look into the Gazette notifications regarding the alleged land acquisition proceedings producted by the petitioner's counsel now as these records were not exhibited before the lower Court or referred to by it specifically before passing its order. Nor am I concerned with the action, if any, said to be proposed to be taken by the Government for taking possession of these plots prior to acquisition.

In the end, therefore, I confirm the orders of the lower Court in all the three execution applications but direct the eviction orders should only be passed in the execution proceedings on or after the 1st February, 1951. I am giving this time in the exercise of my inherent powers just as time is often given in equity, when a house rent appeal against eviction is rejected, for the person sought to be evicted to get some suitable accommodation, if he can, within the time given. In the circumstances, of course, the petitioners will pay the costs of the respondent in all these three Civil Revision Petitions. The three Civil Miscellaneous Petitions do not require separate orders, in view of the orders in the Civil Revision Petitions. They are also closed. No order as to costs in them.

V.P.S. ———— *Orders confirmed. Time given.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

Gurusami Naidu *alias* Chinnaswami Naidu .. *Petitioner* *

v.

Villis Guruswami Naidu .. *Respondent.*

Criminal Procedure Code (V of 1898), sections 154 and 164.—First information report—What will constitute—Information of alleged offence given at police station—Entry in the General Diary—Subsequent statement recorded from the victim of the alleged occurrence—If can be used against him for convicting him of an offence under section 211, Penal Code.

When a Court has to decide whether a particular information lodged at the police station is a First Information Report or not, questions as to whether the alleged offence is the result of an accident, or the voluntary or wrongful act of some one else or is covered by one or other of the general exceptions are wholly irrelevant as they are circumstances which can be properly ascertained only during the actual investigation. No doubt gossip or rumour or hearsay would not ordinarily fall within the scope of section 154, Criminal Procedure Code. But if some one goes to a police station and definitely tells the officer-in-charge that a cognizable offence has been committed and that statement is made with a view to inducing the police officer to enquire into the matter, there is no reason for refusing to call it information relating to the commission of a cognizable offence within the meaning of section 154, Criminal Procedure Code.

Where a cousin of a person who had received certain injuries goes to a police station and gives information that such a person has been shot and that he has been brought to the hospital and an entry is made in the General Diary to that effect and subsequently a statement is recorded by the Sub-Inspector from the injured person, the first information would be the entry in the General Diary and the subsequent statement would fall within the mischief of section 164, Criminal Procedure Code and would not be available to be used against the injured person for convicting him of an offence under section 211, Penal Code.

Petition under sections 435 and 439, Criminal Procedure Code 1898, praying that the High Court will be pleased to revise the judgment of the Court of Session, Coimbatore, dated 14th October, 1949 in C.A. No. 112 of 1949 preferred against the order of the Court of the Principal Assistant Sessions Judge, Coimbatore in S.C. No. 20 of 1949.

M. E. Nambiar and *M. Sekhara Menon* for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

V. Rajagopalachari and *P. S. Kailasam* for Respondent.

The Court made the following

ORDER.—The petitioner was convicted by the Assistant Sessions Judge, Coimbatore, under section 211, Indian Penal Code, and sentenced to undergo rigorous

*Cr.R.C. No. 1439 of 1949. 22nd January, 1951.
(Cr.R.P. No. 1361 of 1949).

imprisonment for three years. His appeal to the Sessions having been dismissed, he has come to this Court in revision.

The material facts are these. About 8-30 p.m. on 15th October, 1947, when the petitioner Guruswami was on the verandah of his garden shed, he received certain injuries either as the result of a gun shot or as the result of the explosion of a country bomb. He was taken to the hospital at Udamalpet where he was examined and attended to by the local Assistant Surgeon. His cousin, also called Guruswami, went to the police station at Udamalpet at about 9-30 p.m. and told the Sub-Inspector and the Circle Inspector that the petitioner had been shot and that he had been brought to the hospital. The Sub-Inspector did not take down this statement of Guruswami in writing. Instead, he merely made an entry in the General Diary to this effect :

"21-30 hours. G. Guruswami Naidu of Chinnakomalapalayam stated that Sri Guruswami has been shot and the injured man has been brought to the hospital. I go to hospital with the Circle Inspector of Police. Station charge with H.C. No. 932 ".

Thereafter the Sub-Inspector and the Circle Inspector went to the hospital to see the injured man. From there on the suggestion of the doctor, the Sub-Inspector went to the Sub-Magistrate and took him to the hospital. Between 9-50 and 10-5 p.m. the Sub-Magistrate recorded a dying declaration from the petitioner. At that time both the Sub-Inspector and the Circle Inspector were present. Half an hour later the Sub-Inspector recorded another statement from the petitioner which was marked as Exhibit P-4 in the case. In that document the petitioner alleged that when he was sitting on the pial of his house, four persons whom he named and who were examined as P.Ws. 14, 15 and 24 went to the threshing floor, that they were armed with guns, that they were his enemies, that on seeing them he got up in fear and when he tried to go into the house he was shot from behind. The police investigated the case and taking the view that it was false, prosecuted the petitioner under section 211, Indian Penal Code. The charge preferred by the petitioner was held to be false primarily for two reasons : (1) the injuries on the person of the petitioner and the traces of arsenic detected on the dhoti he was wearing at the time he was injured indicated that he had been injured as the result of the explosion of a bomb and not as the result of a shot from a gun, (2) P.W. 24 whom he had named as one of his assailants had what appeared to be a reasonably good *alibi*.

The first argument which Mr. Nambiar, the learned advocate for the petitioner put forward was that the Courts below were in error in treating Exhibit P-4, the statement which the Sub-Inspector recorded from the petitioner at about 10-35 on the night of 15th October 1947, as the F.I.R. in the case. According to him the real F.I.R. in the case is the information which Guruswami Naidu, the cousin of the petitioner gave at the police station. I think there is very considerable force in this argument. It is no doubt true that Guruswami the cousin of the petitioner, did not say who the offenders were or give any inkling about them, but that is not a circumstance which alters the character of that information. In quite a large number of cases the complainant does not know the name of the offender, but that would not alter the fact that the information is what is called an F.I.R. If a citizen informs the concerned station house officer that his house has been burgled the previous night, that would certainly be information relating to the commission of a cognizable offence within the meaning of section 154, Criminal Procedure Code, notwithstanding that the complainant is unable to say who the offenders were or even what all articles he has lost. The learned Sessions Judge was inclined to take the view that the information given by the cousin Guruswami could not be treated as an information under section 154 because as he says there was no indication in it as to whether the petitioner had been voluntarily shot or whether his injuries were the result of an accident or whether the matter was covered by some one or other of the general exceptions set out in the Penal Code. He was also influenced by the following circumstances :

"In fact, Exhibit P-7 gave less particulars than the 'Intimation of accident' form filed in and en t by medical officers, which is not usually treated as sufficient to start an investigation. P.W.

25's evidence shows that the informant C. G. Guruswami Naidu made himself scarce after giving the information. Apparently it was not possible for P.Ws. 2 and 25 to reduce the information to writing as prescribed by section 154, Criminal Procedure Code. It may be that the manner in which C. G. Guruswami Naidu gave the information was so suspicious that they were unable to attach any weight to the same. This might have been the reason why they proceeded to the hospital to see for themselves whether there was any foundation of truth in the information."

It seems to me that considerations of this kind are wholly irrelevant when we have to decide whether a particular information lodged at the police station is an F. I. R. or not. Whether an alleged offence is the result of an accident or the voluntary and wrongful act of some one else or is covered by one or other of the general exceptions—these are circumstances which can be properly ascertained only during the actual investigation. The fact that the quantum of material information in Ex. P-7 is meagre does not really affect its true nature. If a band of hooligans start looting in a bazaar and one of the residents of the locality runs up to the station and informs the station house officer that looting is proceeding, I do not think that that report ceases to be information relating to the commission of an offence merely because the informant is unable to furnish fuller particulars. The circumstance that the informant ran away thereafter does not alter the fact that it relates to the commission of a cognizable offence and is also a report relating to it. The inability or the failure of the station house officer in the present case to reduce to writing the information brought by the cousin of the petitioner does not take away from it its character as a report relating to the commission of a cognizable offence. The omission would only show that they did not act with sufficient alacrity or were negligent. The attempt to discover whether there was any foundation of truth in the report is really a part of the investigation. A police officer conducting an investigation has to do a number of things. First of all he has to find out whether the information is true. If he considers it is true, he has next to discover who the offenders are and try to arrest them. He has to recover the properties lost as a result of the crime or connected with the crime. Lastly, he will have to collect the evidence necessary to bring the offenders to book. An enquiry the object of which is to discover whether the information is true or false is really the starting point of an investigation. I agree that mere gossip or rumour or hearsay would not ordinarily fall within the scope of section 154, Criminal Procedure Code, but that is because it is really not "information" at all. Gossip and rumour are not statements relating to a crime; they are statements about statements relating to a crime; they involve no assertion about the crime and have no shape or form. They do not therefore amount to information. But if someone goes to a police station and definitely tells the officer-in-charge there that a cognizable offence has been committed and that statement is made with a view to inducing the police officer to enquire into the matter, I do not see how we can refuse to call it information relating to the commission of a cognizable offence within the meaning of section 154, Criminal Procedure Code. That in subsequently dealing with the information so furnished the police officers concerned failed to do what the Code directed them to do will not in any way change the character of that information.

The case of *Chandrika Ram Kahar* v. *King Emperor*[1], is in point. The head note to the report reads as follows:

"Where a person reported to a police officer that he had seen a certain woman with her throat cut and the officer did not make a record of the fact but subsequently treated an information lodged by the woman's father as the first information in the case, *held* (i) that the unrecorded information was in fact the first information in the case; . . . and (iii) that the information given by the woman's father not being the first information could not be taken into consideration."

A large number of decisions have been read before me by learned Counsel on both sides, but I do not think it necessary to refer to them, for in substance whether a particular information amounts to an F. I. R., or not is essentially a question of fact and in the present case the matter seems to be plain to my mind. I have no

1. (1922) I.L.R. 1 Pat. 401.

doubt that Ex. P-4 on the basis of which the petitioner was convicted was a statement falling within the mischief of section 162, Criminal Procedure Code, and therefore not available to be used against him. In this view it becomes unnecessary to deal with the other questions of fact raised by Mr. Nambiar. The revision petition is allowed and the petitioner acquitted and ordered to be set at liberty unless he be otherwise lawfully detained.

V.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

V. P. Abu Syed Sahib .. *Petitioner**

v.

V. P. Ahmed Mohideen Sahib .. *Respondent.*

Criminal Procedure Code (V of 1898), section 145—Applicability—Dispute relating to a mill.

Land in section 145, Criminal Procedure Code, is used as synonymous with immoveable properties which includes things attached to earth. A mill therefore which is attached to the earth will fall within the scope of immoveable property or land. In this view a dispute though it may be to the mill really includes the dispute to the land in which it is situate and section 145, Criminal Procedure Code, will apply.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Joint Magistrate, Tindivanam, dated 4th November, 1949, in M. C. No. 2 of 1949.

S. Krishnamurthi for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

L. S. Veeraraghava Aiyar for Respondent.

The Court made the following

ORDER.—The main contention of Mr. Krishnamurthi who appears for the petitioner is that the dispute in this case really relates to a mill which is situated in the premises mentioned in the preliminary order and that the definition of "land" mentioned in clause 2 to section 145, does not include mills and therefore this cannot be subject of proceedings under section 145, Criminal Procedure Code. It is no doubt true that the definition of the land mentioned in clause 2 of the section does not mention mills as being included in the definition. Land or water have been defined to include buildings, markets, fisheries, crops or other produce of the land. The definition does not say that the land means buildings, markets, etc. It says it includes also buildings, markets, etc. The definition is not exhaustive. It is only illustrative. The crops or other produce, *i.e.*, things that could be cut and carried away fall under the definition of the term land. It has been held in *Rev. A. Rampus* v. *Subba Reddi*[1] following *Emperor* v. *Gaya Prasad*[2] that trees cut and lying in the land came within the definition of land. As observed by Malik, J., in *Emperor* v. *Gaya Prasad*[2], section 145 being a preventive section a liberal interpretation should be given. He has further observed that it must include property attached to earth. The chapter in which section 145 occurs is headed Disputes as to Immoveable Properties. This shows that land in section 145 is used as synonymous with immoveable properties which includes things attached to earth. Mill therefore which is attached to the earth will fall within the scope of immoveable property or land. It is in this view that the dispute though it may be to the mill really includes the dispute to the land in which it is situate and section 145 will apply.

On the merits, I am satisfied that the lower Court was justified in coming to the conclusion that the mills was in the possession of the respondent herein. In the result the petition is dismissed.

V.S. ——— *Petition dismissed.*

*Cr. R. C. No. 1611 of 1949. 18th January, 1951.
(Cr. R. P. No. 1526 of 1949.)

1. (1950) 1 M.L.J. 213. 2. I.L.R. (1947) All 741 at 743.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

K. Venkataratnam and others .. *Petitioners**

Criminal Procedure Code (V of 1898), section 161—Record of statement by investigating officer—Form—Failure to conform to—Effect.

Under section 161 (3) the police officer may reduce to writing any statement made to him in the course of investigation and if he does so he shall make a separate record of the statement of each of such persons whose statement he records. The failure to do so would be a violation of the mandatory provision of section 161 (3) and would often result in the earlier statement of the witnesses not being made available to the accused and the Court not being in a position to test the veracity of these witnesses. It is necessary that the investigating officers should remember the salutary and mandatory provisions of section 161 (3) and conform to them.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of Sessions, Guntur division, dated 18th July, 1949, in C. A. No. 54 of 1949, preferred against the order of the Court of the Sub-Divisional Magistrate, Tenali, in C. C. No. 93 of 1948.

Messrs. Row and *Reddi* for Petitioners.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

The Court made the following

ORDER.—The petitioners in this case have been convicted under section 7 (2) of Act I of 1947 and sentenced to three months rigorous imprisonment.

The offence consists in their being members of the Communist Volunteer Corps and disobeying the provisions of G. O. No. 275 Public, dated 6th February, 1948. Under the provisions of the said G. O., the members of the Communist Volunteer Corps were prohibited from holding processions, meetings or assemblies or from performing drills or parades, with or without arms. It is only when the members of the Communist Volunteer Corps perform such drills they could be said to have committed an offence under section 7 (2) of Act I of 1947 as it is a violation of the G. O. passed on 6th February, 1948.

The proof that these petitioners are members of the Communist Volunteer Organisation consists in the testimony of P. Ws. 1 to 3 and 5. It is clear from the evidence of P. W. 5 that his version regarding the identification cannot be acted upon. According to the evidence of P. Ws. 1 to 3 they were examined on 3rd September, 1948 and 18th September, 1948, the offence having been committed on 30th August, 1948 and 31st August, 1948. In their examination on 3rd September, 1948, none of these three witnesses ever told the police officer that these petitioners were members of the Communist Volunteer Organisation. This implication that they were members of the Communist Volunteer Organisation emerged only in their examination on 18th September, 1948. The evidence, therefore, that these petitioners were members of the above organisation is a belated one and cannot be acted upon. There is no other evidence that these petitioners were members of the forbidden organisation. One of the ingredients of the offence has not been made out and the conviction cannot therefore stand. The petitioners are acquitted.

I cannot take leave of this case without pointing out the irregularity committed by the investigating officer in the case. Under section 161 (3), Criminal Procedure Code, the police officer may reduce into writing any statement made to him in the course of an examination under this section, and if he does so he shall make a separate record of the statement of each such person whose statement he records. There is no doubt that in this case the investigating officer chose to record the statement of witnesses, but he admits in his cross-examination that he did not record the statement of each witness separately. This is a clear violation of the mandatory provision of clause (3) of section 161, Criminal Procedure Code. It

* Cr.R.C. No. 884 of 1949. (Cr.R.P. No. 820 of 1949). 17th January, 1951.

is necessary that the investigating officers should conform themselves to the requirements of the section. The failure to do so very often results in the earlier statements of these witnesses not being made available to the accused, and the Court is not in a position to test the veracity of these witnesses. It is high time the investigating officers remember the salutary and mandatory provisions of section 161 (3), Criminal Procedure Code and conform to them. A copy of this order will be forwarded to the Inspector-General of Police.

V. P. S. ——— *Petition allowed.*

[THE SUPREME COURT OF INDIA].

[Criminal Appellate Jurisdiction.]

PRESENT :—H. J. KANIA, *Chief Justice*, S. FAZL ALI, M. PATANJALI SASTRI, B. K. MUKHERJEA, S. R. DAS, AND N. CHANDRASEKHARA AIYAR, JJ.

Tarapada De and 99 others .. *Appellants**

v.

The State of West Bengal .. *Respondent.*

Constitution of India (1950), *Article* 22 (5) *and Preventive Detention Act* (*IV of* 1950), *section* 3—*Vague grounds—Effect on validity of detention—Supplemental grounds—Serving of—If and when affects validity of detention.*

Per *Kania, C.J., Fazl Ali, Mukherjea* and *Chandrasekhara Aiyar, JJ.*—"Vague" grounds do not stand in the same footing as "irrelevant grounds." An irrelevant ground has no connection at all with the satisfaction of the Provincial Government which makes the order of detention. For the reasons stated in *State of Bombay* v. *Atma Ram Sridhar*[1], the contention that if the grounds are vague and no representation is possible there can be no satisfaction of the authorities as required by section 3 of the Preventive Detention Act cannot be accepted. This argument mixes up two objects. The sufficiency of the grounds, which gives rise to the satisfaction of the Provincial Government is not a matter for examination by the Court. The sufficiency of the grounds to give the detained person the earliest opportunity to make a representation can be examined by the Court, but only from that point of view. The contention that that the quality and characteristic of the grounds should be the same for both sets cannot be accepted. On the question of satisfaction, one person may be but another may not be satisfied on the same grounds. That aspect, however, is not for the determination of the Court, having regard to the words used in the Act. The second part of the enquiry is clearly open to the Court under Article 22 (5).

A description of the contents of a second communication by the Government to the detained person, as "supplementary grounds" does not necessarily make them additional or new grounds. One has to look at the contents to find out whether they are new grounds as explained in *State of Bombay* v. *Atma Ram Sridhar*[1]. When they only furnish details of the grounds of detention already supplied, they cannot be treated as fresh or new grounds. It is not proper to consider the true effect of the communication only by reading its opening words. The whole of it must be read and considered together.

Patanjali Sastri and Das, JJ.—For the reasons given by us in *State of Bombay* v. *Atma Ram Sridhar*[1], the contention of the detenus cannot be accepted.

Appeal under Article 132 (1) of the Constitution of India, against the Judgment and Order, dated the 16th August, 1950, of the High Court of Judicature at Calcutta, in Criminal Miscellaneous Case No. 361 of 1950.

Atul Chandra Gupta and *Sudhansu Sekhar Mukherjee*, Senior Advocates (*Arun Kumar Dutta* and *S. N. Mukherjea*, Advocates with him) for Appellant.

M. C. Setalvad, Attorney-General for India (*B. Sen*, Advocate with him) for Respondent.

The Court delivered the following

JUDGMENTS : *Kania, C.J.* (*Fazl Ali, Mukherjea and Chandrasekhara Aiyar, JJ.*, agreeing with him)—This is an appeal under Article 132 of the Constitution of India from the judgment of the High Court at Calcutta, which rejected the *habeas corpus* petitions of the appellants. The detention orders under the Preventive Detention Act, 1950, in all cases were served on the appellants on

*Case No. 24 of 1950. 25th January, 1951.

1. (1951) S.C.J. 208.

the 26th February, 1950, and the grounds for the detention were served on the 14th March, 1950. By way of specimen we quote one of them :

" You are being detained in pursuance of a detention order made under sub-clause (ii) of clause (*a*) of sub-section (1) of section 3 of the Preventive Detention Act, 1950 (Act IV of 1950), on the following grounds :—

(1) That you have been assisting the operations of the Communist party of India, which along with its volunteer organisations has been declared unlawful by Government under section 16 of the Indian Criminal Law Amendment Act (Act XIV of 1908), and which has for its object commission of rioting with deadly weapons, robbery, decoity, arson and murder and possession and use of arms and ammunitions and explosives and thus acting in a manner prejudicial to the maintenance of public order and that it is necessary to prevent you from acting in such manner.

(2) That as a member of the C.P.I. on its Kishan front, you have fomented trouble amongst the peasants of Howrah District and incited them to acts of lawlessness and violence :

and have thereby acted in a manner prejudicial to the maintenance of public order :

That as a worker of the C. P. I. you have tried to foment trouble amongst the tramways men and other workers at Calcutta and in speeches which you delivered at the University Hall and other places you actually incited them to resort to acts of violence and lawlessness ; and have thereby acted in a manner prejudicial to the maintenance of public order."

On the 16th July, 1950, the Government of West Bengal served on the appellants, " in continuation of the grounds already furnished on the 14th of March, 1950, supplementary grounds " for their detention a specimen of which is in the following terms :—

" In continuation of the grounds already furnished under order No. 6163 H. S., dated 14th March, 1950, you are being informed of the supplementary grounds for your detention which are as follows :—

You as the Secretary of the Bengal Chatkal Mazdoor Union, as a member of the Executive Committee of the Federation of Mercantile Employees Union, as the honorary reporter of the 'Khabar' newspaper (C. P. I. organ) carried on the disruptive programme of the C. P. I. on the 29th July, 1948, you along with others led a procession at Howrah preaching discontent against Government and you have been thus acting in a manner prejudicial to the maintenance of public order."

As in the case of the first grounds, these " supplementary grounds " were also served on each appellant separately. The appellants applied for a Rule of *Habeas Corpus* separately under section 491 of the Criminal Procedure Code and on the 21st July, 1950, the High Court issued a Rule in each case on the Chief Secretary to the Government of West Bengal. A second set of grounds were communicated to the appellants on the 22nd or 23rd of July, 1950. A specimen of one is in the following terms :—

"In continuation of the grounds already furnished under order No. 12820, dated 14th July, 1950, you are being informed of the supplementary grounds for your detention which are as follows :

1. That in a meeting held at the University Institute on the 19th March, 1947, under the auspices of the Calcutta Tramway Workers Union, you held out the threat that any attempt to take out tram cars on the 20th March, 1947, would be inviting disaster and you further said that if the authorities tried to resume the tram service you and your friends would not hesitate to remove the tram lines and cut the wires.

2. That on the 19th June, 1948, you presided over a meeting under the auspices of the Student Federation (C.P.I. controlled) and delivered speech advocating withdrawl of ban on the Communist Party of India and its organ Swadhinta."

The High Court after considering the whole matter rejected the petitions of the appellants and the appellants have thereupon come in appeal before us.

In the High Court, it was first contended on behalf of the appellants that the communication of the grounds dated the 14th March, was not a compliance with Article 22 (5) of the Constitution of India, as those grounds were not communicated " as soon as may be." The High Court rejected this contention. Under the circumstances of the case, we agree with the High Court and are unable to hold that in furnishing the grounds dated the 14th March, 1950, the authorities had failed to act in accordance with the procedure laid down in Article 22 (5) of the Constitution. Under the Bengal Criminal Law Amendment Act, 1930, a very

large number of persons were detained. The validity of that Act was being challenged in the High Court and the judgment was expected to be delivered towards the end of February, 1950. The Preventive Detention Act, 1950, was passed by the Parliament of India in the last week of February, 1950 and these orders on all those detenus were served on the 26th February, 1950. Having regard to the fact that the Provincial Government had thus suddenly to deal with a large number of cases on one day, we are unable to accept this contention of the appellants.

On behalf of the appellants it was next urged that there has been a non-compliance with the procedure laid down in Article 22 (5) of the Constitution and section 7 of the Preventive Detention Act in the manner of supplying grounds to the appellants resulting in not providing to the appellants the earliest opportunity to make a representation, which they had a right to make. In the judgment delivered to-day in Case No. 22 of 1950[1], we have discussed in detail the nature of the two rights conferred under Article 22 (5). We have to apply those principles to the facts of this appeal for its decision.

When the authorities sent their second communication dated the 16th July, 1950, to the appellants they described it as "in continuation of the grounds already furnished" and as the "supplementary grounds for your detention." Relying on the wording of this communication it was argued that these were additional grounds which were furnished to the detenu and therefore the procedure prescribed under Article 22 (5) had not been followed. It was argued that the obligation to communicate grounds "so soon as may be" was absolute. The grounds for detention must be before the Provincial Government before they could be satisfied about the necessity for making the detention order. If the grounds before the detaining authorities on the 26th February, 1950, were only those which they communicated on the 14th March, they cannot support the detention on additional grounds which were not before them on that day and which they set out in the second communication four months later. It was also contended that the fact of this communication showed that the authorities were not satisfied on the original grounds and had therefore put forth these supplementary grounds as an after-thought. In our opinion these arguments cannot be accepted. A description of the contents of the second communication as "supplementary grounds" does not necessarily make them additional or new grounds. One has to look at the contents to find out whether they are new grounds explained in our judgment in Case No. 22 of 1950[1]. Examining the contents of the later communication in that way we find that they only furnish details of the second heads of the grounds furnished to the appropriate appellant on 14th March, 1950, in respect of his activities. We are unable to treat them as new grounds and we agree with the High Court in its conclusion that these are not fresh or new grounds. We do not think it proper to consider the true effect of the communication only by reading its opening words. The whole of it must be read and considered together. The contention that the authorities were not satisfied on the original grounds and therefore put forth this communication as the supplemental grounds is again unsound. The fact that these details were communicated later does not necessarily show that they were not within the knowledge of the authorities when they sent the communication dated the 14th March. The contention that this communication of the 16th of July, 1950, was not "as soon as may be", has to be rejected having regard to the principles set out in our judgment in Case No. 22 of 1950[1]. The facts in each case have to be taken into consideration and if the detained person contends that this part of the procedure prescribed in Article 22 (5) was not complied with, the authorities will have to place materials before the Court to refute that contention. In the present case the High Court has considered that there has been no infringement of this procedural law and we see no reason to come to a different conclusion.

It was next argued that the grounds being vague, they could not be considered as grounds at all and therefore they could not be sufficient "to satisfy"

1. (Since reported) (1951) S.C.J. 208.

the authorities. On this point we have nothing to add to what we have stated in our judgment in Case No. 22 of 1950[1]. We are unable to accept the contention that "vague grounds" stand on the same footing as "irrelevant grounds". An irrelevant ground has no connection at all with the satisfaction of the Provincial Government which makes the order of detention. For the reasons stated in that judgment we are also unable to accept the contention that if the grounds are vague and no representation is possible there can be no satisfaction of the authority as required under section 3 of the Preventive Detention Act. This argument mixes up two objects. The sufficiency of the grounds, which gives rise to the satisfaction of the Provincial Government, is not a matter for examination by the Court. The sufficiency of the grounds to give the detained person the earliest opportunity to make a representation can be examined by the Court, but only from that point of view. We are therefore unable to accept the contention that the quality and characteristic of the grounds should be the same for both tests. On the question of satisfaction, as has been often stated, one person may be but another may not be satisfied on the same grounds. That aspect however is not for the determination of the Court, having regard to the words used in the Act. The second part of the inquiry is clearly open to the Court under Article 22 (5). We are therefore unable to accept the argument that if the grounds are not sufficient or adequate for making the representation the grounds cannot be sufficient for the subjective satisfaction of the authority.

As regards the grounds furnished by the Government in each case in its first communication, it is sufficient to notice that while the first ground is common to all the appellants, the second ground is different in most cases. The High Court has considered the case of each appellant in respect of the communication dated the 14th March, 1950, sent to him. In their opinion those grounds are not vague. They have held that the procedural requirement to give the detained person the earliest opportunity to make a representation has not been infringed by the communication of the grounds of the 14th March and by the subsequent communication made to the appellants in July. This point was not seriously pressed before us. After hearing counsel for the appellant we see no reason to differ from the conclusion of the High Court on this point. The result is that the appeal fails and is dismissed.

Patanjali Sastri, J.—This appeal was heard along with Case No. 22 of 1950[1], *The State of Bombay* v. *Atma Ram Sridhar*[1], as the main question involved was the same. In the view I have expressed on that question in my judgment delivered today in that case, this appeal cannot succeed and I agree that it should be dismissed.

Das, J.—The same important questions have been raised in this appeal by 100 detenus against an order of a Bench of the Calcutta High Court as were raised by the detenu in the appeal of the State of Bombay in which judgment has just been delivered. One additional point raised in this appeal was that the fact that a large number of fresh orders of detention were made "overnight" indicates bad faith on the part of the authorities, for the authorities could not have applied their minds to each individual case. I am unable to accept this contention as correct. The authorities had already applied their minds to the suspected activities of each of the detenus and were satisfied that with a view to prevent them from doing some prejudicial act of a particular kind it was necessary to make an order of detention against them under the local Acts. There being doubt as to the validity of the local Acts and the Preventive Detention Act having been passed in the meantime the question was to make a fresh order under the new Act. The minds of the authorities having already been made up as to the expediency of making an order of detention against them, an elaborate application of mind, such as is now suggested, does not appear to me to be necessary at all. I do not think there was any failure of duty on the part of the authorities which will establish bad

1. (Since reported (1951) S.C.J. 208.

faith on their part. In my view, for reasons stated in my judgment in the other appeal, there being no proof of any *mala fides* on the part of the authorities, no fundamental rights of the petitioners have been infringed. In the case of each of the detenus, apart from the common ground, there were one or more specific grounds of detention which are quite sufficient to enable the detenu concerned to make his representation. Therefore, the question of supplementary particulars does not arise at all. In my opinion the conclusions arrived at by Roxburgh, J., were correct and well-founded and, therefore, this appeal should be dismissed.

Agent for Appellants: *P. K. Chatterjee.*

Agent for Respondent: *P. K. Bose.*

G.R./V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SUBBA RAO.

Modalavalasa Mukundarao and others .. *Appellants**

v.

Hanumantha Suryanarayana Naidu .. *Respondent.*

Usurious Loans Act (X of 1918), section 3 (1), Explanation 1, (as amended in Madras by the Madras Usurious Loans (Madras Amendment) Act (VIII of 1937)—Scope and effect of.

A combined reading of the provisions of section 3 (1), Usurious Loans Act, 1918, and the Explanation 1 to the section added by the Madras (Amendment) Act (Act VIII of 1937) indicates that if compound interest is charged and there is no rebutting evidence the Court shall presume the interest charged is excessive and the transaction is also substantially unfair.

Where on a bond for Rs. 6,000 interest at twelve annas per month per cent. at compound rate was charged and there was no evidence sufficient to rebut the presumption of excess.

Held that it was unfair and in the circumstances only 9 annas per cent. simple interest will be a reasonable rate.

Appeal against the decree of the Court of the Subordinate Judge, Srikakulam, dated 30th January, 1947, in O. S. No. 53 of 1946.

B. V. Ramanarasu for Appellants.

B. V. Subramanyam for Respondent.

The Court delivered the following

JUDGMENT.—The only question in this appeal is whether the Subordinate Judge of Chicacole was right in refusing to give relief under the Usurious Loans Act, 1918. The defendants executed a mortgage bond in favour of the plaintiff, Ex. P-1, dated 10th August, 1936, for Rs. 6,000 payable with interest thereon at twelve annas per cent. per mensem at compound rate. The defendants pleaded that the said rate was excessive and substantially unfair and therefore was liable to be reduced. The learned Subordinate Judge held that there was nothing excessive or unconscionable in the rate of interest charged on the suit bond. The defendants have preferred the above appeal.

Section 3 (1) of the Usurious Loans Act, 1918, reads:

"Notwithstanding anything in the Usury Laws Repeal Act, 1885, where, in any suit to which this Act applies, whether heard *ex parte* or otherwise, the Court has reason to believe, (*a*) that the interest is excessive, and (*b*) that the transaction was, as between the parties thereto, substantially unfair, the Court may exercise all or any of the following powers".

The Act is amended in its application to the Madras Presidency by the Usurious Loans (Madras Amendment) Act, 1936, Act VIII of 1937. The relevant amendment reads as follows:

"*Explanation* 1.—If the interest is excessive, the Court shall presume that the transaction was substantially unfair; but such presumption may be rebutted by proof of special circumstances justifying the rate of interest:

*Appeal No. 615 of 1947. 5th December, 1950.

Provided that in the case of loans to agriculturists if compound interest is charged the Court shall presume that the interest is excessive".

A combined reading of these provisions indicates that if compound interest is charged and there is no rebutting evidence the Court shall presume the interest charged is excessive and the transaction is also substantially unfair. In this case as compound interest is charged, under the proviso the Court shall presume that the interest is excessive. The learned Subordinate Judge held on the evidence that the said presumption was rebutted. I cannot agree . The plaintiff did not take any risk in advancing the moneys to the defendants. The financial conditions of the defendants was sound and the properties mortgaged were valuable. There is no evidence to show that in or about the year 1936 the prevailing rate of interest in the locality concerned was nine per cent. compound. But the plaintiff relied on two documents, Ex. P-3 dated 19th July, 1921, the mortgage deed executed by Sitabai Amma and others in favour of the 1st defendant's mother and Ex. P-14 dated 3rd April, 1923, executed by Sitaramiah Naidu in favour of the 1st defendant's mother. Under both these documents the debtors agreed to pay nine per cent. compound interest. But these documents relate to a period of ten years prior to the suit mortgage deed and they cannot conceivably afford any basis for ascertaining the current market rate of interest in the year 1936. D.W. 1, in his evidence, says that prior to the suit the defendants executed another bond in favour of the plaintiff stipulating to pay at the rate of nine per cent. compound interest but the plaintiff accepted only nine per cent. simple interest. From this evidence, I cannot hold that the presumption in favour of the defendants is rebutted. Having regard to the circumstances of the case, in my view, nine per cent. simple interest will be a reasonable rate. As regards lawyer's fee no case is made out for interference.

The appeal is allowed in part with proportionate costs in this Court. The plaintiff will only get his proportionate costs in the Court below.

K.C. ——— *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, AND MR. JUSTICE VISWANATHA SASTRI.

Devineni Narasamma .. *Petitioner**

v.

Devineni Satyanarayana, minor by guardian, Gondi Chandramma and others .. *Respondents.*

Court-Fees Act (VII of 1870), Section 7 (iv) (c), (iv-A), Sch. II, Article 17-A and Court-Fees Rules framed under section 9 of the Suits Valuation Act, Rule 2—Suit for cancellation of a decree and the decree passed in appeal therefrom or declaration that they are void, invalid and not binding on plaintiff—Plaintiff alleging that though she was impleaded as a party to the suit in which the decree was passed, she was in fact a minor and was not represented by a guardian—Court-fee payable.

The plaintiff in a suit prayed for a decree cancelling a prior decree of the same Court and all proceedings in the appeal therefrom and the decree passed in the appeal or declaring the same to be void, invalid, and not binding on the plaintiff. The plaintiff alleged that though she was impleaded as a major, she was in fact a minor when the decree sought to be cancelled was passed and that she was not represented by any guardian and that she had all along been in possession of the properties which formed the subject-matter of that decree. On a question as to provision of the Court-Fees Act applicable to the case and the basis on which the court-fee should be paid.

Held : Though the distinction between a decree to which the plaintiff is a party and a decree to which he was not a party and the distinction between void and voidable decrees, may be relevant in connection with other branches of law, so far as the Court-Fees Act is concerned, a suit by a party to the decree, which is *ex facie* regular and within the jurisdiction of the Court, to have it declared void as against him is taken out of Article 17-A of Schedule II and section 7 (iv) (c) and brought within section 7 (iv-A) of the Act. On the facts of this case it could not be said that the decree sought to be cancelled was *ex facie* void or one passed without jurisdiction The present suit might be considered to be one for "cancellation" of the prior decree falling within section 7 (iv-A) of the Act. Even if the plaintiff can be considered not to have been a party at all to the prior suit on the strength

*C.R.P. No. 426 of 1949. 22nd September, 1950.

of her allegations in the plaint, still since she has chosen to sue for a declaration of the invalidity of that decree, she must pay court-fee under the main part of rule 2 of the Court-fee Rules framed under section 9 of the Suits Valuation Act, the proviso being inapplicable to the case. Whether the suit is governed by section 7 (iv-A) of the Act or rule 2 of the Court-fee Rules, *ad valorem* court-fee must be paid on the market-value of the lands which formed the subject-matter of the previous decree.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court, Anantapur, in unregistered appeal—of 1948 preferred against the decree of the Court of the District Munsiff of Gooty in O.S. No. 199 of 1947.

P. M. Srinivasa Aiyangar for Petitioner.

The Government Pleader (*P. Satyanarayana Raju*) and *C. Kondiah* for Respondents.

The Court delivered the following

JUDGMENT.—This Civil Revision Petition raises a question as to the amount of court-fee payable by the petitioner on a memorandum of appeal filed by her in the Court of the District Judge of Anantapur against the decree of dismissal of her suit, O. S. No. 199 of 1947, by the District Munsiff's Court of Gooty. In paragraph 13 of the plaint she prayed for a decree :

"Cancelling the decree in O.S. No. 29 of 1942 on the file of this Court and all the proceedings in the appeal therefrom and the decree passed in the appeal A.S. No. 91 of 1944; or declaring the same to be void, invalid, and not binding in the plaintiff; and directing the defendants or such of them as may be found liable, to pay the plaintiff the costs of this suit".

O. S. No. 29 of 1942 was a suit filed by the present 1st defendant for possession of the lands described in schedules A and B of the plaint, claiming title under a will executed by the plaintiff's deceased husband. The plaintiff was impleaded as the 3rd defendant and as a major in that suit, which ended in a decree in favour of the 1st defendant, then plaintiff. The decree was affirmed on appeal in A. S. No. 91 of 1944. In her plaint the plaintiff alleged that though she was impleaded as a major, she was in fact a minor when O. S. No. 29 of 1942 was decided and that she was not represented by any guardian. She also alleged that she had all along been in possession of the lands described in schedules A and B to her plaint and that the 1st defendant recently attempted to interfere with her possession under colour of a delivery of the properties to him in execution of the decree in O. S. No. 29 of 1942. The plaint was valued under section 7 (iv-A) of the Court-fees Act, hereinafter referred to as the Act, and *ad valorem* court-fee was paid on the value of the lands in schedules A and B, calculated in the manner provided by section 7 (v) of the Act. The suit having been dismissed, an appeal was filed from the decree with a court-fee of Rs. 15 treating the suit as one falling within Article 17-A of schedule II of the Act. On 28th October, 1948, the Appellate Court passed an order fixing the market-value of the lands in schedules A and B at Rs. 2,712 and calling upon the appellant to pay *ad valorem* court-fee on that amount both on the plaint and the memorandum of appeal. The court-fee demanded not having been paid, the memorandum of appeal was rejected by an order dated 22nd November, 1948. It is against this order that the Civil Revision Petition has been preferred.

It is argued for the petitioner that the allegations in the plaint must be taken to be correct for the purpose of levying court-fee; that her case was that though she was impleaded as a major in O. S. No. 29 of 1942, which ended in a decree against her she was in fact a minor; and that the decree was, for that reason, wholly void. Though she engaged a pleader and gave evidence in that suit to the effect that her husband had died intestate and the will relied upon by the plaintiff was not genuine, it is her case now that she was a minor all along, that she was not aware of the nature of the dispute in that suit and that no guardian had been appointed to represent her. The decree in O. S. No. 29 of 1942, affirmed on appeal in A. S. No. 91 of 1944, was *ex facie* a decree against the plaintiff, then the 3rd defendant, as a major, and it is this decree that is sought to be declared invalid by the plaintiff. The question is, what is the provision of the Court-fees Act that is applicable to the case and on what basis should court-fee be paid.

It is contended for the petitioner that though she has prayed only for cancellation of the decree in O. S. No. 29 of 1942, yet the Court must have regard to the substance of the plaint and treat the suit as one merely for a declaratory relief. Reliance is placed on a decision of Krishnaswami Nayudu, J., in *Azima Bibi* v. *Sohara Bibi*[1], where the facts were somewhat similar to those of the present case, except that the plaintiff in that case had also prayed for recovery of possession paying court-fee under section 7 (v) besides a fixed court-fee of Rs. 15 for a declaratory relief under schedule II, Article 17-A of the Act. The learned Judge observed :

"It is well established that when a person is a party to the decree he should necessarily ask for relief to have the decree set aside before he could claim a share in the property and the question in this case is whether the plaintiff was a party to the decree in O.S. No. 328 of 1943. On the allegations in the plaint she was a minor and there was no guardian *ad litem* appointed for her. Reference is made to the decision reported in *Abdulla* v. *Subramania Pattar*[2], where it was held that the minors could not be deemed to be parties to a prior decree since they alleged that the decree was obtained fraudulently and collusively and that the guardian had acted *mala fide* and negligently. In this case there was no guardian at all that represented the minors and a decree passed against a minor without representation by a proper guardian would be a nullity. This view is supported by the decision of Ramesam, J., in *Gangaraju* v. *Satyanarayana*[3]. Since the decree is a nullity the petitioner is not bound to have the decree set aside and so the court-fee under section 7, clause (iv-A), is not payable."

The learned Judge distinguished *Ramasami* v. *Rangachari*[4], on the ground that in that case the plaintiff who, as a minor, was a party to the previous decree had been duly represented in the suit by a guardian appointed by the Court and therefore it was incumbent upon him to sue for a cancellation of that decree.

Assuming the correctness of the petitioner's contention that the suit in substance was for a mere declaration that the decree in O. S. No. 29 of 1942 was not binding on her, and that to the decree purporting to have been passed against her as a major she could not legally be considered to have been a party by reason of her minority and non-representation by a guardian, we are of the opinion that when the plaintiff came to Court with a prayer that the decree in O. S. No. 29 of 1942 should be declared to be invalid, she had to pay court-fee on the plaint under rule 2 of the Court-fee Rules framed under section 9 of the Suits Valuation Act. The rule which came into force on 1st November, 1943, runs thus :

"In suits for a declaration or for an injunction consequent on a declaration that a decree for money or any other property having a money value is not binding on the plaintiff who was not a party to the decree, the subject-matter of the suit shall, for purposes of jurisdiction and court-fee, be valued at the amount or value of the property for which the decree was passed : Provided that if the value of the property or the interest which the plaintiff seeks to be declared not liable for the decree is less than the value of the decree the plaint should be valued as if it were one for the possession of such property or interest".

This rule was not brought to our notice by the learned counsel in this case, nor does the attention of the learned Judge who decided *Azima Bibi* v. *Zohara Bibi*[1], appear to have been drawn to it. Under this rule *ad valorem* court-fee would be payable on the value of the subject-matter of the suit, that is, the land described in the schedules A and B to the plaint and decreed in the previous suit. The manner in which that value has to be calculated will be dealt with later.

As the arguments before us were confined to the applicability of section 7 (iv-A) of the Act, we shall indicate our opinion on this point. Not only persons who are parties to a decree but persons not *eo nomine* parties but represented by those on record may, under the personal law governing the parties, be bound by the decree. Both these sets of persons have a right to set aside the decree or to have it declared invalid by a separate suit if there are justifying reasons recognised by law. But as pointed out by Venkataramana Rao, J., in *Vallabhacharyulu* v. *Rangacharyulu*[5], there was, with reference to the court-fee payable, a distinction between an obligation imposed on a party by a decree against him and an obli-

1. (1949) 2 M.L.J. 553.
2. (1936) 71 M.L.J. 383.
3. A.I.R. 1931 Mad. 674.
4. (1940) 1 M.L.J. 32 : I.L.R. (1940) Mad. 259 (F.B.).
5. (1936) 45 L.W. 380.

gation imposed on him in pursuance of the decree by the personal law to which he was subject. The learned Judge said :

"In the one case he seeks to get rid of the obligation existing under the decree ; in the other he seeks to have it declared that he or his interest in the estate, which is sought to be made liable cannot be rendered liable under the decree by virtue of the said personal law. In the latter case he is not bound to sue for cancellation of the decree ; in the former case he is bound to sue for cancellation. Even if he sues for a bare declaration, it necessarily involves cancellation and the form of the relief he prays for is immaterial, as pointed out in *Venkatasiva Rao* v. *Satyanarayanamurti*[1].

The same distinction was drawn by the Full Bench in *Ramaswami* v. *Rangachari*[2] the relevant passage being as follows :

"In respect of decrees passed against him (minor) in suits in which he had been *eo nomine* impleaded as a party, it is plain that he must pay the fee prescribed by section 7 (iv-A). Such decrees bind him until set aside and therefore he cannot seek to obtain a decision on the footing that his interest in the joint family property is not affected by them. It makes no difference that the plaintiff is a minor or merely a junior member of the family, as the considerations which apply to the decree of a competent Court once it is passed are essentially different from those applicable to the transactions of a party. The plaintiff must be held to have impliedly asked for a cancellation of the decrees passed against him and must accordingly stamp his plaint *ad valorem* on the amount of the decrees and not merely on his share fraction, as his liability is for the full amount though necessarily limited to the extent of his share in the joint family assets."

Section 7 (iv-A) of the Act was held to be applicable only to a case where a person who was *eo nomine* a party to the decree sought to set it aside or to have it declared invalid. In such a case *ad valorem* court-fee was payable on the amount of the decree sought to be set aside or the value of the property forming the subject-matter of such decree. In other cases, Article 17-A of Schedule II was held to be applicable and a fixed court-fee was payable. Rule 2 of the Court-Fee Rules has effected a change in the law as previously understood. Where a person not a party to a decree sues for a declaration that the decree is not binding on him or his interest, he must pay *ad valorem* court-fee on the amount of the decree or the value of the property decreed. If however the value of the property or the interest claimed by the plaintiff in the later suit is less than the value of the decree, he need pay court-fee as in a suit for possession of that interest or property alone. To this extent there is a difference between the position of a person who is a party to a decree and one who is not a party, but no further. Neither Article 17-A of Schedule II of the Act nor section 7 (iv) (*c*) can now be invoked by a person seeking to have a decree declared invalid even where he was not a party to the decree. The Court-Fees Act does not however compel anybody to seek such a declaration if it is unnecessary under the substantive law.

In *Balakrishna Nair* v. *Vishnu Nambudiri*[3], Ramesam, J., observed that in the case of decrees :

"the proper prayer is not to set aside the decrees but one for a declaration that the decrees are not binding on the plaintiffs".

In *Venkatasiva Rao* v. *Satyanarayanamurthi*[1], Reilly and Ananthakrishna Aiyar, JJ. pointed out that this distinction was merely verbal and that a suit to set aside a decree was a well-known form of action both in England and in India. In the view of the learned Judges, the intention of the Legislature in enacting section 7 (iv-A) of the Act was to bring within its ambit suits in which the plaintiff prayed that a previous decree obtained against him was of no effect, whether he worded his prayer as one "to declare a decree void" or to "set aside a decree" or to "cancel the decree." This decision was followed by another Division Bench in *Secretary of State* v. *Lakhanna*[4]. The distinction between a decree to which the plaintiff was a party and a decree to which he was not a party and the distinction between void and voidable decrees, may be relevant in connection with other branches of the law, as for instance, in determining the period of limitation applicable to a suit to set aside the decree and the rights of innocent third parties who have acquired

1. (1932) 63 M.L.J. 764 : I.L.R. 56 Mad. 212.
2. (1940) 1 M.L.J. 32 : I.L.R. (1940) Mad. 259 (F.B.).
3. (1930) M.W.N. 509.
4. (1932) 64 M.L.J. 24.

for value an interest in the subject-matter of the suit. But so far as the Court-Fees Act is concerned, a suit by a party to the decree, which is *ex facie* regular and within the jurisdiction of the Court, to have it declared void as against him is taken out of Article 17-A of Schedule II and section 7 (iv) (*c*) and brought within section 7 (iv-A) of the Act.

Mr. P. N. Srinivasa Aiyangar for the petitioner relied on a decision of Cornish, J., in *Abdullah* v. *Subramania Pattar*[1], where the learned Judge held that a suit by a minor to set aside a decree to which he was a party, on the ground that his interests had been sacrified by his guardian *ad litem*, fell within Article 17-A of Schedule II and outside section 7 (iv-A) of the Act. With great respect we are unable to accept the correctness of this decision. The decree sought to be set aside in that case was not on the face of it a nullity or one passed without jurisdiction, but was a decree capable of execution until declared inoperative by a decree in a subsequent suit. The minor could not have resisted execution of the decree on the ground put forward in the subsequent suit. In such a case a subsequent suit by the minor to have the decree set aside would clearly fall within section 7 (iv-A) of the Act.

It is possible to conceive of cases where a decree might be held to be void on its face without any further investigation or enquiry. Where a minor is impleaded in a suit statedly as a minor without any guardian at all being appointed to represent him, the decree on its face would bear the stamp of nullity against him. *Ramanathan* v. *Palaniappa*[2] is such a case. A dispute may arise as regards the identity of the person whose name appears on the face of the decree and it might be open to a person to say that he was not the person impleaded as a party to the suit but some one else. Where a person is impleaded as a major defendant in a suit and a decree is passed against him by a Court having jurisdiction the decree is *ex facie* regular. It is true that a Court cannot legally pass a decree against a person not a party to the suit at all or not properly represented on the record. It is also settled law that an executing Court cannot go behind the decree, but must take it at its face value. If the objection to the validity of the decree is not apparent from the decree itself, but requires a separate investigation or enquiry involving, it may be, the reception of evidence, oral or documentary, the executing Court cannot entertain the objection as a bar to execution. It is not as though the objector in such cases has no remedy except in the executing Court. It is open to him to bring a suit to set aside the decree or for declaring it invalid as against him.

The petitioner's learned counsel relied upon the decision in *Rashid-un-nissa* v. *Mohammad*[3]. But in our opinion this decision does not support his contention that a decree passed against a minor without his being represented by a duly qualified guardian *ad litem* is a nullity in the sense that its existence can be ignored even by the executing Court. All that the Judicial Committee decided was that an objection to the validity of a decree passed against a minor on the ground that the guardian appointed for him in the suit was legally disqualified from being a guardian or had an interest adverse to that of the minor could not be the subject of enquiry under section 244, Civil Procedure Code, 1882, but could properly be agitated in a separate suit instituted by the minor. This decision does not affect the principle that a decree, however erroneous in law, is good until it is set aside or declared inoperative and can be executed according to its terms unless it appears from a perusal of the decree itself or the decree and judgment, that it was passed without jurisdiction. Reference was also made to a decision of Mack, J., in *Satyanarayana* v. *Venkatachalaswami Temple*[4], where the learned Judge had to consider the Court-fee payable in a case where the plaintiffs sued for a declaration that a prior decree to which they had been parties, was not binding on them and for an injunction restraining execution of the decree. There was an allegation that the

1. (1936) 71 M.L.J. 383.
2. (1934) 66 M.L.J. 609 : I.L.R. 57 Mad. 973.
3. (1909) 19 M.L.J. 631 : L.R. 36 I.A. 168 : I.L.R. 31 All. 572 (P.C.).
4. (1949) 1 M.L.J. 615.

plaintiffs, who had been minors at the time of the passing of the prior decree, had been impleaded as majors in the suit, The learned Judge observed :

"If at the time of the decree in O.S. No. 456 of 1938 the present plaintiffs were, in fact minors, though impleaded in that litigation as majors, the decree would be a nullity so far as they were concerned, and they would be entitled to ask for a declaration without any obligation to cancel the decree and to pay Court-fee under section 7 (iv-A). This is a case rather on the border line and midway between that on which a court-fee of Rs. 100 is payable under Article 17-A of Schedule II, namely, one for a pure declaration without consequential relief such as that considered in *Abdulla* v. *Subramania Pattar*[1] and a suit for cancellation of a decree which should be governed by section 7 (iv-A). A *via media* has been adopted for court-fee valuation, namely, section 7 (iv) (*c*), which cannot be said in the circumstances to be incorrect or inappropriate".

We are, with respect, unable to follow this reasoning. If there is an *ex facie* valid decree executable as it stands against a defendant, and he seeks to get rid of its effect by a suit, he is suing for its "cancellation" which expression, as we have already observed, includes "setting aside" or "declaration of invalidity" of the decree. For the purposes of section 7 (iv-A) of the Act these reliefs are treated alike. Even if the plaintiff in the subsequent suit be considered not to have been a party to the prior suit, still if he sues to set aside the decree in that suit, rule 2 of the Court-fee Rules would govern the case and *ad valorem* court-fee would be payable. In *Ramasubba Iyer* v. *Ayyalu Naidu*[2], the learned Judges held that where persons not being parties to a decree sue as representatives of a trust which was represented in a prior suit by another person, for a declaration that the decree passed in the prior suit was not binding on the trust, the suit must be regarded as one on behalf of the trust for cancellation of the decree within the meaning of section 7 (iv-A) of the Act though *eo nomine* the parties to the subsequent suit were not on the record in the previous suit. In *Sethurajan* v. *Gurusami Pathar*[3], a Division Bench of this Court had to consider the case of a decree passed against a person as a major to the execution of which objection was taken on the ground that he was a minor at the time of the decree. After an examination of the previous decisions, both of this and other High Courts, the learned Judges held that it was not open to the executing Court to consider the objection or to investigate matters relating to the validity of the decree itself when on the face of the decree or the decree read with the judgment, it did not appear that it was void and made without jurisdiction.

It cannot be said that the decree in O. S. No. 29 of 1942 was *ex facie* void or one passed without jurisdiction. The executing Court could not have refused execution of that decree unless it went behind it and took evidence as regards the age of the plaintiff, a matter which has been made the subject of investigation in the present suit but which it was not open to the executing Court to enquire into. The present suit might be considered to be one for "cancellation" of the decree in O S No. 29 of 1942 falling within section 7 (iv-A) of the Act. Even if the petitioner can be considered not to have been a party at all to the prior suit on the strength of the allegations in her plaint, still since she has chosen to sue for a declaration of the invalidity of that decree, she must pay court-fee under the main part of rule 2 of the Court-fees Rules, the proviso being inapplicable to the case. Whether the suit is governed by section 7 (iv-A) of the Act or rule 2 of the Court-fees Rules, *ad valorem* court-fee must be paid on the market-value of the lands in schedules A and B of the plaint which formed the subject of the previous decree. *Kutumba Sastri* v. *Bala Tripurasundari*[4]. The order of the learned District Judge is therefore correct and this civil revision petition must be dismissed with costs (one set). Time for payment of the deficit court-fee is allowed till 20th October, 1950, by consent.

V.S. *Petition dismissed.*

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1. (1936) 71 M.L.J. 383.
2. (1941) 1 M.L.J. 414 : I.L.R. (1941) Mad. 708.
3. (1937) 2 M.L.J. 37: I.L.R. (1937)Mad.834.
4. (1939) 1 M.L.J. 702 : I.L.R. (1939) Mad. 764 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

Irulappa Konar and others .. *Appellants**

v.

Madhava Konar (died) and others .. *Respondents.*

Malicious prosecution—Action for damages for—Decree—Reversal on appeal—Death of plaintiff thereafter—Second appeal by legal representatives of deceased plaintiff—Death of defendant, during pendency of second appeal and his legal representatives brought on record—Competency of the second appeal—Maxim of actio personalis moritur cum persona—*Applicability of.*

A suit for damages for malicious prosecution was decreed by the trial court with costs, but on appeal by the defendants, the decree of the trial court was reversed and the suit dismissed with costs. The plaintiff died thereafter and his legal representatives filed a second appeal. During the pendency of the second appeal the defendant died and his legal representatives were brought on record. On a preliminary objection raised by the respondents to the hearing of the second appeal founded on the rule *actio personalis moritur cum persona,*

Held : When the plaintiff-respondent in the lower appellate court died after the decree of that Court there was no right to seek relief in further appeal on the part of his legal representatives. With the decree of the lower appellate Court in reversal of that of the trial Court, the plaintiff lost in appeal what he had gained in the Court of trial. It is as if he were thereafter to agitate the matter with a clean slate, so to say, if he should file a second appeal, and if before he could file it he died, his legal representatives could not file it after his death because with his death the cause of action personal to him died too. Further, when the defendant-respondent died during the pendency of the second appeal, the right to seek further relief did not survive against his legal representatives. After wiping out of the trial Court's decree by the lower appellate Court's, the position was that there was merely an outstanding claim in the second appeal indeterminate in character on the part of the legal representatives of the plaintiff against the respondent after whose death the claim cannot be pursued against his estate since it is only an unliquidated claim which has not been perfected by judgment at the time of the death of the defendant.

Appeal against the decree of the Court of the Subordinate Judge, Turicorin, in A. S. No. 6 of 1946, preferred against the decree of the Court of the District Munsiff, Srivaikuntam, in O. S. No. 197 of 1945.

S. Ramachandra Aiyar and *G. R. Jagadisa Aiyar* for Appellants.

K. V. Srinivasa Aiyar and *S. K. Sundaram* for Respondents.

The Court delivered the following

JUDGMENT.—In this second appeal the few facts which I have to state for the purpose of the decision are as follows : The suit was for damages for malicious prosecution which the trial Court decreed with costs. On appeal taken by the defendant the decree of the trial Court was reversed and the suit dismissed with costs. The plaintiff having thereafter died, his legal representatives preferred this second appeal to this Court. After the institution of the second appeal, the defendant having died, the appellants herein have brought the respondents before me as legal representatives.

To the hearing of this second appeal an objection *in limine* has been taken by the respondents founded on the rule *actio personalis moritur cum persona.* I have heard arguments not only on the objection but also on the merits of the second appeal. As regards the latter I may at once say that there is very little, if any, of substance in the argument for the appellants. The report of the commissioner appointed by the lower appellate Court is said to be additional evidence taken in contravention of Order 41, rule 27, Civil Procedure Code by which the appellate judgment is vitiated. There is however other evidence in support of the findings of the lower appellate Court on the question of the existence of malice and the absence of reasonable and probable cause which I am not therefore prepared to disturb.

Concerning the preliminary objection raised by him learned counsel for the respondents has relied on *Maniramlala* v. *Mt. Chalti Bai and another*[1] while learned counsel for the appellants has relied as against it on *Nga Hpet Sein* v. *Mi Kyin Mya*[2]

* S.A. No. 386 of 1947. 28th July, 1950.

1. I.L.R. (1938) Nag. 280. 2. (1916) 34 I.C. 249.

a decision of the Judicial Commissioner of the Upper Burma Judicial Commissioner's Court not as a decision citable to this Court but for its reasoning which counsel seeks to adopt as his own. It is not disputed by counsel on both sides that the present case is sufficiently indistinguishable on facts from each of those cases, although there unlike here the original respondent in the first appeal preferred a second appeal and died afterwards and the respondent in the second appeal did not die during the pendency of the second appeal but remained alive and on record down to the decree of the second appellate Court. It is not disputed therefore that the decision of the point must go in favour of the respondents or the appellants according to the one decision or the other is accepted by me as correct.

Before dealing with the two decisions it is necessary to ascertain the provisions of the Civil Procedure Code which govern the situation. They are to be found in Order 22, rules 1 and 11, Civil Procedure Code. Rule 1 is as follows :

"The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives".

Rule 11 is in the following terms :

"In the application of this order to appeals, so far as may be, the word 'plaintiff' shall be held to include the appellant, the word 'defendant' a respondent, and the word 'suit' an appeal".

"The right to sue" occurring in rule 1 has been, in my opinion, rightly interpreted by Fulton, J., in *Gopal* v. *Ramachandra*[1], as meaning the right to seek relief. Says the learned Judge at page 603 of the report :

"What, then, is the meaning of the words 'right to sue' in that section? (Section 361 of Act XIV of 1882). If the words are synonymous with 'cause of action' as used in Order L referred to in *Tuyeross* v. *Grant*[2], that decision, may doubtless be appealed to in order to show that 'cause of action' means the plaintiff's original cause of action. But they appear not to be synonymous. In Act VIII of 1859 and Act X of 1877 the words 'cause of action' were used in sections 99 and 361 corresponding with section 361 of the present Code, in which the words 'right to sue' have been substituted. It seems useless, therefore, in regard to this point to refer to *Tuyeross* v. *Grant*[2], which depends on words which the Legislature has superseded. It is obvious how inconvenient the words 'cause of action' would be in section 362 after substituting 'appellant' and 'respondent' for 'plaintiff' and 'defendant.' I have not been able to discover any judicial interpretation of the words 'right to sue' in section 361, but I venture to suggest that, as applied to appeal, they mean right 'to seek relief.' This construction seems to my mind to be in furtherance of justice and to be consistent with the etymology of the word 'sue' which in Wharton's Law Lexicon is defined as meaning "to prosecute by law, to claim a civil right by means of legal procedure". What may have been the precise object of the Legislature in altering the phraseology we do not know. But the meaning must be sought in the words themselves, on which we must put a fair grammatical construction. In popular language, no doubt, the phrase 'right to sue' is associated with the right to institute a suit, but when we come to deal with appeals the analogy fails. In the appeal, it is the appellant, whether plaintiff or defendant, who is suing for relief; and it would surely be anomalous if the representatives of the defendant were debarred from prosecuting an appeal against an erroneous decree because the plaintiff could not have obtained that decree if the defendant had died during the course of the suit."

Applying the meaning of the words "right to sue" as given by Fulton, J., in the Bombay case, *Gopal* v. *Ramchandra*[1], above cited, the question first is, when the plaintiff respondent in the lower appellate Court died after the decree of that Court, was there a right to seek relief in further appeal on the part of his legal representatives? When during the pendency of the second appeal, if competent, the defendant-respondent died, the further question is, did the right to seek relief survive against the legal representatives of the respondent?

These being the two questions for consideration I shall take them up in their order as indicated above. As regards the first I am clear that the answer must be in the negative. With the decree of the lower appellate Court in reversal of that of the trial Court the plaintiff lost in appeal that which he had gained in the Court of trial. It is as if he were thereafter to agitate the matter with a clean slate, so to say, if he should file a second appeal, and if before he could file it he died, his legal representatives could not file it after his death because with his death the cause of action personal to him died too. In the case in *Maniramlala* v. *Mt. Chalti*

1. (1902) I.L.R. 26 Bom. 597. 2. (1878) 4 C.P.D. 40.

Bai and another[1], which was a case of action for defamation this is what Gruer, J. who decided the case says at page 281 :

"It is clear law that an action for defamation is a personal one, and if the defendant had died during the course of the original trial the case would undoubtedly, have abated. The question is whether this general principle is inapplicable because of the fact that the litigation reached the stage of the decision in two Courts. The matter undoubtedly *transit in rem judicatam*, but the first decree has been wiped out by the appellate decree which grants no relief to the present appellant and imposes no liability on him except for payment of costs. There is good authority for holding that when a decree has been passed in favour of a party in such a personal suit he is entitled to execute it against the estate of the defendant who may subsequently die, and also that if a decree has been passed against a party he is not precluded from appealing because of the death of his opponent. But there is also authority for distinguishing such cases from the present in which the appellant is practically in the position in which he was before he started the litigation so far as his claim is concerned. In such a case there seems no valid reason why the litigation should not rest."

Reliance is placed by the learned counsel for the appellants on two cases one in *Gopal* v. *Ramachandra*[2] (already referred to in another connection) and the other in *Paraman Chetti* v. *Sundararaja Naick*[3]. In the former the facts were as follows : In a suit for defamation the plaintiff obtained a decree for damages against the defendant and executed the decree. The defendant filed an appeal, but died before the hearing. His son and legal representative was placed on the record as appellant. When the appeal came on for hearing before Candy and Fulton, JJ., the respondent objected that by the death of the defendant the appeal has abated, and that the defendant's son had no right to continue the proceedings. The two learned Judges differed, the former holding that the appeal did not abate and that the defendant's legal representative had a right to continue the proceedings as appellant, the latter holding the contrary. There was a reference to a third Judge, Grove, J., who agreed with Fulton, J., and disagreed with Candy, J.

The case in *Paraman Chetty* v. *Sundararaja Naick*[3], was a similar case which however went up to the High Court in second appeal. There, as the head note bears :

"In a suit for damages for malicious prosecution the District Munsif decreed in plaintiff's favour and gave damages. Defendant appealed to the District Judge, who confirmed the decree and dismissed the appeal. Defendant preferred a second appeal, but died before it was heard. The appeal was prosecuted by defendant's legal representative, when it was objected that inasmuch as the cause of action for damages for malicious prosecution could not survive after the death of the defendant, his legal representative was not entitled to prosecute the appeal."

It was held that the legal representative was entitled to prosecute the appeal.

It will be seen that both the cases in *Gopal* v. *Ramachandra*[2], and *Paraman Chetty* v. *Sundararaja Naick*[3], are distinguishable from the present on the ground referred to by Gruer, J., in *Maniramlala* v. *Mt. Chalti Bai and another*[1], namely, that in the present case, as in the Nagpur case[1],

"the appellant is practically in the position in which he was before he started the litigation so far as his claim is concerned".

Learned counsel for the appellants urges that this distinction made by Gruer, J., is not just and that there is no reason to assume that the decree of the lower appellate Court wiping out the decision of the trial Court is necessarily correct. He places strong reliance on the reasoning of the case in *Nga Kyit Sein* v. *Mi Kyin Mya*[4]. There the plaintiff-appellant sued one Maung Chu Ni for damages for slander and obtained a decree for Rs. 100 and costs. On appeal this decree was set aside and the suit was dismissed. The plaintiff appellant then appealed to the Upper Burma Judicial Commissioner's Court, and after the appeal was filed, Maung Chu Ni died and his legal representatives were brought on the record. At the hearing of the second appeal the advocate for the respondents took the preliminary objection that as the right to sue did not survive the appeal must abate. It was contended on the other hand that as the plaintiff appellant obtained a decree in the Court of first instance thereby potentially increasing his wealth, he must have the right to get rid of the decree of the lower appellate Court which has deprived him of that

1. I.L.R. 1938 Nag. 280.
2. (1902) I.L.R. 26 Bom. 597.
3. (1902) I.L.R. 26 Mad. 499.
4. (1916) 34 I.C. 249.

benefit. Reliance was placed on *Gopal* v. *Ramachandra*[1]. The Court observed in its judgment :

"In that case the position was reversed ; the plaintiff having lost in the first Court obtained a decree for damages in the lower appellate Court. One of the Judges before whom the second appeal came was of the opinion that no distinction should be drawn between an appeal by a plaintiff and an appeal by a defendant and that in the case of an action for slander an appeal must abate on the death of one of the parties whichever side appealed, but the majority of the Judges held that though in such a case an appeal by a plaintiff must abate, an appeal by a defendant did not because his estate was affected by the decree.

It seems to me that though the position is reversed the same principle applies in the present case. If the defendant had died during the pendency of the first appeal, his legal representatives would have been entitled to prosecute that appeal on the authority of the ruling above cited, which was followed in *Paraman Chetti* v. *Sundararaja Naick*[2] and on their succeeding the plaintiff-appellant would undoubtedly have had a right to contest the correctness of the decision in this Court, because if the right to continue the appeal in the lower Court survived, it could not be extinguished by the judgment. I am unable to see on what principle the fact that the defendant died after the second appeal was filed and not during the pendency of the first appeal, can make a difference. In the Bombay case Fulton, J., interpreted 'the right to sue' as the 'right to seek relief'. If, therefore, the 'right to sue' in the case of the first appeal meant the defendant's right to appeal against a decree which affected his estate, I do not see why in the present appeal the words should refer back to the original cause of action. The plaintiff-appellant is not now endeavouring to enforce his personal right of immunity from slander, but to recover the benefit which accrued to his estate in consequence of the judgment of the Township Court and of which he has been deprived by the judgment of the lower appellate Court."

To my mind this reasoning of the Upper Burma Judicial Commissioner's Court seems fallacious. It does not take note of the distinction between the two classes of cases. Gruer, J., in the Nagpur case, *Maniramlala* v. *Mt. Chalti Bai*[3] rightly makes that distinction and I accept his view as correct. I may also refer in this connection to a case in *Marwadi Mothiram* v. *Sannaji*[4], cited for the respondents. In that case a suit for damages for malicious prosecution was dismissed, and the plaintiff died during the pendency of an appeal preferred by him against the dismissal of the suit. It was held that the appeal abated and his legal representatives had no right to prosecute it. Referring to *Gopal* v. *Ramchandra*[1], and *Paraman Chetti* v. *Sundararaja Naick*[2], Krishnan, J., delivering the judgment of the Court consisting of himself and Abdur Rahim, O.C.J., observes at page 773 of the report thus :

"The case of *Gopal* v. *Ramachandra*[1] and *Paraman Chetti* v. *Sundararaja Naick*[2], following the view of the majority in the Bombay case have no application here as in both those cases a decree for damages had been obtained before the wrong-doer died; the legal representative was allowed to prosecute the appeal to save the estate which had devolved on him from loss by the execution of the decree. In the present case, as the lower Court dismissed Motiram's suit without costs, he was in the appeal, in the position of a person claiming damages not yet decreed. Both the cases cited recognise the rule that personal actions so long as they remain unconverted into decrees abate on death. Fulton, J., in his judgment observes, 'Now it need not be doubted that to a suit for libel the maxim *actio personalis moritur cum persona* applies. If previous to decree the defendant dies, the plaintiff can no longer prosecute his suit for damages. The same rule would apply in the appeal, if the plaintiff having failed in the lower Court were seeking to obtain a decree for damages in the Court of appeal."

The circumstance that the lower appellate Court's decree in the present case was a decree of dismissal of the plaintiff's suit with costs and not of dismissal *simpliciter* does not, in my opinion, make any difference to the competency of the present second appeal. That is the view of this Court in *Josium Tiruvengadachariar* v. *Swami Aiyangar*[5], which Gruer, J. in the *Nagpur case*[3] also adopts. In *Josium Thiruvengadachariar* v. *Swami Aiyangar*[5], in a personal action for an injunction a decree was given for the defendant with costs. Plaintiffs appealed, and during the pendency of the appeal the defendant respondent died. It was held that the right to prosecute the appeal against the respondent's legal representative did not survive to the appellants. It was further held that if an action failed as a result of the application of the rule *actio personalis moritur cum persona* what is incidental namely, the matter of the costs directed to be paid by one party to the other, also failed. The Court observes at page 79 of the report :

1. (1902) I.L.R. 26 Bom. 597.
2. (1902) I.L.R. 26 Mad. 499.
3. I.L.R. (1938) Nag. 280.
4. (1916) 31 M.L.J. 772.
5. (1910) 20 M.L.J. 760: I.L.R. 34 Mad. 76.

" . . . . . it appears to us that if the appeal abates because the appellant can no longer claim the injunction he prayed for against the deceased second defendant, the costs he was made liable to pay as a consequence of the dismissal of his suit could not form the subject-matter of a continuing appeal. It was said that an appeal might be preferred for costs alone. But this is not as of course, for no such appeal on a mere question of costs is ever entertained unless there is a legal principle involved. And if the appellant cannot prosecute his appeal for the injunction, he cannot be allowed to show that the decree refusing the injunction was wrong for the mere purpose of getting rid of the directions as to costs ".

Turning then to the question whether, when during the pendency of the second appeal, if competent, the defendant respondent died, the right to seek relief survives against the legal representatives of the respondent, here again, I am clear that the appellants are faced with an equally insurmountable difficulty. As observed by Bowen, Lord Justice in *Phillips* v. *Homfray*[1], in a passage which has been accepted by this Court in the case in *Josiam Tiruvengadachariar* v. *Swami Iyengar*[2]

"It is of the essence of the rule, viz., *actio personalis moritur cum persona*, that claims which are indeterminate in their character shall not be pursued against the estate of a person after his death. If the claim is one for unliquidated damages and *has not been perfected by judgment* at the time of the death of the defendant, the rule applies."

In the present case after the wiping out of the trial Court's decree by the lower appellate Court's the position is that there is merely an outstanding claim in the second appeal indeterminate in character on the part of the legal representatives of the plaintiff against the respondent after whose death the claim cannot be pursued against his estate since it is only an unliquidated claim which has not been perfected by judgment at the time of the death of the defendant. As pointed out in Chitaley and Rao's Commentary on the Code of Civil Procedure, 4th edition at pages 24-27 :

" the *maxim actio personalis moritur cum persona*, is, as a general rule, applicable to actions in respect of torts and, therefore, on the death of *either* party to such an action, the right to sue will be extinguished. The right to seek relief in appeal too must stand similarly extinguished on the same principle where the claim is indeterminate in character and has not yet taken the shape or form of a decree or judgment of Court."

For the reasons indicated I am clearly of opinion that this second appeal fails on the preliminary objection of the respondents as well as on the merits and must accordingly be dismissed with costs.

No leave.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VISWANATHA SASTRI.

Parvathi Ammal .. *Petitioner**

v.

Meenakshi Ammal .. *Respondent.*

Civil Procedure Code (V of 1908), Order 33, rule 3—Plaint returned after deciding question of pauperism by Subordinate Judge's Court as being below its pecuniary jurisdiction for presentation to Munsif's Court—Amendment of plaint adding new reliefs raising the pecuniary value and re-presentation to Subordinate Judge's Court—Plaint is fresh plaint and must be presented in person by plaintiff seeking leave to sue in forma pauperis.

Where a plaint as originally presented had been returned after the question of pauperism of the plaintiff was decided by the Court of the Subordinate Judge, for presentation to the District Munsif's Court, as the suit was within the pecuniary jurisdiction of the latter Court, and had to be filed there under section 15, Civil Procedure Code, the suit ceased to be pending in the Court of the Suboridnate Judge. Where such a plaint was subsequently amended (by the plaintiff *suo motu*) after the return and included reliefs not originally claimed but whose value brought the suit within the jurisdiction of the Court of the Subordinate Judge, it is in substance a fresh plaint, though the old plaint had been amended in many respects and presented to the same Court which had previously returned the original plaint. Such an amended plaint being a new plaint should be presented by the plaintiff in person, in conformity with the provisions of Order 33, rule 3 of the Civil Procedure Code.

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1. (1883) 24 Ch. D. 439.
2. (1910) 20 M.L.J. 760 : I.L.R. 34 Mad. 76.

* C.R.P. No. 406 of 1949. 28th April, 1950.

If after re-presentation by the advocate and numbering of the plaint an interlocutory application is filed for leave to sue *in forma pauperis* the plaintiff could be considered as having presented the plaint in person on the date the interlocutory application was filed. But where such interlocutory application also though verified and signed by the plaintiff was not presented in person it is not possible to hold that the suit had been properly instituted.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Tirunelveli, dated 28th February, 1949, in I. A. No. 11 of 1949, in O. S. No. 70 of 1948.

K. S. Ramabhadra Aiyar and *K. Rajah* for Petitioner.

K. E. Rajagopalachari for Respondent.

The Court delivered the following

JUDGMENT.—This is an application to revise an order of the learned Subordinate Judge of Tirunelveli, in I. A. No. 11 of 1949, in O. S. No. 70 of 1948, a suit instituted *in forma pauperis* on the file of that Court. The defendant is the petitioner and the plaintiff, the respondent in this Civil Revision Petition. The respondent filed an application, O. P. No. 58 of 1947, under Order 33, rules 1 and 2, Civil Procedure Code *in forma pauperis* in the Court of the Subordinate Judge of Tirunelveli claiming to recover possession of some landed property with mesne profits, and also claiming an enhanced maintenance for herself, besides a sum of Rs. 975 for expenses of religious observances and Rs. 300 the value of certain silver vessels belonging to her. The respondent is the brother's widow of the petitioner. There were bequests in favour of both the parties under a will of the father-in-law of the respondent. During the course of the enquiry into the pauperism of the respondent, she was put in possession of the landed property claimed by her, and thereafter the suit was registered as O.S. No. 41 of 1948, after contest regarding the pauperism of the respondent. Issue No. 5 framed in the suit was, "Whether the suit was within the pecuniary jurisdiction of the Court of the Subordinate Judge of Tirunelveli". This issue was taken up as a preliminary issue, and the Court held that the value of the suit was below Rs. 3,000 and therefore returned the plaint for presentation to the Court of the District Munsif of Tirunelveli. There was an appeal by the respondent to the District Court, Tirunelveli, in C.M.A. No. 22 of 1948, but the District Court confirmed the order of the Subordinate Judge.

Thereafter the respondent's advocate who had originally appeared in O.S. No. 41 of 1948, re-presented the plaint which had been returned by the Court of the Subordinate Judge, after amending it by the inclusion of additional claims and prayers for additional reliefs which resulted in the valuation of the suit being fixed at the sum of Rs. 6,285. The plaint, as amended and enlarged, was represented to the Sub-Court itself. The learned Subordinate Judge made an endorsement on the plaint dated 10th August, 1948, to the effect, "file at party's risk". The re-presented plaint was numbered as O.S. No. 70 of 1948 on the file of the Court of the Subordinate Judge, Tirunelveli. The petitioner filed a written statement on 5th October, 1948, wherein she pleaded, *inter alia*, that the suit had not been properly instituted. On 6th January, 1949, the respondent filed I.A. No. 11 of 1949, purporting to be under Order 33, rules 1 and 8 and section 151, Civil Procedure Code, praying that the Court should accord permission to her to institute the suit O.S. No. 70 of 1948 *in forma pauperis*. This application was ordered by the learned Subordinate Judge and the permission sought for was granted.

The only question that was argued in I.A. No. 11 of 1949 in the Court below was, whether the plaint, which was numbered as O.S. No. 70 of 1948, should have been presented by the respondent in person, or whether the advocate, who had already appeared for her in O.S. No. 41 of 1948, was competent to re-present the plaint, which was eventually numbered as O.S. No. 70 of 1948. Order 33, rule 2, Civil Procedure Code, requires that every application for permission to sue as a pauper should contain the particulars required in regard to plaints in suits. Order 33, rule 3, requires that the application shall be presented to the Court by the applicant in person unless he is exempted from appearance in Court. These

provisions are mandatory. The plaint, which was presented to the Court of the Subordinate Judge of Tirunelveli, and which was numbered as O.S. No. 70 of 1948, contained many additions to, and alterations of, the plaint as originally filed in that Court, which was returned to be presented to the Court of the District Munsif. There was a claim for additional maintenance and for the recovery of the value of jewels deposited with the father of the petitioner. The value of the reliefs sought in the amended plaint was nearly twice the value of the claim as originally laid. The contention on behalf of the respondent is that she was entitled after the return of the plaint, to make such alterations and amendments in the plaint as she thought fit, to bring the suit within the pecuniary jurisdiction of the Subordinate Judge's Court and re-present the plaint in that Court without the necessity of a personal presentation in accordance with Order 33, rule 3, Civil Procedure Code. This is an untenable contention. The plaint as originally presented had been returned by the Court of the Subordinate Judge, for presentation to the District Munsif's Court, as the suit was within the pecuniary jurisdiction of the latter Court, and had to be filed there under section 15, Civil Procedure Code. After the plaint was so returned, the suit ceased to be pending in the Court of the Subordinate Judge. The plaint, as subsequently amended after the return included other reliefs not originally claimed but whose value brought the suit within the jurisdiction of the Court of the Subordinate Judge. This was in substance a fresh plaint, though the old plaint had been amended in many respects and presented to the same Court which had previously returned the plaint as unamended. I am unable to accept the contention of the respondent that the same old suit in the Court of the Subordinate Judge, which was numbered as O.S. No. 41 of 1948, was again given a fresh number, O.S. No. 70 of 1948, and therefore there was no need for any fresh presentation of the plaint by the respondent, as required by Order 33, rule 3, Civil Procedure Code. It cannot be maintained that the additional reliefs sought in the amended plaint must be deemed to have been sought when the plaint was originally filed and that the amendments introduced by the respondent herself without any order or direction of the Court relate back to the date of the filing of the plaint in the first instance. By professing to re-present the old plaint with new claims and reliefs added *suo motu* so as to bring the suit within the jurisdiction of the Sub-Court the respondent cannot claim that it is a continuation of the old suit O.S. No. 41 of 1948. That suit had come to an end when the plaint was returned under Order 7, rule 10, Civil Procedure Code, by the Subordnate Judge and that order was upheld on appeal. The same plaint could not therefore again be re-presented to the Court of the Subordinate Judge. In fact the plaint as re-presented was substantially different both with reference to the reliefs sought and the pecuniary values of those reliefs.

I therefore proceed on the basis that the plaint as amended was a new plaint and should have been presented to the Court of the Subordinate Judge by the plaintiff herself in person in conformity with the provisions of the Order 33, rule 3 of Civil Procedure Code. The learned Subordinate Judge instead of insisting upon compliance with the provisions of this rule numbered the amended plaint as O.S. No. 70 of 1948. When the defendant filed a written statement objecting to the procedure adopted by the learned Subordinate Judge and raising a plea that the suit had not been validly instituted the plaintiff, here respondent, filed I.A. No. 11 of 1949 through her advocate asking for leave to sue *in forma pauperis*, treating the plaint in O.S. No. 70 of 1948, already on the file of the Court as the petition for leave to sue *in forma pauperis*. The question is whether this was a sufficient compliance with the law. The amended plaint which was re-presented to the Sub-Court and registered as a suit O.S. No. 70 of 1948 could not thereafter be taken back by the plaintiff so long as the suit was pending. Even assuming that it can be formally handed over to the plaintiff and taken back along with I.A. No. 11 of 1949 I consider it was a needless formality having regard to the decisions of this Court in *Subbarao* v. *Venkatanarasimham*[1], *Bava Saheb Miyan* v.

1. (1929) 57 M.L.J. 677 : I.L.R. 53 Mad. 43.

Abdul Ghani Sahib[1] and *Neeli Kandi* v. *Kunhayissa*[2]. If the plaintiff had presented in person in I.A. No. 11 of 1949 for leave to sue *in forma pauperis* and the plaint in respect of which leave was sought was already on the file of the Court, she could be considered as having presented the plaint in person on the date when I.A. No. 11 of 1949 was filed by her in person in Court. Unfortunately, she did not present I.A. No. 11 of 1949 in person though the verified petition was signed by her and she declared the truth of its contents. In these circumstances, it is not possible to uphold the order of the Court below.

I therefore set aside the order of the learned Subordinate Judge. The Civil Revision Petition is allowed but in the circumstances of this case, there will be no order as to costs either here or in the Court below.

K.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

K. A. S. Mohammed Ibrahim .. *Petitioner* *

v.

Minor Jaithoon Bivi Ammal, represented by her next friend and guardian, Shaik Dawood Rowther .. *Respondent.*

Mahomedan Law—Irrevocable thalak *by husband at Karur of wife living then at Tanjore—Suit by wife for interim maintenance amount due and for return of her clothes and jewels—If maintainable at Tanjore.*

An irrevocable *thalak* only terminates the wife's right to conjugal relationship, and makes the venue for filing a suit for restitution of conjugal rights, if any, subsist at the place where the irrevocable *thalak* is pronounced by the husband. But the right to interim maintenance and the return of clothes and jewels arises out of an irrevocable *thalak* and hence stands on a different footing. The divorced wife can bring the suit in respect of her prompt dower and also for her clothes and jewels at the place where she resides at the time of the divorce and receives notice thereof. So where the irrevocable *thalak* was pronounced by the husband at Karur of the wife residing normally at Tanjore and made known to her at Tanjore she can file a suit in respect of her interim maintenance during the intervening period allowed under the Mahomedan Law and her clothes and jewels, in the Tanjore Court.

It cannot, however, be said that the husband, the moment he pronounces an irrevocable *thalak* is bound to seek out the wife and return the clothes and jewels and that a suit for the same could be filed by her at the place where she resides.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Munsif Court, Tanjore, dated 5th April. 1950, in O.P. No. 81 of 1949.

S. Amudachari for Petitioner.

K. Raman for Respondent.

The Court delivered the following

JUDGMENT.—This petition raises an interesting question as to whether a Muslim wife divorced by an irrevocable *thalak*, at Karur, has a right to sue for the interim maintenance amount due and return of her clothes and jewels, at Tanjore, her normal place of residence at the time when the *thalak* was pronounced and the place at which the *thalak* was made known to her. The lower Court held that part of the cause of action arose at Tanjore because the irrevocable *thalak* was communicated to her when she was living at that place; and because the husband was bound to seek out the wife, who was resident at Tanjore and return to her her jewels and clothes there as soon as he pronounced the irrevocable *thalak* and communicated it. There is also an implied assumption in the lower Court's order that, in any event, the wife could bring the suit on the cause of action at Tanjore, where she was normally living, the moment her rights to the clothes and jewels on the irrevocable *thalak* arose. Of course, as urged by Mr. Amudachari, for the husband, it would be most unreasonable to contend that a Muslim husband, the

1. (1933) 64 M.L.J. 728.
2. A.I.R. 1936 Mad. 158.

*C.R.P. No. 770 of 1950.

14th December, 1950.

moment he pronounces an irrecoverable *thalak*, is bound to carry the divorced wife's clothes and jewels in a bundle and seek her out wherever she is and deliver them to her. That will, indeed, be an effective check on divorce, perhaps too effective a check. I do not think that the Mahommedan Law, or any other law, contemplates such an onerous obligation on the part of the divorced husband, especially when the right to divorce the wife is granted to him at his will and pleasure and not for any justifiable reason. Mr. Raman, for the wife, also does not seriously contend for this position.

Mr. Amudachari next urged that an irrevocable *thalak* operates at once, and at the place where it is pronounced, and need not be even communicated to the wife, and that, therefore, it is unreasonable to attach any significance to the husband's letter to Tanjore communicating the divorce to the wife. He relied upon a ruling in *Ahmed Kasim Molla* v. *Khatun Bibi*[1], where it has been definitely stated that any Mahomedan of a sane mind who has attained puberty can divorce his wife without assigning any cause, and can do so even in the absence of the wife, and that the irrevocable *thalak* will take effect forthwith without any communication to her, even though she many not be aware of it all. But that, in my opinion, will not help Mr. Amudachari's client in this case. An irrevocable *thalak* only terminates the wife's right to *conjugal relationship*, and makes the venue for filing a suit for restitution of conjugal rights, if any, subsist at the place where the irrevocable *thalak* is pronounced. But the right to interim maintenance and the clothes and jewels arises out of an irrevocable *thalak* and hence stands on a different footing. As held in *Tulsiman* v. *Abdul Latif Mia*[2], the divorced wife can bring the suit in respect of her prompt dower and, obviously therefore, also for her clothes and jewels at the place where she resides at the time of the divorce and receives notice thereof. So, the plaintiff could bring the suit in the Tanjore Court, as she did, in respect of her interim maintenance during the intervening period allowed under the Mahomedan Law, and her clothes and jewels.

So there is no reason to interfere with the lower Court's order. This Civil Revision Petition is dismissed ; but, in the peculiar circumstances without costs, as it seems to me to have been filed because of the observations of the lower Court that the husband was bound to take the jewels and clothes of the wife, seeking her out wherever she was, and deliver them.

K.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AYYAR.

K. Bhashyam Iyengar and another .. *Petitioners* *

v.

The Superintendent of Police, Special Branch, C.I.D., Madras and others .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XV of 1946), section 7 (2)—Exemption from provisions of—If can be claimed by Sub-inspector of Police who was in occupation of a house under a contract of tenancy executed by the Superintendent of Police.

The Superintendent of Police, Special Branch, C.I.D., Madras, wrote a letter to the wife of the owner of the house in question, who was then in jail, that the house would be taken up for occupation by an officer of that department. Excepting this letter there was no other document relating to the tenancy of the house in question. A Sub-Inspector was in occupation of the house and there was a default in due payment of rent within the meaing of section 7 (2) (*i*) of the Madras Buildings (Lease and Rent Control) Act. A petition filed for his eviction was dismissed on the ground that the provisions of section 7(2) of the Act were not applicable to the premises in question as the Provincial Government were the tenants and are exempted from those provisions by section 13 of the Act. In an application to quash the order of the appellate tribunal confirming the order of the Rent Controller,

1. (1931) I.L.R. 59 Cal. 833.
2. A.I.R. 1936 Cal. 97.

* C. M. P. No. 6437 of 1950. 11th January, 1951.

Held, as the Superintendent of Police is not one of the authorities prescribed by the Governor under section 175 (3) of the Government of India Act, 1935, who could execute a deed, contract or other instrument, there could not be, in the circumstances of the case, a tenancy between the Provincial Government and the wife of the owner. What has to be decided is whether it can be said that the Provincial Government are the tenants of the building in question. It is not sufficient that an officer under the Provincial Government is a tenant. On the facts it has to be held that the Provincial Government were *not* the tenants of the building when the application for eviction was made and therefore the person in occupation would not be entitled to rely on an exemption from the provisions of sub-section (2) of section 7 of the Act.

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records in H.R.A. No. 1152 of 1949 on the file of the Court of Small Causes, Madras, in L. Dis. No. 2689 of 1949 on the file of the Rent Controller, Madras, and quash the order therein.

N. Rajagopala Aiyangar for *C. Natarajan* for Petitioners.

The Advocate-General (*K. Kuttikrishna Menon*) for the State Counsel for Respondents.

The Order of the Court was delivered by

The Chief Justice.—This application arises out of a petition filed under section 7 of the Madras Biuldings (Lease and Rent Control) Act, for eviction in respect of premises belonging to the petitioners in Mowbray's Road, Mylapore. It is a matter of admission that there has been default in due payment of rent within the meaning of section 7 (2) (i). The petitioners would have been entitled to an order of eviction, but their petition has been dismissed on the ground that the provisions of section 7 (2) of the Act were not applicable to the premises in question as the Provincial Government are the tenants and are exempted from those provisions by a notification issued under section 13 of the Act.

The only question which falls for decision on this application is whether this finding that the Provincial Government were the tenants of this building on the date of the application for eviction is correct. The relevant facts have to be ascertained from the correspondence which passed between the parties. On 27th May, 1943, the Superintendent of Police, Special Branch, C.I.D., Madras, at Vellore, wrote a letter to the second petitioner herein who is the wife of the first petitioner who was then in Jail that the house in question would be taken up for occupation by an officer of that department on a monthly rent of Rs. 30, or the amount fixed by the Corporation of Madras whichever is less from 21st April, 1943, subject to certain conditions which are not material. It is common ground that except this letter there was no other document relating to the tenancy of this building. One H. R. Bangara, Sub-Inspector, was in occupation of the house since the beginning of 1943. From October, 1944, the fair rent for the building was fixed by the Rent Controller at Rs. 40 per month. The second petitioner issued a notice through her lawyer on the 26th January, 1945, to Mr. Bangara calling upon him to pay the balance of rent due from him calculating according to the order of the Rent Controller. To this Mr. Bangara replied on 30th January, 1945, giving an explanation for the delay and added that in future any notice of the kind may be sent to the Superintendent, Special Branch, C.I.D., Madras, as the agreement renting out the house was made to him and he was the officer to deal with such things. It appears that thereupon the second petitioner applied for a copy of the agreement and she was furnished with a copy which is marked as Exhibit 1 in this case on 29th March, 1945.

To ascertain whether the Government are the tenants of this house, it is necessary to advert to the provisions of the Government of India Act, section 175 (3) That runs as follows :

"Subject to the provisions of this Act with respect to the Federal railway authority, all contracts made in the exercise of the executive authority of the Federation or of a Province shall be expressed to be made by the Governor-General, or by the Governor of the Province, as the case may be, and all such contracts and all assurances of property made in the exercise of that authority shall be executed on behalf of the Governor-General or Governor by such persons and in such manner as he may direct or authorise."

Under this sub-section, His Excellency the Governor has prescribed the authorities who should execute certain classes of deeds, contracts and other instruments. Though several specific kinds of documents have been mentioned, there is no item which directly covers a lease of a building for the residence of a police official. The learned Advocate-General contended that such a lease might fall under item 2, *i.e.*, contracts and other instruments for the purchase, supply, conveyance or carriage of building materials, stores, machinery, etc., and the provision of labour for building or other work and such like engagements. Evidently the contention of the learned Advocate-General is that the lease would fall within the scope of the residuary phrase "such like engagements". In our opinion, the suggestion is far-fetched. It involves too much strain on the language to bring a residential lease under the category of an engagement to be likened to contracts for the purchase, supply and conveyance or carriage of building materials and for the provision of labour for building and other work. It follows that a residential lease must fall under item 1, namely, all deeds and instruments relating to any matters other than those hereinafter specified. In respect of these the prescribed authorities are, Secretaries to Government and the Additional Secretary to Government, Development Department. Appendix No. 7 to the Madras Financial Code which contains special rules and restrictions regarding particular items of contingent expenditure *inter alia* contains provisions for the renting of private lands and Government buildings for the residence of officers and for other public purposes (Item No. 49). So far as the Police Department is concerned, originally it was the Inspector-General of Police who was empowered to rent houses for use as residence by Police officials like a Sub-Inspector in cases where the maximum monthly rent in Madras City was Rs. 30. By a later amendment in 1948, the Deputy Inspector-General of Police and other officers were so empowered. As the tenancy in respect of the house with which we are now concerned commenced in 1943 before the amendment, it was the Inspector-General of Police who was the authority empowered to rent a house for the use of a Sub-Inspector.

Undoubtedly, it is not necessary that there should be a formal document of lease as evidence of tenancy. A lease can be inferred from correspondence in which case there should be a communication signed by an officer with due authority. In the present case, there are two difficulties in the way of the learned Advocate-General. The Superintendent of Police is not among the officers who are empowered to execute on behalf of the Governor deeds and instruments specified in item 1 in Appendix A. Secondly the Superintendent of Police was not at the time when the tenancy commenced the authority empowered to rent a house for the use as residence by a Sub-Inspector in the Madras City. It therefore follows that there could not be in law a tenancy between the second petitioner and the Provincial Government as such. No doubt it was in the contemplation of parties that only subordinate officers of the Police Department would be occupying the premises. But that is neither here nor there. What we have to decide is whether it can be said that the Provincial Government are the tenants of the building in question. It is not sufficient that an officer under the Provincial Government or a department under the Provincial Government is a tenant. It can well be that Government officers or Government Departments are tenants without any liability on the part of the Provincial Government as such because the conditions to be fulfilled before any such liability could arise are not fulfilled. This is such a case. It has been held in this Court that if the provisions of section 175 (3) of the Government of India Act are not satisfied, there is no contract which can bind the Government as such, vide *Sankara Mining Syndicate* v. *Secretary of State for India*[1] and *Perumal* v. *Madras Province*[2]. We are therefore constrained to hold that the Provincial Government are not the tenants of the building on the date of the application for eviction. The respondents would not therefore be entitled to rely on an exemption from the provisions of sub-section (2) to section 7 of the Act. The petitioners will be entitled to an order of eviction.

1. (1938) 2 M.L.J. 141 at 147. 2. (1949) 2 M.L.J. 156.

It was contended by the learned Advocate-General that the parties including the second petitioner were under the impression that virtually the Provincial Government were the tenants. Any such impression which they might have had cannot obviously decide the legal rights of parties.

The order of the appellate tribunal confirming the order of the Rent Controller is hereby quashed.

V.S. *Order quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, AND MR. JUSTICE VISWANATHA SASTRI.

T. Venkateswara Rao .. *Petitioner* *

v.

Masulipatam Municipal Council by Commissioner, S. Subba Rao and another .. *Respondents.*

District Municipalities Act (V of 1920), section 23—Power of Council to delegate to committee certain functions and duties—Exercise of power delegated—Decision binding on Council.

Decisions and actions of the Committee to which the Municipal Council has delegated its powers, duties and functions in any behalf under section 23 of the District Municipalities Act will be binding on the Council.

In the absence of anything to show the Council exceeded its powers in making a delegation, such a delegation must be presumed to have been validly made.

Petitions praying that in the circumstances stated in the affidavit in C.M.P. No. 7716 of 1950 on the file of the High Court, the High Court will be pleased to issue a writ of *certiorari* and a writ of prohibition respectively to the respondents in respect of the resolution, dated 9th March, 1950 and place all proceedings of the Committee before the Council and otherwise quash all the proceedings of the Committee subsequent to 9th March, 1950 as illegal.

S. Suryaprakasam, A. S. Prakasam and *D. P. Narayana Rao* for Petitioner.

Respondents not represented.

The Order of the Court was delivered by

The Chief Justice.—The petitioner is not entitled to any of the reliefs which he seeks in this application under Article 226 of the Constitution of India. Under section 19 of the Madras District Municipalities Act, subject to the provisions of the Act the Municipal Administration shall vest in the Council. Section 23 provides for the Council constituting committees for the purpose of exercising such powers, discharging such duties or performing such functions as it may delegate to them. It may also appoint individual councillors, or committees, to enquire into and report or advise on any matters which it may refer to them. Under section 25, the Council is given power to make rules in regard *inter alia* to the constitution and procedure of committees and the delegation of its powers, duties or functions to such committees. What the Municipal Council in this case did was to constitute committees and to delegate some of its powers and functions to these committees. This delegation was made by means of two resolutions, dated 8th November, 1948 and 9th March, 1950. In the absence of anything to show that the Council exceeded its powers in making this delegation which *prima facie* it had power to make under section 23 of the Act, we must presume that the delegation was validly made. The contention of the petitioner is that the proceedings of these committees should be sent to the Council to be discussed and if need be, to be modified or even set aside. We cannot agree with this contention. Under section 23 of the Act, two classes of committees are contemplated (1) committees to which the Council delegates some of its powers and duties and functions and (2) committees which are constituted only to enquire into and report or advise on any particular matter referred to them. So far as the proceedings of the latter class of committees are concerned,

* C. M. P. Nos. 7716 and 7717 of 1950. 27th September, 1950.

undoubtedly the Council can have the final word. The proceedings of such committees are only advisory. But the decisions and actions of the committees to which the Council had delegated its powers, duties and functions in any behalf will be binding on the Council.

Reliance was placed by learned counsel for the petitioner on rule 12 of schedule 3. This rule occurs among the rules regarding proceedings of the Council and the mode of transacting business. The rule runs thus :

"The proceedings of every committee appointed by the Council shall be recorded in writing and submitted to the Council."

This rule, in our opinion, does not affect the powers of the committee to which there has been a delegation of powers or functions in any behalf. It only provides for the recording of the proceedings in writing and for the submission of the proceedings recorded to the Council for information. The petitioner does not state in the affidavit filed by him in support of his application that the committees have failed to act according to rule 12. His real complaint is that these proceedings are made final and are not subject to further consideration by the Council. Rule 12 does not help the petitioner in any way. There is no ground therefore to either quash the two resolutions above mentioned or to direct the Council to place all the proceedings of the committee before the Council.

The applications are therefore dismissed.

K.C. ——— *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE PANCHAPAKESA AYYAR.

The State of Madras represented by the Collector of East Godavari at Kakinada .. *Appellant* *

v.

Sree Raju Ravu Venkatakumara Mahipathi Surya Rao Bahadur Garu Maharajah of Pithapuram, Trustee of Sree Rajah Ram Venkata Mahipathi Gangadhara Rama Rao Bahadur Garu and others .. *Respondents.*

Rivers—Bed of navigable rivers—Title to and law relating to—Madras River Conservancy Act (VI of 1884), sections 16 and 25—Ancient zamindari ryoti lands submerged by navigable river and re-formed in situ —Right of zamindar to—Refusal of permission to cultivate—Liability of Government to pay compensation—Suit for compensation—Notice under section 25 of Act VI of 1884—If essential—Conservator of Rivers—If necessary party to the suit.

The law regarding the right to the bed of a river may be stated broadly in the following five propositions :

(1) The bed of a navigable river in any part of India whether tidal or not, is vested in the Government, and not in the zamindar or other private person owning lands on both sides of the river, unless it has been granted to such private individual. The English Common Law Rule that the bed of non-tidal rivers, even though they are navigable, belongs to the riparian proprietors, does not apply to Madras State.

(2) To create a title to the river bed in the Government, the river should be navigable at that part of it where the disputed plots are situated.

(3) The ownership of the bed of the river would depend upon its character in 1802, the time of the Permanent Settlement and the grant of the adjacent land to the parties.

(4) A river in India is not navigable in the legal sense unless it is navigable throughout the year, though it need not be navigable for a portion of the day, as at low tide.

(5) Facilities for passage of large river crafts which may not be capable of rising to the dignity of ships, seem to be generally considered sufficient to call a river affording such facilities a navigable river.

Where the suit plots even in a navigable river are found to be re-formations *in situ* of ancient zamindari ryoti lands submerged by the river Godavari in 1915 after having been continuously cultivated for more than 60 years, the title of the owners is not taken away, notwithstanding that such re-formations *in situ* were partly due to conservancy work done by the Government.

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*Appeals Nos. 93 and 111 of 1947 and Transferred Appeals Nos. 251 to 257 of 1948. 31st October, 1950.

The mere fact that orders under section 16 of the Madras River Conservancy Act refusing permission for cultivation were proper and in public interests cannot take away the private parties' right to compensation, as no private party need shoulder the whole burden of conferring such a benefit on the public.

It is, no doubt, true that if in a particular Act a particular mode is *exclusively prescribed* for claiming the compensation claimable under the Act, that mode and *no other* should be resorted to. But, where as in section 25 of Madras Act, VI of 1884, there is no reference to the compensation claimable under section 16 of that Act and section 16 and other sections of the Act nowhere say that the compensation claimable under section 16 shall only be claimable by a suit brought against the Conservator of Rivers, the right of the plaintiffs under the general law to sue the Government for such compensation, or for damages or mesne profits, cannot be taken away, and will remain as supplementing the right under section 25 of the Act. Accordingly no question of non-maintainability of the suit without a notice under that section to the Conservator of Rivers, or limitation arises. A suit for compensation under section 16 of Act VI of 1884, can be brought against Government alone under section 80, Civil Procedure Code, without adding the Conservator of Rivers as a party. If the Conservator is added the notice under section 25 will become necessary. But a decree can be passed against the Government who had been given proper notice under section 80, Civil Procedure Code and the Conservator can be held to be an unnecessary party and the suit dismissed as against him.

Section 25 of Act VI of 1884 may conceivably cover claims to compensation against a conservator, surveyor or subordinate or any person acting under his direction though such compensation may not in all cases be claimable against the Government, being compensation for damage caused by the negligent and careless acts of these officials and subordinates in carrying out the duties under the Act albeit not *mala fide*.

Appeals against the decree of the Court of the Subordinate Judge of Amalapuram, dated 22nd June, 1946 and made in O.S. No. 61 of 1944.

The Government Pleader (*P. Satyanarayana Raju*) and *V. Balakrishna Eradi* for Appellants in A.S. Nos. 93 of 1947, 251 to 257 of 1948 and Respondents in Appeal No. 111 of 1947.

A. Sundaram Aiyar, Ch. Ramakrishna Rao and *R. Ramamurthi* for Respondents in Appeal No. 93 of 1947, etc., and with *C. Durga Bai* for Appellants in Appeal No. 111 of 1947.

The Judgment of the Court was delivered by

Panchapakesa Ayyar, J.—These are nine connected Appeals, A.S. Nos. 93 and 119 of 1947 being appeals by the opposite parties to O.S. No. 61 of 1944 on the file of the Sub-Court, Amalapuram, and the other seven appeals having been originally filed in the District Court, East Godavari, and got transferred here as the points involved in those appeals were the same as those in the first two appeals. Of these eight suits, covered by the nine appeals, four were filed by the Maharajah of Pithapuram, his son the Kumararajah, in whose favour he had executed a settlement, and his daughter-in-law the Yuvarani, who was the lessee in respect of the suit lands. These four suits are O.S. Nos. 34 of 1941, 29 of 1943, 14 of 1944 and 61 of 1944. In those suits the plaintiffs had alleged that the two blocks of land shown in the plaint schedule had been formerly *ryoti* lands of the Pittapuram Zamindari and part of Lanka Gannavaram village, adjoining the Vynatheyam branch of the river Godavari and that the lands had been cultivated till fasli 1325, that is, till about 1915, that the Godavari submerged those lands and cultivation therein had to be abandoned, that by about 1935 or so the lands began to be re-formed *in situ* owing to the river receding and so, the first two plaintiffs leased out the 17 acres 90 cents of the suit lands thus re-formed to the third plaintiff on a rental of Rs. 455-5-6 by an order, dated 29th September, 1940, and that the third plaintiff held an auction for the lease of the above lands publicly and got bids for Rs. 10,000 on 28th September, 1940, after she had applied to the Conservator of Rivers, East Godavari, who was the East Godavari Executive Engineer, Head Works Division, Dowleswaram, under the Government of Madras, for permission to clear the *nanal* and cultivate the lands, but the Conservator of Rivers refused such permission for this and the three succeeding years covered by the four suits, improperly and illegally, and that, in any event, the Government became liable to pay the "compensation" to the plaintiffs under section 16 of the Madras River Conservancy Act, VI of 1884, or, in the alternative, to pay "mesne profits" or "damages" for such deprivation of cultivation.

In O.S. No. 34 of 1941 (covered by A.S. No. 256 of 1948) the plaintiffs claimed Rs. 3,760 as compensation under section 16 of Act VI of 1884 or as damages and mesne profits, for 1940-41. In O.S. No. 29 of 1943 (covered by A.S. No. 255 of 1948) they claimed damages of Rs. 3,500, Rs. 455-5-6 for plaintiffs 1 and 2 and Rs. 3,044-10-6 for the third plaintiff for the year 1941-42, as compensation under section 16 of Act VI of 1884, or as damages and mesne profits. In O.S. No. 14 of 1944 (covered by A.S. No. 257 of 1948) they claimed the same amount of Rs. 3,500 as compensation under section 16 of Act VI of 1884, or as damages and mesne profits for the year 1942-43. In O.S. No. 161 of 1944 (covered by A.S. No. 93 of 1947) they claimed Rs. 10,000 as compensation under section 16 of Act VI of 1884, or as damages and mesne profits for the year 1943-44 claiming Rs. 455-5-6 for plaintiffs 1 and 2 and Rs. 9,635 for the third plaintiff and giving up Rs. 80-5-6. In O.S. Nos. 29 of 1943, 14 of 1944 and 61 of 1944, only the Province of Madras, represented by the Collector of East Godavari had been made the defendant, and notice under section 80, Civil Procedure Code alone was given. In O.S. No. 34 of 1941, though the Conservator of Rivers, East Godavari, namely, the Executive Engineer, Headworks Division, Dowleswaram, was made the second defendant, the Province of Madras being the first defendant, notice under section 80, Civil Procedure Code alone was given to the Government and notice under section 25 of Act VI of 1884 was not given to the Conservator of Rivers. In O.S. No. 13 of 1944, Ravi Subbarayudu, the owner of Zamindari *ryoti* land in Lanka Gannavaram village, near the lands covered by the other four suits and said to have been submerged like them in 1915 or so and become fit for cultivation in 1940 claimed a compensation of Rs. 350 under section 16 of Act VI of 1884, for the year 1941-42, owing to refusal of permission to cultivate and made only the Conservator of Rivers, East Godavari, the sole defendant. He gave notice to the conservator, under section 25 of Act VI of 1884. In O.S. No. 11 of 1945, covered by A.S. No. 252 of 1948, the same Ravi Subbarayudu claimed a compensation of Rs. 500 for the same land for the year 1943-44 owing to refusal of permission to cultivate. In O.S. No. 41 of 1943, covered by A.S. No. 253 of 1948, one Dokka Jagganna, the owner of a Zamindari ryoti land of Lanka Gannavaram village, adjoining the lands in the other suits, said to have been submerged in 1915 or so and become fit for cultivation in 1940, claimed damages of Rs. 1,100 under section 16 of Act VI of 1884 for the year 1941-42 for refusal of permission for cultivation, the sole defendant was the Conservator of Rivers, and he was given notice under section 25 of Act VI of 1884. In O.S. No. 42 of 1943, one Joganna claimed compensation of Rs. 1,850 under section 16 of Act VI of 1884, against the Conservator of Rivers in respect of another land submerged by the Godavari in 1915 or so and re-formed in 1939 or so, owing to refusal of permission to cultivate in 1941-42. Subbarayudu and Joganna had filed their suits originally in the District Munsif's Court, Razole, and they had been transferred to the Sub-Court, Amalapuram, for trial along with the other four suits filed there covering the same question.

All these suits were vigorously contested. The main points of the contention by the Government in all the suits were (1) that the plots were not proved to be re-formations *in situ* and that, at any rate, the plot E. F. G. H. I. concerned in the four suits, O.S. Nos. 34 of 1941, 29 of 1943, 14 of 1944 and 61 of 1944, was an independent formation in the bed of the Godavari, a navigable and tidal river, and that the title to this plot, at any rate, belonged only to the Government; (2) that the re-formations in the other cases, even if true, were not spontaneous re-formations *in situ*, but a direct result of protective and conservancy works undertaken by the Government through the Conservator of Rivers, and, so, the title to such re-formed lands would vest only in the Government; (3) that the orders of the Conservator of Rivers refusing permission to cultivate were *bona fide* and proper and in the interests of the Rivers and the public, and so, no compensation or damages could be claimed; (4) that, even otherwise, no damages could be claimed by the plaintiffs as the lands covered by the suits were overgrown with *nanal* and unfit for tobacco or other cultivation (contrary to the allegations in the plaints) and would have fetched very little, if at all anything, if the *nanal* were cleared and the lands were

cultivated with tobacco, and that they would not have fetched even the cost of clearing the *nanal*, and that the damages claimed were, in any event, exorbitant and fanciful, not even Rs. 10 to 15 per acre being got on similar adjoining lanka lands free from *nanal* in auctions held by Government in these very years. Regarding the four suits filed by the Maharajah of Pithapuram and two others, the Government raised two more contentions, namely, that the suits were not maintainable as no notice had been given to the Conservator of Rivers under section 25 of Act VI of 1884, and as the Government would not be liable for compensation except through the Conservator of Rivers under section 25 of the Act, and that the alleged lease to the third plaintiff, the Yuvarani of Pithapuram, was a fraud on the public in order to prevent the actual cultivating tenants from getting ryoti rights in the lands by giving them fictitiously to this lady of the zamindar's own family and that the alleged bids for Rs. 10,000 for these lands were bogus and nominal and would not afford any standard for assessing the compensation or damages, if any, caused by the refusal of permission to cultivate.

The learned Subordinate Judge, Amalapuram, in an exhaustive judgment, considered all the contentions of all the parties in all the suits. He held that the orders of the Conservator of Rivers refusing permission to cultivate were *bona fide* and in the interest of the conservancy of the rivers, and the public, as such cultivation would have been prejudicial from the conservancy point of view, and that, therefore, the orders were neither unauthorised nor *ultra vires* nor *mala fide*, but that reasonable compensation could be claimed by the plaintiffs for the inability to cultivate the lands, consequent on such refusal of permission, under section 16 of Act VI of 1884 itself. He found, after a local inspection and after a thorough discussion of the evidence, including the survey plans and sketches and their comparison, that all the suit lands were re-formations *in situ* of old zamindari *ryoti* lands in existence for more than sixty years before they were submerged by the Godavari in 1915 or so, they having completely re-emerged in 1939 or 1940. He held that the plot E. F. G. H. I. was also such a re-formation *in situ* of old zamindari *ryoti* lands belonging to the plaintiffs, either by grant or at least by adverse possession uninterruptedly for more than sixty years, and that plot E. F. G. H. I. was not part of the bed of a tidal and navigable river, and so, even if it was not a re-formation *in situ* it would only belong to the plaintiffs (the riparian owners) and not to the Government. He found further that even if the plot E. F. G. H. I. was not a re-formation *in situ* and was an independent formation in a tidal and navigable river, as urged by the Government, it would still belong to the plaintiffs, being a *lateral accretion and not a vertical accretion*. He held after a careful discussion of the entire oral and documentary evidence regarding the income from tobacco cultivation in similar lanka lands and from his local inspection of the suit lands, that if permission had been given to cultivate them the net annual income per acre would be one *putti* of tobacco, for the majority of the lands, and he fixed the value of that one *putti* at Rs. 100 in 1940, Rs. 125 in 1941, Rs. 150 in 1942, Rs. 175 in 1943 and Rs. 200 in 1944. He gave slightly higher rates of income for Oorapaya lands and the plot E.F.G.H.I.

He was of opinion that in O. S. No. 34 of 1941, the 2nd defendant, the Conservator of Rivers, was an unnecessary party, as the 1st defendant, the Government, which was liable to pay compensation, had been made a party and no independent tort had been proved against the 2nd defendant, and so dismissed the suit as against the 2nd defendant, and granted a decree only against the 1st defendant. He held in O. S. Nos. 34 of 1941, 29 of 1943, 14 of 1944, and 61 of 1944, that the suits were all maintainable even though a notice under section 25 of Act VI of 1884, had not been given to the Conservator of Rivers, and that officer had not been made even a party in three of the suits. According to him, a suit under the general law against the Government for damages and mesne profits, and even for compensation under section 16 of Act VI of 1884, was not precluded by section 25 of the Act which was only an enabling and not an exhaustive section.

In the end, he gave the plaintiffs in O.S. No. 34 of 1941 a decree for Rs. 2,385-8-0 as damages and Rs. 374-13-0 as proportionate costs, and dismissed

the rest of the claim with proportionate costs of Rs. 151-6-9. A. S. No. 256 of 1948 is the appeal by the Government against that decree. The plaintiffs have filed a memorandum of cross-objections for Rs. 2,614-3-9 the disallowed amount and costs and subsequent interest. In O. S. No. 29 of 1943 he gave a decree to the plaintiffs for Rs. 2,833-4-0 as damages and Rs. 388-5-2 as proportionate costs and dismissed the rest of the claim with proportionate costs of Rs. 44-9-9. The Government have filed appeal No. 255 of 1948 against the decree, and the plaintiff have filed a memorandum of cross-objections for Rs. 1,427-0-11, the disallowed amount, costs and subsequent interest. In O. S. No. 14 of 1944 he gave the plaintiffs a decree for Rs. 3,134-4-0 as damages and Rs. 428-10-1 for proportionate costs and dismissed the rest of the claim with proportionate costs of Rs. 24-8-1. The Government have filed A. S. No. 257 of 1948 against the decree and the plaintiffs have filed a memorandum of cross-objections for Rs. 968-7-11 being the disallowed amount, costs and interest. In O. S. No. 61 of 1944 he granted a decree to the plaintiffs for Rs. 3,580 as damages and Rs. 399-0-11 as proportionate costs and dismissed the rest of the claim with proportionate costs of Rs. 349-6-5. The Government have filed A. S. No. 93 of 1947 against the decree, and the plaintiffs have filed A.S. No. 111 of 1947 for Rs. 677-5-8, for the disallowed amount, costs and interest. In O. S. No. 13 of 1944, he granted the plaintiff a decree for Rs. 300 as damages with Rs. 53-10-0 as proportionate costs and dismissed the rest of the claim with proportionate costs of Rs. 3-9-2. The Government have filed an appeal, A. S. No. 251 of 1948 against the decree. There is no memorandum of cross-objections. In O. S. No. 11 of 1945, he granted the plaintiff a decree for Rs. 400 as damages with proportionate costs of Rs. 67-0-10, and dismissed the rest of the claim with proportionate costs of Rs. 5. The Government have filed A. S. No. 252 of 1948 against the decree. There is no memorandum of cross-objections. In O. S. No. 41 of 1943, he gave the plaintiff a decree for Rs. 750 as damages and proportionate costs of Rs. 120-9-0 and dismissed the rest of the claim with proportionate costs of Rs. 23-9-2. The Government have filed A. S. No. 253 of 1948. There is no memorandum of cross-objections. In O. S. No. 42 of 1943 he gave the plaintiff a decree for Rs. 1,200 as damages and Rs. 177-13-7 as proportionate costs, and dismissed the rest of the claim with proportionate costs of Rs. 43-9-6. The Government have filed A. S. No. 254 of 1948 against the decree. There is no memorandum of cross-objections.

We have perused the entire records, and heard the learned Government Pleader for the Government and the learned counsel for the plaintiffs. The learned Government Pleader raised several contentions. His first contention was that O. S. Nos. 34 of 1941 and 29 of 1943, 14 of 1944 and 61 of 1944, were not maintainable and should have been dismissed as the requisite notice under section 25 of Act VI of 1884 had not been given to the Conservator of Rivers, and that no compensation under section 16 for refusal of permission to cultivate the lands could be claimed except as provided for under section 25 of Act, and that the suits had become barred by limitation under section 25. We cannot agree. It is no doubt, true that if in a particular Act a particular mode is *exclusively prescribed* for claiming the compensation claimable under the Act, that mode, and no other should be resorted to. But where, as in section 25, there is no reference to the compensation claimable under section 16, and section 16 and other sections of Act VI of 1884 nowhere say that the compensation claimable under section 16 shall only be claimable by a suit brought against the Conservator of Rivers, the right of the plaintiffs under the general law to sue the Government for such compensation, or for damages or mesne profits, cannot be taken away, and will remain as supplementing the right under section 25 of the Act. So no question of non-maintainability or limitation arises. As this point has not been apparently covered by any decision of this Court, it is better to discuss the point a little in detail.

Section 16 runs as follows :

"Whenever under section 11, 12, 13 or 14 the Conservator of Rivers refuses the owner or occupier of any land permission to plant, cultivate or build on any land, or requires him to remove any

groynes, buildings, constructions, plantations, grasses, trees or other obstructions or works existing at the time of the survey or subsequently authorised by the Conservator of Rivers, such owner or occupier shall be entitled to compensation for any damages sustained by him by reason of such requirement or refusal of permission.

Section 25 runs as follows :

"No suit shall be brought against any conservator, surveyor or subordinate, or any person acting under his direction, for anything done or intended to be done under this Act until after the expiration of three months next after notice in writing shall have been delivered or left at the office of such conservator, surveyor, subordinate or person or at his place of abode, explicitly stating the cause of action and the name and place of abode of the intended plaintiff and of his agent in the cause, if any, and upon the trial of such suit the plaintiff shall not be permitted to go into evidence of any cause of action except such as is stated in the notice so delivered and unless such notice be proved the Court shall find for the defendant ; and every such suit shall be commenced, within six months next after the accrual of the cause of action."

It will be obvious, even at the cursory glance, that section 25 does not say that the compensation claimable under section 16 can only be claimed by a suit brought under that section against the conservator, surveyor or subordinate or any person acting under his direction. It is also not reasonable to hold so, as the section does not refer to the word "compensation" at all or say that that shall be the only mode of claiming the compensation claimable under section 16. As the lower Court has remarked, it is immaterial from the point of view of the plaintiffs whether a decree is passed against the Government or the Conservator of Rivers, or against both, and that, while it is open to the plaintiffs to make both parties or one of them a party to a suit for compensation, the sum awarded as compensation has to be recovered only from the Government as this represents only compensation under section 16 of the Act for an act lawfully done by the Conservator of Rivers under powers vested in him under Act VI of 1884, and not any compensation for independent torts committed by the Conservator of Rivers, for which the Government is not liable. It is clear that section 25, while undoubtedly covering a claim for compensation under section 16, as contended by the learned Government Pleader, may also conceivably cover other claims against the conservator, surveyor or subordinate or person acting under his direction, besides the compensation contemplated in section 16. So, two conclusions follow. The first is that the compensation claimable under section 16 can be claimed by a suit under section 25 after a notice under section 25, against the Government and the Conservator of Rivers though if the conservator is added the conditions prescribed in section 24 for the period of notice and for limitation will operates. The very clause :

"No suit shall be brought against any conservator, surveyor or subordinate or any person acting under his direction."

in section 25 shows that it is a section intended to protect the conservator, surveyor, or subordinate or person acting under this direction, and not one intended to exclude the liability of the Government for compensation under section 16, except by a suit under section 25. Under section 80, Civil Procedure Code, no suit shall be instituted against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity except under the terms regarding notice, etc., prescribed by that section. It is clear to us that the Conservator of Rivers, East Godavari, who is no other than the Executive Engineer, Headworks, Dowleswaram Division, is a *public officer*, and that his act in these suits were undoubtedly purported to be done by him as such public officer in his official capacity. So a suit for compensation under section 16 of the Act VI of 1884, can, in our opinion be brought against Government alone under section 80, Civil Procedure Code, without adding the Conservator. If the conservator is added, the notice under section 25 will become necessary. Of these four suits, the conservator was added only in O. S. No. 34 of 1941. We agree that no decree could be given against him in that suit as the notice required under section 25 of Act VI of 1884 was not given to him. But the lower Court held him to be an unnecessary party in that suit, and dismissed the suit as against him. We see no legal objection to the lower Courts having granted a decree against the 1st defendant (Government) who had been given proper notice under section 80, Civil Procedure

Code. The decree will not be affected by the addition of the 2nd defendant in the plaint as he had been held to be an unnecessary party to the suit and there was no decree against him.

The second conclusion is that section 25 of Act VI of 1884, may conceivably cover claims to compensation against a conservator, surveyor or subordinate or any person acting under his direction though such compensation may not in all cases be claimable against the Government, being compensation for damage caused by the negligent and careless acts of these officials and subordinates in carrying out their duties under the Act albeit not *mala fide*. So we over-rule this contention.

The next contention of the learned Government Pleader was that the lower Court went wrong in holding that the Godavari at the spot where the suit lands, especially the plot E. F. G. H. I., are located is not a tidal and navigable river whose bed vests in the Government. After an exhaustive consideration of the entire evidence in the case we agree with the learned Government Pleader that the lower Court went wrong in this respect though it does not affect the decrees in these suits, and that really the Godavari at this spot is a tidal and navigable river whose bed belongs to the Government. We have had occasion in a recent appeal, A.S. No. 120 of 1947, between more or less the same parties, to deal with this question regarding the Godavari river only a furlong away from the present spot, concerning some islands formed near Patha Gannavaram, on the other side of the Vynatheyam branch of the Godavari to Lanka Gannavaram. The conclusion we arrived at regarding the river and the river bed in this case also is the same and is based on the same grounds.

The law regarding the matter is well settled, and may be stated broadly in five propositions, as we did in A. S. No. 120 of 1947 :—

(1) The bed of a navigable river in any part of India whether tidal or not, is vested in the Government, and not in the Zamindar or other private person owning lands on both sides of the river, unless it has been granted to such private individual. The Privy Council has laid down this clearly in *Maharajah of Pithapuram* v. *The Province of Madras*[1]. The English Common law rule that the bed of non-tidal rivers, even though they are navigable, belongs to the riparian proprietors, does not apply to Madras State.

(2) To create a title to the river bed in the Government, the river should be navigable at that part of it where the disputed plots are situated.

(3) The ownership of the bed of the river would depend upon its character in 1802 the time of the permanent settlement and the grant of the adjacent land to the plaintiffs. *Province of Madras* v. *Jagannatha*[1].

(4) A river in India is not navigable in the legal sense unless it is navigable throughout the year, though it need not be navigable for a portion of the day, as at low tide.

(5) Facilities for passage of large river crafts, which may not be capable of rising to the dignity of ships, seem to be generally considered sufficient to call a river affording such facilities a navigable river. *Secretary of State for India* v. *Venkata-narasimha Naidu*[2].

The evidence in this case clearly shows that river craft carrying firewood, etc., can freely navigate in this portion of the river at all times of the year except during low tide, and even shows that there is tidal action at this place. We hold that the Vynatheyam, passing between the villages of Lanka Gannavaram and Patha Gannavaram, is a navigable and tidal river at this spot, and that its bed belongs to the Government, though, of course, that will not affect the right of a private owner of lands submerged by that river to those lands when they are re-formed

1. (1949) 1 M.L.J. 128 : L.R. 75 I.A. 305 : I.L.R. (1949) Mad. 675 (P.C.).
2. (1945) 2 M.L.J. 27 : I.L.R. (1945) Mad. 420.
3. (1919) 11 L.W. 256.

in situ or to *lateral accretions* to such lands. Till the year 1866 Lanka Gannavaram and Patha Gannavaram admittedly formed part of one single village. In that year, for purposes of revenue convenience, the single village was divided into two separate villages. In A. S. No. 120 of 1947 we held that the river Vynatheyam, at a spot a furlong from the suit plots and adjoining Patha Gannavaram on the opposite side, was a navigable river even at the time of the Permanent Settlement in 1802. We considered that river navigable throughout the year now except at low tide should have been navigable then, the Dowleswaram anicut having even diminished the quantity of water below it, and the river above it being navigable for many miles even now and for years before. In *Province of Madras* v. *Jagannatha*[1] a Bench of this Court held that the Vasishta branch of the Godavari from which the Vynatheyam takes off only some three miles from this spot, should have been navigable in the year 1802. There have been also some other cases holding the river Godavari very near the suit plots to be navigable. The oral evidence in the case of disinterested and credible persons, also proves this.

But this conclusion of ours regarding the Vynatheyam river, differing from the lower Court, will not help the Government in these suits as we are satisfied, after an exhaustive perusal of the evidence on record, that the lower Court was right in considering all the suit plots to be only re-formations in *in situ* of ancient zamindari ryoti lands submerged by the river Godavari in 1915 after having been continuously cultivated for more than 60 years. That will apply also to the plot E. F. G. H. I. which too we are satisfied, is only a re-formation *in situ* of former zamindari *ryoti* land. The contention of the learned Government Pleader, that the plot E. F. G. H. I. is still river bed, and has not yet become a formation, cannot be upheld in view of the express recital in paragraph 5 of the written statement filed by the Government in O. S. No. 61 of 1944 which admits that the plot E. F. G. H. I. has been formed, though it calls it "an independent formation" in the bed of the river. This plot E. F. G. H. I. is only two or three feet lower in level than the rest of the plots claimed in the suit, and is more than 16 feet above the level of the Godavari, and not a drop of water is found anywhere on this plot. So, we need not consider the further contention of the learned Government Pleader that the lower Court erred in recognising the title of the plaintiff to this plot on the ground of its being a *lateral accretion*, though it was not set up in the plaint and was covered only by an issue and though it was not consistent with the allegation of re-formation *in situ*. We are of opinion that the question of lateral formation, having been raised by an issue and covered by the evidence, could have been considered by the lower Court under the law though it is not quite consistent with the plaintiffs' story of re-formation *in situ* and though it is not necessary for supporting the plaintiffs' case as they have fully proved their case that this plot too is only re-formation *in situ*. We see no point in the learned Government Pleader's claiming that the re-formations *in situ* were partly due to the conservancy work done by Government. That will not take away the title of the owners to the re-formed lands, even if true, any more than the title of the owner of a stolen or lost jewel is lost by him before the Government police officers recovered it.

The next contention of the Government Pleader was that when the orders of the Conservator of Rivers were held by the lower Court itself to be fully justified in the interest of river conservancy, and to be necessary and proper, the plaintiffs should not have been given any damages. We cannot agree. Section 16 of Act VI of 1884 expressly allows compensation for such rightful refusal of permission to cultivate, and that right to compensation has not been taken away by any other Act or Ordinance or circumstance. The mere fact that orders refusing permission for cultivation were proper and in public interests cannot take away the private parties' right to compensation as no private party need shoulder the whole burden of conferring such a benefit on the public. Thus a plot may be required for constructing defences, or a hospital, or a prison or a school, or a Court,, or a cremation ground and yet the Land Acquisition Act

1. (1945) 2 M.L.J. 87 : I.L.R. (1945) Mad. 420.

under which such lands are acquired usually, not only awards compensation to the private party whose land is acquired for such public purposes, but gives him 15 per cent extra for compulsory acquisition. So, this contention cannot hold good.

The last contention of the learned Government Pleader was that the *quantum* of compensation awarded was excessive and ought to be drastically reduced. The learned counsel for the Maharajah and others who have filed three memoranda of cross-objections and A. S. No. 111 of 1947, urged on the other hand, that the compensation awarded by the lower Court was totally inadequate and that the entire compensation claimed in those four suits ought to have been granted, especially since the highest bid for the lease was Rs. 10,000 every year. The learned Government Pleader attacked those bids as bogus and nominal, and even the lease to the 3rd plaintiff as a fraudulent act intended to prevent the actual cultivating ryots from getting *ryoti* rights in those lands. We are not very much concerned in this case with the alleged fraudulent act of the zamindar in giving a lease to the 3rd plaintiff, the Yuvarani of Pittapuram, who has neither bulls nor ploughs of her own and is not likely to cultivate those lands herself. Such leases to members of the zamindar's family are too numerous, and of too long a practice, to be suddenly declared null and void. On principle there is nothing in law to prevent a zamindar from giving a lease to a member of his family, especially in these days when zamindaries are being abolished and zamindars levelled down to the status of common men. Nor need a lessee show bulls and ploughs of his own or cultivate the land himself, before he can claim the leasehold rights granted to him validly. In fact many Brahmins and Vysias and others, who do not own ploughs or bulls and do not intend to cultivate the lands themselves, have got leases in their names and those leases cannot be attacked as invalid for those reasons. The learned Government Pleader, did not, therefore, seriously press this portion of his argument. He pressed the other portion of his argument, namely, that the bids were all bogus and nominal ones, and that the auctions were simply held to bolster up the suit claims, that not a pie was paid by the bidders, that the auctions themselves were held only after applications for cultivation had been made in 1940 and it was informally known that they would be refused, and that the auctions were held year after year thereafter in spite of the knowledge that permission to cultivate would be refused in public interests, would all show the bids to be bogus and nominal. We agree regarding this, for the reasons urged by the learned Government Pleader which appeal to us as true and valid.

But his further contention that no compensation or damages should have been awarded to the plaintiffs, or, at the most, only some small amount, not exceeding Rs. 25 per acre does not appeal to us. No doubt, one witness examined by the plaintiffs admitted that he sustained loss by clearing similar *lanka* land of *nanal* and cultivating it with tobacco. But that was an exceptional case and cannot be relied on. No doubt also, some of the witnesses like P. W. 7, speaking to an income of Rs. 200 or Rs. 300 per acre by tobacco cultivation of similar lands, were speaking of lands in Kapileswaram Estate, 17 or 20 miles from this place. It is also true that the Government realised only Rs. 7-11-0 to 73-12-0 per acre by leasing out the *lanka* lands in *Mondapu lanka, Kottapalli lanka, Mannapalli lanka, Koderu lanka and Korugerumilli lanka* similar to the suit lands, and situated only some 2 to 8 furlongs from the suit lands, though tobacco was raised in the lands in all those five *lankas*. But Government, it is notorious, realises much less in such leases than private parties do. There is no doubt that there is an element of surmise and guess in fixing the damages arising out of the refusal of the permission to clear the *nanal* and do tobacco cultivation on these lanka lands. There is also evidence to show that the normal net income per acre from such lands is only a *putti* an acre. The lower Court has considered all these factors when rejecting the contention of the Government for awarding no compensation, or a very small sum as compensation, and when rejecting the exhorbitant sums (Rs. 300 to Rs. 560 per acre) claimed by the plaintiffs based on the bids and the evidence of P. Ws. 3, 4, 5, 6, 7, 8, 9, 11, 14, 15, 16 and others about the realisation from Kapileswaram lankas and other lands farther away.

It has carefully weighed the evidence on both sides and arrived at the figures it did after such weighing and after a local inspection. Generally, appellate Courts are not expected to interfere with such careful assessment of figures by the trial Court, which has seen the witnesses and weighed every bit of evidence, oral and documentary and made also a local inspection. We do not see any reason to depart, from that salutary practice in this case, especially as we too consider the figure fixed by him to be proper. In the end, therefore, we hold that the compensations, or damages, awarded by the lower Court in all the cases were correct and proper, and do not deserve to be interfered with. ...

In the result, all the appeals and memoranda of cross objections are dismissed with costs. Government given two months' time to pay the costs.

K.S. *Appeals and memoranda of cross objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAGESA SASTRY.

A. Sankunni Menon .. *Appellant**

v.

The South Indian Railway having their head office at Trichinopoly and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 80—Requirements of—Suit against railway for damages due to deterioration of goods caused by misconduct of Railway—Averment in plaint that notice was delivered or left with Secretary to Government—If essential—Notice if bad for not stating that Governor-General will be sued.

A plaint against the Governor-General in Council as owner of the Railway cannot be dismissed on the ground that the express words that the notice was delivered or left with the Secretary for Railways are not found in the plaint. An amendment would get over such a technical objection.

The notice under section 80 of the Civil Procedure Code after setting out the despatch of goods and the non-delivery in time and their late arrival and the deterioration of the goods and the loss sustained by the plaintiff ended with this paragraph :—"Please therefore take notice that unless you make good the loss I have sustained by reason of your negligence, I intend instituting a suit against your railway for such loss as mentioned above." The letter was addressed to Secretary for Railways, Central Government, New Delhi, and the agents of the three Railways concerned.

Held :—Though section 80 of the Civil Procedure Code is mandatory it is equally well settled that the Court should not be hypercritical in examining the language used but should interpret the same in a free and liberal spirit. On a fair reading of the notice in the present case it may well be taken as an intimation which will satisfy the requirements of sections 79 and 80 of the Civil Procedure Code. The name of the proposed defendant need not be stated although of course it is expected that the person against whom the relief is sought would be particularised.

Subramaniam v. *Union of India*, (1950) 2 M.L.J. 656, reaffirmed.

Governor-General in Council v. *Krishnaswami Pillai*, (1946) 1 M.L.J. 267, distinguished.

Appeal against the decree of the Court of the Subordinate Judge, Calicut dated 31st October, 1946, in O. S. No. 33 of 1945.

R. Bashyam and *T. R. Srinivasan* for Appellant.

S. S. Ramachandra Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal by the plaintiff against the decree of the Subordinate Judge of South Malabar at Calicut dismissing his suit on a preliminary point namely that a proper statutory notice under section 80 of the Civil Procedure Code has not been given by the plaintiff before the suit was instituted. There are four defendants to the suit. The first is the South Indian Railway. The second is the Madras and Southern Mahratta Railway. The third is the Great Indian Peninsular Railway and the fourth is the Governor-General in Council, New Delhi. The plaintiff's case was that he despatched from Calicut to self at Kalapipal, a station in the G. I. P. Railway, 34 bags of dry coconuts, 11 bags of moist coconuts and 77 bags of copra balls by invoice dated 17th July, 1944. He charged the

* Appeal No. 543 of 1947. 21st November, 1950.

railway system with wilful default and negligence and misconduct as the goods were wrongfully diverted and otherwise unduly delayed in the course of transit. It was only after continued enquiries regarding the delay at the other end that the goods were traced and finally sent to the destination in October, 1944. The goods had become deteriorated and became unmarketable. The District Commercial Inspector, Jhansi, certified the condition of the goods and assessed the claim for damages at Rs. 1,918. The plaintiff's agent took delivery under protest reserving his claim for full and adequate damages. He claimed Rs. 5,059 as the proper amount of damages sustained by him. In paragraph 9 of the plaint it was stated that he had sent various letters to the defendants complaining of the delay and claiming damages and that finally the defendants evaded and refused to make good the damages. He issued on 29th March, 1945, a registered notice under section 80 of the Civil Procedure Code. Along with the plaint he filed the copy of the notice sent by him and also the acknowledgments of delivery by the various addressees signed by them. All the defendants separately filed written statements and in each of them we find an objection being taken to the legal validity of the notice under section 80. The ground of objection was that proper statutory notice was not served on the Governor-General in Council who owns the railways. The written statements disclosed that the goods were misdespatched to Mysore and after some delay they were traced and finally they were rebooked to Kalapipal. Sometime before the trial an additional written statement was filed on behalf of all the defendants wherein it was stated that section 80 of the Civil Procedure Code was not complied with as the plaint did not use the words "sent, delivered and left" with reference to the notice under section 80. Various issues were framed but as stated before the validity of the notice was treated as a preliminary point of law and the lower Court was asked to try that issue first. It accordingly took it up for trial and in the end dismissed the suit as stated above.

Two grounds are urged in the judgment of the Court below for its conclusion that the notice is bad. The first is that there is no allegation in the plaint that the notice was delivered or left at the office of the Central Government and that the mandatory provision of section 80 are not complied with. Section 80 says :

> "That the plaint shall contain a statement that such notice has been so delivered or left."

The second ground was that the notice does not state that the Governor-General in Council will be sued and did not claim any relief against the Governor-General in Council.

The points for determination are whether the notice is bad because the plaint did not contain an averment that it was delivered or left with the Secretary to Government ; (2) whether the notice is bad because no relief was claimed against the Governor-General in Council nor was it intimated that he will be sued.

As regards point number 1, want of a proper averment in the plaint, it may be noted that along with the plaint the acknowledgments of the delivery of registered letters were filed. Paragraph 9 of the plaint referred to the despatch of the registered notice under section 80 and the non-receipt of a reply. In this circumstance it seems to me a highly technical view that the plaint should be dismissed on the ground that the express words that the notice was delivered or left with the Secretary for Railways are not found in the plaint. If that was the only point I would allow an amendment to get over the objection. The learned advocate for the respondents agreed that an amendment would get over the technical argument. In view of that he did not insist on an amendment but was content to support the judgment on other points. Point number 1 therefore must be found in favour of the plaintiff in the circumstance.

Point No. 2.—The more serious objection to the notice that was pressed before me was the absence of a reference to the Governor-General in Council in the notice issued. The copy of the notice is Ex. P-1 (the original has not been produced by the defendants). Ex. P-1 after setting out the despatch of goods and the non-delivery in time and their late arrival and the deterioration of the goods and the loss sustained by the plaintiff ends with this paragraph :

"Please therefore take notice that unless you make good the loss I have sustained by reason of your gross negligence I intend instituting a suit against your railway for such loss as mentioned above."

The letter, was amongst others, addressed to Secretary for Railways, Central Government, New Delhi. Similar notices were sent to various persons including the agents of the three railways. The lower Court had placed reliance on the judgment of a Division Bench of this Court in *Governor-General in Council* v. *Krishnaswami Pillai*[1], and also the decision of the Privy Council in *Bhagchand Dagadusa* v. *Secretary of State for India*[2]. It is well settled that the section is mandatory. At the same time it is equally well settled that the Court should not be hypercritical in examining the language used but should interpret the same in a free and liberal spirit. In my opinion the decision in the M.L.J. case[1] is distinguishable because the registered notice there stated that the Secretary of State for India in Council will be sued. Actually it is a different person that should be the defendant and that was the defendant. In such circumstance the notice was regarded as bad. In the present case there is no such reference to a wrong person as the person who was going to be sued. It is no doubt true that it is not expressly stated that the proposed suit would be against the Governor-General in Council. On the other hand, it is stated generally that the suit will be against your Railway and the notice was addressed to Secretary to Railways, Central Government, New Delhi. Any person who receives this notice and reads it will understand that this is a claim against the Government and the suit would be against the owners of the Railway, the Governor-General in Council. It could not have been the intention, nor could it have been understood, as a suit which is contemplated against the individual official, the Secretary for Railways. In fact the language used is "the suit will be against your railway" and not "against you." I think a fair reading of this notice may well be taken as an intimation which will satisfy the requirements of sections 79 and 80 of the Civil Procedure Code. In fact section 79 says that actually in the suit the defendant must be the Governor-General in Council. In the present suit he is the 4th defendant. Section 79, therefore, is strictly and literally complied with. Section 80 requires that the notice should state the cause of action, the name, description of the plaintiff and the relief which he claims. It is somewhat significant that the name of the proposed defendant need not be stated although of course it is expected that the person against whom the relief is sought would be particularised. I had occasion to decide the same question in a batch of C. R. Ps., C. R. P. No. 753 of 1948, etc., *Subramaniam* v. *Union of India*[3]. I held therein that a notice in somewhat similar terms which merely stated that the suit would be filed for recovery of the amount claimed and was despatched by registered notice to the Secretary to Governor-General in Council, Department of Railways and stated that it was a notice under section 80 of the Civil Procedure Code was a good notice. The matter has been argued before me again. I do not however, see any reason to change my view. I hold accordingly that the notice is not bad on this ground either.

Lastly Mr. Ramachandra Aiyar sought to raise a new point in support of the judgment of the lower Court. He contended that the notice was certainly bad because it merely stated that loss had been incurred and that unless the loss is made good a suit will be filed. No particulars of the loss were indicated nor the amount. He stressed the need for definite information on the point in the notice itself so that the Government may be apprised of the magnitude of the claim and the matter be dealt with at the appropriate level having regard to the magnitude of the claim among other things. I see some force in this argument. But in the present case notwithstanding the fact that the defendants raised an additional statement setting an objection to the notice on other grounds, they never raised this point. I do not see any justice in allowing them to raise a further point now particularly when I find that in the written statement it is admitted that the goods

1. (1946) 1 M.L.J. 267. (P.C.).
2. (1927) 53 M.L.J. 81 : I.L.R. 51 Bom. 725 (P.C.).
3. (1950) 2 M.L.J. 656.

were misdespatched to Mysore where they were lying unclaimed and it was only after some considerable delay that the mistake was found out and the goods were despatched to the proper place. I do not see any reason why the plaintiff should be made to suffer for this delay which may be due either to the negligence or an accident on the part of the railway officials. Having regard to this aspect of the matter I do not see why I should allow an indulgence in favour of the railway to the possible detriment of the plaintiff. I therefore decline to entertain this point.

In the result, the appeal is allowed and the case will be sent back to the lower Court for trial of other issues. Costs to abide. Court-fee to be refunded.

K.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRA REDDI.

Annadhana Katlai attached to Sri Thyagarajaswami Devasthanam, Tiruvarur, by its executive officer .. *Petitioner**

Court-Fees Act (VII of 1870), section 7 (v) and (xi) (cc)—Applicability—Suit to recover possession of land from tenant after ejecting him and for arrears of rent—Allegation in the plaint that defendant is setting up a false claim to occupancy rights—No claim for declaration of title.

The suit by the plaintiff was for recovering the suit land from defendant after ejecting him and for arrears of rent based on tenancy created by lease deeds, the periods of which had expired. There was a recital in the plaint that in reply to a notice calling upon the defendant to surrender possession of the suit property on the termination of the leases, he set up a false claim to occupancy right in the suit land which he was not entitled to. On the question whether the suit has to be valued for purposes of court-fee under section 7 (v) or (xi) (cc) of the Court-Fees Act,

Held : The suit is to evict the defendant from possession on the basis of his being a tenant under the plaintiff whose tenancy was determined. The fact that it is averred in the plaint that the defendant denied the plaintiff's title to recover possession of property by setting up occupancy rights in the suit property would not enlarge the scope of the suit for purposes of court-fee and would not take it away from the ambit of section 7 (xi) (cc). of the Court-Fees Act. The suit as framed is by the landlord against the tenant whose tenancy was terminated and to recover possession within the meaning of section 7 (xi) (cc) of the Court-Fees Act.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order dated 23rd July, 1946, of the Court of the Subordinate Judge, Mayuram, in the unfiled plaint, dated 16th April, 1946.

N. Arunachalam and *K. S. Naidu* for Petitioner.

The Government Pleader (*P. Satyanarayana Raju*) for Respondent.

The Court delivered the following

JUDGMENT.—This Civil Revision Petition raises a question of court-fee and jurisdiction. The suit out of which this petition arises relates to an extent of 48 acres and 55 cents of wet and dry lands situated in Perumbugalore Vattam in Tanjore district, belonging to Annadana Katlai attached to Sri Thyagarajaswami Devasthanam, Tiruvarur. The plaintiff, who is the executive officer of Sri Thyagarajaswami temple appointed by the Hindu Religious Endowments Board, instituted the suit in the Court of the Subordinate Judge of Mayuram for recovering the suit land from the defendant, after ejecting him, and for arrears of rent. The basis of the suit is the tenancy created under two lease deeds, one of 11th October, 1906, and the other of 16th April, 1908, both for a period of 11 years. It is alleged in the plaint that the annual rent reserved under these deeds was 40 kalams of paddy for wet lands and Rs. 4 for the dry lands. The plaint recited that in reply to a notice calling upon the defendant to surrender possession of the suit property on the termination of the leases, he set up a false claim to occupancy right in the suit land which he is not entitled to as the suit land is a minor inam not situated

*C.R.P. No. 1154 of 1946. 14th September, 1950.

in an estate within the meaning of the Madras Estates Land Act. The prayers in the plaint are for recovery of possession of the suit properties from the defendant, for arrears of rent, etc. The relief of declaration of title to the suit property is not claimed in the suit. For purposes of court-fees the plaint was valued under section 7, clause (xi) (*cc*) of the Court-Fees Act and court-fee was paid on the annual rental of the suit lands. The Subordinate Judge agreeing with the objection raised by the court-fee examiner that the suit was inadequately valued on the ground that the allegations in the plaint involved a prayer for a declaration of the plaintiff's title to the suit property, called upon the plaintiff to value the suit under section 7 (v) of the Court-Fees Act, and pay the court-fee on that basis, and returned the plaint for that purpose. That order is questioned by the plaintiff in this Civil Revision Petition.

The sole point for determination, therefore is whether it is clause (v) or clause (xi) (*cc*) of section 7 that determines the computation of the court-fee in this matter. Section 7 (xi) (*cc*) of the Court-Fees Act applies to suits for the recovery of immovable property from a tenant including a tenant holding over on the determination of the tenancy, while section 7 (v) governs suits for possession of lands, houses and gardens. If the former provision of law applies the court-fee is payable on the amount of annual rent payable in respect of that property whereas if it is the latter, court-fee is payable on the value of the subject-matter. So the question for consideration is, whether the allegation in the plaint bring it under clause (xi) (*cc*) or clause (v) of section 7 of the Court-Fees Act.

It is argued for the petitioner that though the plaint refers to the claim put forward by the defendant in his notices, these allegations should be treated as superfluous, and the suit is one for the ejectment of the tenant, based on the tenancy created under the lease deeds. He also urges that the recovery of possession in this case does not follow a declaration of title to the suit property, as the success or failure in the suit depends entirely upon the proof of tenancy set up by him in the plaint. On the other hand, it is urged by the learned Government Pleader that though the wording of the plaint indicates that it is a suit by a landlord to evict the tenant after the determination of the tenancy and for recovery of possession of the land, virtually, the relief sought for is one for establishing plaintiff's title to the suit property and for possession thereof. No doubt, the plaintiff will not be permitted to circumvent the provisions of the Court-Fees Act by the use of a language which would take away the plaint from the ambit of a provisions of the Court-Fees Act requiring a higher court-fee to be paid, and that it is not the apparent tenor of the plaint that determines the court-fee payable on the plaint, but the substance thereof that should be taken into consideration in assessing the court-fee payable on any plaint. It is well settled that in deciding the scope of the suit for purposes of assessing the court-fee it is the plaint allegations primarily and not the nature of the defence set up in the written statement that should be taken into consideration. Suffice it to refer to a few of the cases that laid down this principle, see *Venkataratnamma* v. *Sreeramulu*[1] and *Balasidhanthan* v. *Perumal Chetti*[2]. This proposition is not disputed by the learned Government Pleader. But what is urged by him is that the allegations in the plaint are such as would involve an adjudication on the kudiwaram right in the suit properties. According to him, it is not a simple suit for ejectment, but the plaintiff indirectly seeks to have the kudivaram right established in the suit, while counsel for the petitioner urges to the contrary. So the point for decision is whether the fact that it is averred in the plaint that the defendant denied his title to recover possession of the property and sets up occupancy rights in the suit property makes any difference for a decision of the question whether the provisions of the Court-Fees Act applicable are section 7 (xi) (*cc*) or section 7 (v). In other words, do these allegations take away the suit from the purview of section 7 (xi) (*cc*) or are they mere superfluous allegations, the suit remaining one by the landlord to eject the tenant who was let into possession as a lessee after the expiry of the leases.

1. (1926) 52 M.L.J. 100.
2. (1914) 27 M.L.J. 475.

In a suit for ejectment under section 7 (xi) (*cc*) a prayer for declaration of title is outside its scope. The plaintiff either succeeds or fails on his case of tenancy. He cannot fall back upon the plea based on his title when he finds that he cannot succeed in establishing the tenancy set up by him in the plaint. If he fails in his attempt to prove that the defendant got into possession of the property by virtue of the leases he runs the risk of the suit being dismissed. The question whether the plaintiff has both the kudivaram and melvaram interest in the suit lands falls outside the scope of this suit, and cannot be gone into. As I have already pointed out, there is no prayer in the plaint for a declaration that the plaintiff is the owner of the kudiwaram also in the suit land, and the tenant is not entitled to occupancy rights therein. The suit is to evict the defendant from possession on the basis of his being a tenant under the plaintiff whose tenancy was determined.

An identical case arose in C. R. P. No. 98 of 1942, etc., which is unreported before Mr. Justice Kunhiraman. The learned Judge, on a review of the case law on the subject and applying the principle that the court-fee payable on a plaint is to be determined on the nature of the allegations in the plaint and not on what is set up in the written statement, laid down that in a suit for recovery of immoveable property from a tenant based on the relationship of landlord and tenant, the court-fee is leviable under section 7 (xi) (cc) of the Court-Fees Act, though the plaint contained allegations that in reply to a notice sent by the plaintiff, the defendant asserted that he had acquired occupancy rights, in the suit by reason of the suit land forming a part of an estate and such a claim was untenable, the defendant being only a tenant whose tenancy was properly terminated. If I may say so with respect, I am in entire agreement with the reasoning adopted by the learned Judge in that case. I must hold that the averments in the plaint that the defendant was denying the relationship of landlord and tenant between the plaintiff and himself would not enlarge the scope of the suit for purposes of court-fee and would not take it away from the ambit of section 7 (xi) (*cc*) of the Court-Fees Act. I have gone through the plaint carefully and I am of opinion that the suit as framed is by the landlord against the tenant whose tenancy was terminated and to recover possession within the meaning of section 7 (xi) (*cc*). The value should therefore be determined on this basis and not as a general suit for possession. It follows that the order of the lower Court directing the plaintiff to value the suit as one falling under section 7 (v) and pay a higher court-fee is not correct and should be set aside. The Civil Revision Petition is therefore accepted. The unnumbered plaint, which is filed along with the memorandum in C. R. P. will be sent to the trial Court. There will be no order as to costs.

V.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Kakumanu Venkatasubbamma .. *Appellant**

v.

Kakumanu Venugopala Rao (died) and others .. *Respondents.*

Insolvency—Powers of the Official Receiver to pay dividend in respect of barred debts—Power of the Insolvency Court to order dividends paid on debts expunged by it to be put back into Court—Provincial Insolvency Act (V of 1920), section 50—Creditor authorised by Official Receiver if can file petition to expunge debts incorrectly admitted.

While a time-barred debt is not extinguished in law but only the remedy to recover it is extinguished, a debt which has been settled or given up years ago, has no *existence*, and any dividend claimed and taken away in respect of it by a person will be in the nature of taking by cheating or by false pretences, and in the nature of stolen property, and can be ordered to be put back into Court, even if the law is that the dividend paid in respect of a genuine and subsisting time-barred debt cannot be. The Insolvency Court has got not only the right but also the duty, to order dividends paid on time-barred debts expunged by it from the schedule to be put back into Court. The Official Receiver is a trustee in respect of the entire body of creditors and has no power at all, like *ordinary full owners*, to spend the money on himself or to make a gift of it to others, however deserving, or to acknowledge

*A.A.A.O No. 34 of 1949. 17th November, 1950.

or pay time-barred debts, settled debts, or other debts not binding on the insolvent's estate under the law, including the law of limitation.

Though there is considerable force in the contention that an Official Receiver cannot delegate to a creditor his statutory powers under section 50 of the Provincial Insolvency Act and permit or direct a creditor to file an application under section 50 of the Act to expunge a debt entered in the schedule and that an order passed on such an application would not be a legal order, it would be only an irregularity not going to the root of the matter and vitiating the entire proceedings and justifying interference on such contentions being raised for the first time in second appeal.

Appeal against the order of the District Court, Guntur, dated 31st July, 1948, in C. M. A. No. 23 of 1948, preferred against the order of the Court of the Subordinate Judge, Guntur, in I. A. No. 233 of 1947, in I. P. No. 54 of 1935.

P. V. Chalapathi Rao for Appellant.

B. V. Ramanarasu for Respondents.

The Court delivered the following

JUDGMENT.—This Civil Miscellaneous Second Appeal is against the judgment and decree of the District Judge, Guntur, dated 31st July, 1948, in C. M. A. No. 23 of 1948, and raises three important questions: (1) whether the Insolvency Court can order dividends paid on time-barred debts, expunged from the schedule, to be put back into Court; (2) whether the Official Receiver, like a full owner, can acknowledge and pay at his will and pleasure time-barred debts; and (3) whether a creditor authorised and directed by the Official Receiver can file a petition under section 50, Provincial Insolvency Act, in the Insolvency Court, to have debts incorrectly or improperly admitted expunged from the schedule and get a valid order.

C. M. A. No. 23 of 1948 was an appeal against the order of the Subordinate Judge, Guntur, dated 19th January, 1948, in I. A. No. 233 of 1947, in O. P. No. 54 of 1935, an application of the respondent, Venugopala Rao, a creditor of the insolvent in I.P. No. 54 of 1935, on the file of the Subordinate Judge, Guntur, to expunge two *Khata* debts amounting to Rs. 9,135 said to be due to the appellant, Subbamma, from one Seetharamamma, from the schedule of proved debts. The learned Subordinate Judge expunged these two debts and directed the appellant, Subbamma, to repay the sum of Rs. 2,689-4-0, paid by the Official Receiver, Guntur, to her as dividend on these expunged debts, with interest thereon up to the date of realisation. The learned District Judge confirmed the order of the Subordinate Judge as he had no hesitation in agreeing that it was correct. He has given two reasons for supporting the expunging of the debts, firstly, that they are *Khata* debts which became barred on 9th April, 1932, and, secondly, that there was obviously an interpolation and subsequent insertion in the accounts of the appellant in a desperate attempt to revive these debts which were given up for good by the appellant at the settlement of accounts, with Seetharamamma, on 12th February, 1935, when the entire sum due by Seetharamamma to the appellant was fixed at Rs. 4,426-6-0 for which a promissory note was executed, which promissory note had already been allowed for in the insolvency petition, and dividend paid therefor. In other words, the learned District Judge considered that this alleged debt of Rs. 9,135-6-0 was not only time-barred, even if true, but it was also given up at the settlement of accounts on 12th February, 1935, and was sought to be fraudulently revived and claimed by interpolations and subsequent insertions in the accounts, a conclusion which the Subordinate Judge too arrived at. I see no reason to differ from these two findings of fact by the learned District Judge, and the question of law has to be considered with reference to these two facts.

I may add that the learned District Judge's finding regarding the bogus nature of the debt of Rs. 9,135-6-0 sought to be dishonestly revived is supported not only by the tell-tale over-writings, etc., in the accounts, but also by the curious fact that the debt of Rs. 4,426-6-0 due really to the appellant, Subbamma, as per the settlement of accounts dated 12th February, 1935, was claimed by her *nearly three years before this alleged additional debt of Rs.* 9,135-6-0 *was claimed by her in the insolvency proceedings.* There can be no explanation at all for this

except on the basis that she too was aware that only Rs. 4,426-5-0 was the debt really due to her, and that she therefore proved that debt first and drew the dividend in respect of it, and waited for a sufficiently long time before coming forward with the subsequent fraudulent claim regarding the abandoned debt of Rs. 9,135-6-0. The Official Receiver could have easlily seen this subsequent claim to be fraudulent if he had looked into the accounts carefully and taken note of two significant facts, namely, that the settlement of accounts on 12th February, 1935, settled the liability of Seetharamamma only at Rs. 4,426-6-0, regarding which a promissory note was executed, and that that amount alone was claimed in the Insolvency Petition at first, the bogus claim regarding Rs. 9,135-6-0 being made three years later. namely, on 6th October, 1945. But, as usually happens, the Official Receiver was not careful enough, and admitted the subsequent claim in respect of this settled or abandoned debt of R. 9,135-6-0, and paid the dividend in respect of it too. Later on, the respondent objected to the inclusion of this bogus debt, and the Official Receiver called upon the appellant to produce her accounts or sufficient evidence to show that the debt of Rs. 9,135-6-0 was really due to her. In spite of eight or nine adjournments given to the appellant, she failed to produce the accounts or other evidence before the Official Receiver and convince him that her claim in respect of this Rs. 9,135-6-0 was true. That, even if it was true, it was time-barred ages ago, is obvious.

The Official Receiver was now in a quandary. He had admitted this bogus debt as genuine, and had disbursed Rs. 2,689-4-0 of the trust monies of the insolvent's estate in his hands in respect of this bogus claim. So, he did not himself file in the Insolvency Court an application under section 50 of the Insolvency Act for expunging this bogus debt, allowed by him to be entered in the schedule of creditors erroneously, but asked the present respondent, by his order dated 23rd December, 1946, to move the Insolvency Court for such expunging. The respondent moved the Subordinate Court, Guntur, the Insolvency Court, by I.A. No. 233 of 1947. The Court allowed him to put in a petition, without the least objection by the present appellant, and untimately expunged the debt and ordered the appellant to refund the dividend already drawn by her. Even in the appeal before the District Judge, the appellant did not raise any objection to the Official Receiver's not putting in a petition himself under section 50 of the Insolvency Act and allowing the respondent to put in such a petition. It is only in this Civil Miscellaneous Second Appeal that this ground has been taken belatedly.

On the merits, I have absolutely no doubt that the learned District Judge was quite right in holding this claim for Rs. 9,135-6-0 to be not only time-barred but also a fraudulent revival of a settled or abandoned debt. But Mr. Chalapathi Rao, for the appellant, has raised three legal grounds before me against the lower appellate Court's order. The first is that the orders of both the Courts below were illegal because the debt was expunged under section 50 of the Provincial Insolvency Act, on the application of a *creditor*, and not upon the application of the Official Receiver. This contention has considerable force in it, though I cannot agree with it and quash the orders of the lower Courts in the circumstances of this case. Firstly, it was not raised in either of the Courts below, and cannot be allowed to be raised for the first time in this Civil Miscellaneous Second Appeal after the appellant has tried her luck on merits in both the Courts below and failed. Secondly, the respondent must, in the light of the Official Receiver's directions to him to file this petition, be taken to have filed the petition in the Court only as an agent of the Official Receiver and on his specific directions. It was urged by Mr. Chalapathi Rao that the Official Receiver cannot be allowed to delegate his statutory power thus and that his permission or direction is of no avail. There is force in this. But, as the appellant did not raise this objection before the Sub-Judge or District Judge, and those Courts also allowed the respondent to proceed with the petition and appeal, I consider this to be only an irregularity not going to the root of the matter and vitiating the entire proceedings and necessitating the allowance of such a belated legal contention taken for the first time in this Civil Miscellaneous second Appeal.

The second contention was that, once a dividend had been paid, it could not be directed to be refunded even though it had been paid in respect of a time-barred and expunged debt, though no more dividend need be paid in respect of that expunged debt. Reliance was placed on the ruling of Somayya, J. in *Gangaraju* v. *Lakshminarayanamurthi*[1]. This ruling has been considered and rejected by the lower appellate Court, and, in my view, rightly, because in this case it is not merely the payment of a dividend in respect of an expunged debt, but the payment of a dividend in respect of a settled and non-existent and time-barred debt. Somayya, J., simply said that a dividend paid could not be recovered on the sole ground that the debt in respect of which it was paid had been expunged. No doubt, a time-barred debt is not *extinguished* in law but only the remedy to recover it is extinguished. But a debt which has been settled or given up years ago, like this debt, has no existence, and any dividend claimed and taken away in respect of it by a person, like the appellant, will be in the nature of taking by cheating or by false pretences, and in the nature of stolen property, and can be ordered to be put back into Court, even if the law is that the dividend paid in respect of a genuine and subsisting time-barred debt cannot be. Indeed, the appellant ought to thank her stars that she was not ordered to be prosecuted in addition, for dishonestly passing off such a settled and non-existent time-barred debt as a genuine and subsisting one. I have not the least doubt that the insolvency Court has got not only the right, but also the duty, to order dividends paid on time-barred debts expunged by it from the schedule to be put back into Court. There is clear authority, English and Indian, for that position. The rulings of Venkataramana Rao, J., (who has relied on English rulings also) in *Chandrayya* v. *Chinnapareddi*[2], of Rajamannar, J., (as he then was) in *Ramamma* v. *The Official Receiver*[3], and of the Bombay High Court in *In re Ramachandra Ganujee Waikar*[4], show this beyond the shadow of a doubt. The facts in those cases were a bit different from the facts in our case, but nothing turns on those facts regarding this point.

The third contention of Mr. Chalapathi Rao was that the Official Receiver was a full owner of the insolvent's property, which vested in him, and, so, like any other full owner, could, at his will and pleasure, acknowledge and pay time-barred debts, as he did, and the Court could not order a refund of the dividend he knowingly and willingly paid in respect of them. I cannot agree at all. The Official Receiver never paid the dividend in this case knowing the debt to be time-barred and settled. Besides, he is a trustee in respect of the entire body of creditors and has no power at all, like ordinary full owners, to spend the money on himself, or to make a gift of it to others, however deserving, or to acknowledge or pay time-barred debts, or settled debts, or other debts not binding on the insolvent's estate under the law, including the law of limitation. Otherwise, the Official Receiver can include any number of time-barred debts in the schedule, and the insolvent's genuine creditors, whose debts are not time-barred, will get only a pittance along with persons whose worthless claims have been hopelessly barred years and years ago! Of course, in this case, it is not even a genuine time-barred debt, but a debt given up and extinguished long ago and revived dishonestly.

All the contentions of the learned counsel for the appellant have failed, and I am satisfied that the lower appellate Court's judgment and decree are correct and proper, and so confirm the same and dismiss this Civil Miscellaneous Second Appeal, but without costs, as the legal point under section 50 of the Provincial Insolvency Act has not been raised in the lower Courts and has not been considered by either of the Courts below, and this must have been the main reason inducing the appellant to file this Civil Miscellaneous Second Appeal. Leave refused.

V.S. *Appeal dismissed.*

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1. (1942) 2 M.L.J. 202 : I.L.R. 1942 Mad. 879.
2. (1941) M.W.N. 489.
3. (1946) 2 M.L.J. 105.
4. (1922) 104 I.C. 378.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Swaminatha Pillai .. *Petitioner* *

v.

Balasubrahmanya Udayar .. *Respondent.*

Civil Procedure Code (V of 1908), Order 44, rule 1 and section 115—Rejection of application for leave to appeal in forma pauperis—Power of Court—Revision.

A Court is bound to reject an application for leave to file an appeal *in forma pauperis*, if on a perusal thereof and of the judgment and decree appealed from, it sees no reason to think that the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. It is not even necessary for the appellate Court to hear the petitioner in a pauper appeal before rejecting the appeal under Order 44, rule 1 or grant the appellant time for paying the court-fee. So, where the appellate Court hears the counsel for the petitioner and rejects the petition it must be presumed to have applied its mind to the arguments of the learned counsel and the facts of the case and the mere fact that no detailed reasons were given for rejection is no proof that the appellate Court did not apply its mind to the facts of the case or the arguments urged. Any interference in revision under section 115 of the Code of Civil Procedure with such an order would not be justified. Case law reviewed.

Petitions under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the orders of the District Court, Tiruchirapalli, dated 27th July, 1950 in O.P. Nos. 100 and 101 of 1950.

T. S. Vaidyanatha Aiyar for Petitioner.

A. V. Narayanaswami Aiyar and *R. Venkatachalam* for Respondent.

The Court delivered the following

JUDGMENT.—The question for consideration in these two petitions is whether an order passed by the District Judge, Tiruchirapalli, under Order 44, rule 1 of the Civil Procedure Code, rejecting two petitions to entertain pauper appeals, against the judgments and decrees in O.S. Nos. 37 and 40 of 1949 on the file of the Additional District Magistrate, Tiruchirapalli, after hearing the counsel for the petitioner, can be interfered with and set aside in revision simply because the points urged by the learned counsel who appeared for this petitioner in the two Original Petitions are not set out and discussed, and the order simply runs as follows :—

"I see no reason for thinking that the decision of the lower Court is contrary to law or is otherwise erroneous. Petition rejected."

Mr. Vaidyanatha Aiyar, for the petitioner in both the Civil Revision Petitions, relied on the ruling in *Chennamma, In re*[1]. There, it was held by a Bench of this Court, consisting of Venkatasubba Rao and Madhavan Nair, JJ., that it was not enough if the order rejecting the petition to file the pauper appeal simply quoted the words of the proviso to Order 44, rule 1, Civil Procedure Code and that an applicant should be granted leave to file a pauper appeal in case he showed that he had *prima facie* a good case. But, here, the fact remains that the learned District Judge heard the counsel for the petitioner, and came to the conclusion that the petitions should be rejected, thereby showing that in his opinion the petitioner had *prima facie* no good case in either of the proposed appeals.

It has been held by a later Bench of this Court, in *Narayana Rao* v. *Veerayya*[2], that the proviso to Order 44, rule 1 is mandatory and that it only contemplates a perusal of the application, the judgment and the decree by the appellate Judge and nothing else, and that unless in the opinion of the appellate Judge the decree is contrary to law or otherwise erroneous or unjust he is bound to dismiss the application ; and that Order 44, rule 1, Civil Procedure Code does not say that the Court shall not reject the application if the appeal raises a substantial question of law or if the appellant has *prima facie* a good case. The ruling in *Chennamma, In re*[1], was considered and not followed, as being in conflict with the ruling in *Sakubai* v. *Ganpat*[3], *Rajendra Prasad Bose* v. *Gopal Prasad Bose*[4] and *Maung Tha Din* v. *Daw Pao*[5]. With very great respect, I prefer to follow the later Bench ruling in *Narayana Rao* v.

*C.R.P. Nos. 1198 and 1199 of 1950. 22nd January, 1951.

1. (1929) 58 M.L.J. 195 : 53 Mad. 245.
2. (1933) 64 M.L.J. 433 : 56 Mad. 323.
3. (1904) I.L.R. 28 Bom. 451.
4. (1924) I.L.R. 4 Pat. 67
5. A.I.R. 1925 Rang. 249.

Veerayya[1] in preference to the earlier Bench ruling in *Chennamma In re*[2], especially as a still later Bench of this Court has held in *Subba Rao* v. *Tata Reddi*[3], that it is not even necessary for the appellate Court to hear the petitioner in a pauper appeal before rejecting the appeal under Order 44, rule 1, Civil Procedure Code, and Wadsworth, J. has held in *Kanthimathi Ammal* v. *Ganesa Aiyar*[4], that the Court does not act illegally if it disposes of an application for leave to appeal in *forma pauperis* in a summary manner without hearing the applicant, and even in Chambers, and without giving him time for payment of the deficient court-fee after rejection of the petition. I am satisfied that the mandatory provisions of the proviso of Order 44, rule 1, Civil Procedure Code will allow only of the interpretation put upon it in the case in *Narayana Rao* v. *Veerayya*[1], *Kanthimathi Ammal* v. *Ganesa Aiyar*[4] and *Subba Rao* v. *Tata Reddi*[3], and that the over-liberal interpretation put on it in *Chennamma In re*[2], is not to be preferred to the stricter interpretation in these rulings.

Even considering the matter solely and purely in the light of the proviso to Order 44, rule 1, Civil Procedure Code and without reference to any rulings, I am satisfied that a Court is bound to reject an application to file an appeal in *forma pauperis* if upon a perusal thereof, and of the judgment and decree appealed from, it sees no reason to think that the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. When it hears the counsel for the petitioner and rejects the petition, it must be presumed to have applied its mind to the arguments of the learned counsel and the facts of the case before rejecting the petition. So any interference in revision under section 115 of the Code of Civil Procedure with such an order appears to me to be not justified, especially in the light of the Privy Council ruling in *Venkatagiri Aiyangar* v. *Hindu Religious Endowment Board, Madras*[5], laying very strict limits within which alone powers of revision can be exercised, none of which conditions are satisfied here. The mere fact that the learned District Judge gave no detailed reasons for his rejection is no prof that he did not apply his mind to the facts of the case or the arguments the learned counsel had urged. The mind of a highly trained judicial officer, like a District Judge, cannot be taken to be a vacuum to which arguments are addressed without leaving any effect behind. No ruling has been shown to me by Mr. Vaidydianatha Aiyar which requires the District Judge to give detailed reasons for rejecting a pauper application under the proviso to Order 44, rule 1, Civil Procedure Code. Indeed, in most cases, it will be a sheer waste of time, money and energy to write long orders when rejecting such pauper petitions under that proviso. It is enough if the Judge is proved to have applied his mind to the judgment and decree and the pauper application. Though he was not bound under the rulings cited above even to hear the counsel for the petitioner before rejecting the application, the learned District Judge did hear the counsel for the petitioners. Though he was not bound, under the above rulings, to give time for payment of the court-fee, after rejecting the applications, he gave time for paying the court-fee. So the learned District Judge has really granted more indulgence to the petitioner than he was entitled to, and there is nothing for the petitioner to complain. Paupers are entitled only to the privileges granted to them. They shall not be allowed more privileges, much less to take up an undue part of the Court's time, crowding out the litigants who pay the stipulated court-fee.

These petitions deserve to be and are hereby dismissed, but, in the peculiar circumstances, without costs, as these petitions seem to have been filed relying on the ruling in *Chennamma, In re*[2]. Time granted for payment of court-fee in both these appeals till 3 p.m. on the 22nd February, in the District Court, Tiruchirapalli. In no circumstances will this time be extended.

V.P.S. ——— *Petition dismissed.*

1. (1933) 64 M.L.J. 433 : 56 Mad. 323.
2. (1929) 58 M.L.J. 195 : 53 Mad. 245.
3. (1942) 1 M.L.J. 435 : I.L.R. 1942 Mad. 746.
4. (1935) 69 M.L.J. 781 : 59 Mad. 805.
5. (1949) 1 M.L.J. 505 : L.R. 76 I.A. 67 : I.L.R. 1950 Mad. 1 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE RAGHAVA RAO.

S. Venkatarama Ayyar .. *Appellant**

v.

Unnamalai Ammal and another .. *Respondents.*

Civil Procedure Code (V of 1908), Orders 41, rule 23 and 43, rule 1 (u)—Appeal against order of remand after disposal of suit—Competency.

Notwithstanding the fact that after an order of remand the suit was disposed of, the party aggrieved by the order of remand would have a right of appeal against the order of remand.

Kanakayya v. *Lakshmayya*, (1950) 2 M.L.J. 379, approved.
Venkatarama Aiyar v. *Unnamalai Ammal*, (1948) 2 M.L.J. 404 overruled and reversed.

Appeal under clause 15 of the Letters Patent preferred against the judgment and order of the High Court in A. A. O. No. 508 of 1946[1], preferred against the order of the District Court of North Arcot, Vellore in A. S. No. 287 of 1945 (O. S. No. 515 of 1943, District Munsiff's Court, Tiruvannamalai).

V. T. Rangaswami Aiyangar for Appellant.

A. Seshachariar for Respondents.

The Judgment of the Court was delivered by

Satyanarayana Rao, J.—The point raised in this appeal is covered by an exhaustive and illuminating judgment of our learned brother, Viswanatha Sastri, J., reported in *Kanakayya* v. *Lakshmayya*[1], in which he held that notwithstanding the fact that after an order of remand the suit was disposed of, the party aggrieved by the order of remand would have a right of appeal, differing from the judgment of Mack, J., in *Venkatarama Ayyar* v. *Unnamalai Ammal*[2]. The view of Mack, J., is that an appeal against an order of remand is incompetent if the suit is disposed of after remand. He dismissed C. M. A. No. 508 of 1946 and this Letters Patent Appeal is against that decision. We do not think it necessary to traverse the same ground which was covered by our learned brother Viswanatha Sastri, J., for holding that the view taken by Mack, J., in *Venkatarama Aiyar* v. *Unnamalai Ammal*[2], is wrong. We cannot usefully add to the reasoning of the learned Judge, Viswanatha Sastri, J., and we entirely agree with his reasoning and his conclusion that the view taken by Mack, J., in *Venkatarama Ayyar* v. *Unnamalai Ammal*[2] is wrong. We therefore think that the decision in *Venkatarama Aiyar* v. *Unnamalai Ammal*[2], does not lay down the law correctly and must be overruled.

The learned counsel for the 1st respondent when asked whether he was in a position to distinguish the case disposed of by Viswanatha Sastri, J., from the present case attempted to argue that the order of remand was necessitated, because the present appellant wanted an indulgence from the lower Court. This does not seem to be correct, as it is evident from the judgment of the learned District Judge that it was the 1st respondent, who was the appellant before him, that raised a new question of law which necessitated an investigation into facts, and the present appellant who was the 1st respondent there requested that if the point were to be allowed to be raised at the stage of the appeal he should be given an opportunity to adduce evidence, as the matter could not be disposed of without trial. It was from this point of view that the learned District Judge framed two issues and remitted the case to the learned District Munsiff with liberty to the parties to adduce fresh evidence. The contention therefore that the appellant elected in favour of an order of remand and therefore is precluded by some principle of estoppel cannot be accepted, even if otherwise tenable.

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* L. P. A. No. 67 of 1948. 30th November, 1950.

1. (1950) 2 M.L.J. 379. 2. (1948) 2 M.L.J. 404.

For these reasons, we think that the appeal must be allowed and the decision of the learned Judge must be reversed. The Civil Miscellaneous Appeal will be disposed of on merits. The appellant will be entitled to his costs in this appeal.

V.P.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Narayanan Nambudripad .. *Petitioner**

v.

Rajagopala Naidu and others .. *Respondents.*

Madras Tenants and Ryots Protection Act (XVII of 1946, XXIV of 1949 and VIII of 1950), section 4 (1), (2) and (2-A.)—Scope of.

The words used in clause (*b*) of section 4 (1) of the Madras Tenants and Ryots Protection Act must be interpreted widely so as to bring within their scope a sale of holding for rent due in respect of a different holding.

The omission of the words " at the rate aforesaid " after the words " rent for two years immediately preceding such commencement " show that the rent for two years immediately preceding such commencement need not be at the rate claimed in the suit or appeal.

Where the rate of rent payable is found by the District Judge and the amount is deposited, there is sufficient compliance with the conditions of sub-section (2-A) of section 4.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order dated 7th November, 1947 of the District Court, South Malabar in I. A. No. 204 of 1947 (A. S. No. 345 of 1946).

D. A. Krishna Variar for Petitioner.

C. S. Swaminathan for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner before me filed the application No. 204 of 1947 on the file of the District Court of South Malabar for staying A. S. No. 345 of 1946 under Act XVII of 1946. The rent due according to the plaintiff was 1099 paras and 2 edangalis of paddy for Kanni. But the respondent deposited the value of only 999 paras and 3 edangalis of paddy. It is said that the difference represents deduction at one per ten on account of shrinkage. The lower Court found that the amount deposited by the respondent was the rent payable by him according to the finding of the first Court. The petitioner is no doubt questioning that finding in the appeal. Mr. Variar contended before me that the respondent should have deposited the rent in accordance with the claim made by his client in the appeal, and as he had only deposited the amount as found by the first Court he would not be entitled to stay under the Act. Pending the revision Madras Act XXIV of 1949 was enacted and it is agreed that the provisions of that Act governed the question to be decided in this case. The relevant provision may be read :

" S. 4 (1).—All suits, proceedings in execution of decrees or orders and other proceedings (*a*) for the eviction of tenants from their holdings or land as the case may be, or in which a claim for such eviction is involved, whether in addition to a claim for rent or not or (*b*) in which the sale of the holding of a tenant or ryot for recovery of rent is claimed and which stood stayed upto the commencement of this Act or which may be instituted after such commencement in any civil or revenue Court, shall continue to stand stayed or shall stand stayed as the case may be, subject to the provisions of the following sub-sections."

The section as originally enacted did not provide for any rent being deposited as a condition precedent for granting of stay. So Act VIII of 1950 was passed and under section 3 of the Act, section (2-A) was introduced after sub-section 2 to section 4 of Act XXIV of 1949. Under that section :

" In the case of a suit or proceeding for the sale of a holding to recover rent, or of a proceeding in execution of a decree or order obtained in any such suit or proceeding or of a proceeding in execution of a decree or order for eviction, where the decree or order provides for the payment of rent—(1) If the suit or proceeding was instituted before the commencement of the Madras Tenants and

* C. R. P. No. 1327 of 1948. 4th September, 1950.

Ryots Protection (Amendment) Act, 1950, and no deposit has been made in pursuance of section 4, sub-section (3) of the Madras Tenants and Ryots Protection Act, 1946, the tenant or ryot shall deposit in Court for payment to the landlord, within two months from such commencement, (*a*) the amount claimed in the suit or proceeding or the amount payable under the decree or order, or (*b*) the rent for two years immediately preceding such commencement, whichever is less, or (ii) if the suit or proceeding is instituted after such commencement, the tenant or ryot shall deposit in Court for payment to the landlord, within two months from the date on which notice of the suit or proceeding is served on him by the Court (which service shall be the duty of the Court,) (*a*) the amount claimed in the suit or proceeding or the amount payable under the decree or order, or (*b*) the rent for two years immediately preceding the date of aforesaid whichever is less, together with such interest as may be payable under law, custom, or agreement upto the date of deposit."

A combined reading of these provisions shows that in the case of an appeal in which the sale of the holding of the tenant or the right for recovery of rent is claimed, the respondent would be entitled to a stay if within two months from the commencement of that appeal, the amount claimed in the suit or the rent for two years immediately preceding such commencement, whichever is less is deposited in Court. Mr. Variar raised two points before me, (1) section 4 (1) (*b*) has no application as his client is not seeking sale of the holding in regard to which rent is payable. (2) that the respondent to be entitled to relief under the Act must pay two years' rent as claimed in the appeal. There is considerable force in the first argument advanced by him but the words are wide enough to take in the sale of holding though the rent is not due in respect of that holding but in respect of a different holding. Further the intention of the Legislature in enacting in quick succession so many Acts is to provide relief to tenants so that their holdings may not be sold before the contemplated tenancy legislation becomes law. If that is the intention there cannot be distinction on principle between the sale of the holding for rent payable in respect of the holding and for the recovery of rent payable in respect of a different holding. In either case the holding of the tenant would be lost to him before the Legislature brought in the contemplated legislation. In the circumstances I am inclined to put upon the words used in clause (*g*) of section 4 (1) a wider interpretation which would bring within their scope a sale of a holding for rent due in respect of a different holding. I cannot also agree with his second argument. Under Act XVII of 1946, section 4 (2) (*i*) says that :

"In the case of a suit instituted before the commencement of this Act, the arrears of rent accrued due until the date of the commencement of this Act, at the rate claimed in the plaint or an amount equivalent to rent for two years at the rate aforesaid whichever is less."

Section 4 (2) of Act XXIV of 1949 omitted the words "at the rate aforesaid" after the words "rent two years immediately preceding such commencement." It, therefore, follows that the rent for two years immediately preceding such commencement need not be at the rate claimed in the suit or in the appeal. In this case the rate of rent payable was found by the District Judge and that amount was deposited. The deposit so made satisfied the condition under sub-section (2-A) of section 4.

In the result the order of the lower Court is correct and the revision is dismissed without costs here.

V.P.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON, AND MR. JUSTICE CHANDRA REDDI.

Dinasari Limited .. *Appellant* *

v.

Hussain Ali and Sons and another .. *Respondents.*

Arbitration Act (*X of* 1940), *section* 34—*Scope of.*

The existence of an admitted agreement is a necessary pre-requisite for an arbitrator undertaking to decide a dispute and it is not open to an arbitrator to decide whether such an agreement exists or not ; and so, a suit in which the agreement is denied cannot be stayed under section 34 of the Act.

Shriram Hanutram v. *Mohanlal & Co.*, I.L.R. (1940) Bom. 249 followed.

* A.A.O. No. 232 of 1950. 4th January, 1951.

Appeal against the order of the City Civil Court, Madras, dated 16th February, 1950 in I.A. No. 2696 of 1949 in O.S. No. 936 of 1949.

S. V. Narayana Aiyar for Appellant.

N. Rajagopalan, V. Srinivasan and *T. R. Ramachandran* for Respondents.

The Judgment of the Court was delivered by

Govinda Menon, J.—The written agreement on which the appellant relies is not admitted by the respondent. It is not an agreement as contemplated under section 2 (*a*) of the Indian Arbitration Act. It has been held by Kania, J. (as he then was) in *Shriram Hanutram* v. *Mohanlal and Co.*[1], that the existence of an admitted agreement is a necessary pre-requisite for an arbitrator undertaking to decide the dispute. Here in this case the written agreement is denied and it is not open therefore to the arbitrators to decide whether the agreement as such exists or not. If the arbitrators have no jurisdiction to decide that point, it necessarily follows that they are not competent to function as well. In such circumstances the suit cannot be stayed under section 34 of the Indian Arbitration Act. The decision of the lower Court is correct and the appeal is dismissed with costs.

V.P.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAKAKESA AYYAR.

K. K. S. Karuppiah Nadar and others .. *Petitioners**

Opium Act (*I of* 1878), *section* 9 (*a*)—*Possession of medicine or pills alleged to contain opium—Proof of knowledge of such contents—Necessity.*

Though there is no knowledge required for possession of *opium, pure and simple,* knowledge will have to be proved when it is alleged that some particular medicine or pills possessed by a shop-keeper without a licence contains opium before the shop-keeper can be convicted under section 9 (*a*) of the Opium Act, as *mens rea* or guilty knowledge has to be established in such cases. In the absence of proof that the medicine or pills in fact contained opium and that the shop-keeper was aware of the presence of opium in the medicine or pills, his conviction under section 9 (*a*) of the Opium Act cannot be upheld.

Petitions under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Additional First Class Magistrate II of Mathurai, dated 21st November, 1949, in C. C. No. 378 394, 376, and 377 respectively of 1949.

S. Ramachandra Aiyar and *G. M. Alagiriswami* for Petitioners.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

The Court made the following

ORDER.—The petitioners in all these cases have been convicted under section 9 (*a*) of the Opium Act and sentenced to a fine of Rs. 50, or, in default, to undergo rigorous imprisonment for one month by the Additional First Class Magistrate of Mathurai. The case against them was that they had in their shops bottles containing *Guru Tiger Pills* without licenses. All the petitioners admitted possession of the bottles and the absence of licenses, but said that they did not know that these pills contained any opium, and also put the prosecution to proof that there was really opium in these pills. Curiously enough the prosecution did not send the pills for analysis, and examine a qualified analyst or chemist to speak to the presence of opium in the pills, but examined P. W. 1, a prohibition Sub-Inspector, and admittedly not an analyst or expert, to show that the pills contained 5 per cent. opium. How P. W. 1 could find it out was not explained, except by his statement that he saw a publication somewhere some months before his evidence that in *Guru Tiger Pills* there was 5 per cent. opium. That evidence is sheer hearsay and

1. I.L.R. (1940) Bom. 249 at 253.

* Crl. R. C. Nos. 112, 113, 300 and 301 of 1950. 23rd February, 1951.
(Crl. R. Ps. Nos. 105, 106, 283 and 284 of 1950).

absolutely worthless. Rumours like these and impressions like these are so rampant in this country of rumours and impressions that no Court should pay any attention to them. Nor can we say that these quack pills contain the same ingredients always, like standard pills of well-known chemists. For Courts and convictions scientific proof of a reliable variety regarding the pills relied on by the prosecution is needed. There was no proof here by any expert chemist or analyst that there was any opium contained in the bottles seized from these petitioners; nor was there any proof that the petitioners knew or had reason to believe that these tiger pills contained any opium. *Tiger pills*, *Lion Balm*, *Karunkurangu Legiyam* are all names fancied by drug sellers in India, and none dealing in such medicines as the agents of these sellers will know what their contents are. Though there is no knowledge required for possession of *opium, pure and simple*, certainly knowledge will have to be proved when it is alleged that some particular medicine or pill contains opium before the man can be convicted criminally, as *mens rea*, or guilty knowledge, has to be established in such cases. As there was no proof in any of these cases that the pills seized contained any opium and that the petitioners were aware of the presence of opium in these pills, I set aside the convictions and sentences of these petitioners and acquit them, and direct the fines, if paid, to be refunded to them.

V.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE CHANDRA REDDI.

Bora Narasimhulu ... *Appellant**

Evidence Act (I of 1872), section 33—Scope—Admission of deposition given in the preliminary enquiry—Witness not available in Sessions Court as he had disappeared and could not be traced—Right and opportunity to cross-examine—Test.

What is contemplated by section 33 of the Evidence Act is an opportunity to cross-examine the witness and not an effective exercise of that right. All that the Court would have to do in such cases is to exercise caution before admitting such a statement. It could not be postulated, that in every case where the accused is not represented by counsel and could not submit the witness to a searching cross-examination, he had no opportunity to cross-examine and therefore that the evidence of the witness should not be admitted under section 33 of the Evidence Act.

In the circumstances of the case, it was held, that the deposition in the preliminary enquiry of the son of the deceased who was an eye witness to the murder of his parents was properly admitted in evidence in the Sessions Court as the witness had disappeared and could not be traced and that such evidence could safely form the basis of the conviction of the accused

Trial referred by the Court of Session, East Godavari division, Rajahmundry, for confirmation of the sentence of death passed upon the said prisoner in C.C. No. 39 of 1950, on 2nd December, 1950, and appeal by the said prisoner.

K. Narayanaswami Mudaliar for Appellant.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

The Judgment of the Court was delivered by

Chandra Reddi, J.—The appellant was charged with the murders of one Kaki Yellayya and his wife Kaki Akkamma on the 29th day of May, 1950, was found guilty of those offences and sentenced to death by the Sessions Judge of East Godavari division. The case put forward on behalf of the prosecution is briefly as follows:

Kaki Yellayya was one of the watchmen in the timber depot of one Kakirala Ramalingayya at Rajahmundry. He was living along with his wife Akkamma in a house in the yard of that timber depot. That house consisted of two rooms one of which was occupied by Yellayya and his wife Akkamma while the other room was occupied by the appellant and his parents. During his stay in the house, the appellant contracted illicit intimacy with Akkamma. Sometime before the occurrence the appellant's mother and Akkamma had a quarrel because of the latter's illicit relationship with the appellant and the parents of the appellant left

* Referred Trial No. 141 of 1950. (Cri. Appeal No. 876 of 1950). 12th February, 1951.

the house and shifted to a place called Aryapuram. Thereafter the appellant who continued to stay in this house was supplied food by Akkamma. A little later he also left the place to join his parents. Nevertheless he used to visit Akkamma till the date of the occurrence.

On the 29th May, 1950, at about 7-30 P.M., while Akkamma was cleaning the vessels after finishing her meal the appellant went there and stabbed her with a knife on receiving which she fell down. Thereupon her husband Yellayya who intervened was also stabbed himself and fell down at the same spot. Yellayya and Akkamma died almost instantaneously. The only person besides Yellayya and Akkamma who was in that room was Pydireddi, the son of the deceased, aged about 12 years. As soon as he saw his parents being stabbed, he cried out. This attracted P. W. 12, another watchman living in the same compound 50 yards away, to Yellayya's house. Learning from the boy, Pydireddi, that the appellant had stabbed both Yellayya and Akkamma, P. W. 12, took the boy to P. W. 13, another employee in the timber depot. There the boy told P. W. 13 also the same thing. Then both P. W. 12 and P.W. 13 took the boy to the town police station, Rajahmundry, where the boy narrated the whole incident to the Sub-Inspector. P.W. 13 wrote down a report of what Pydireddi told him in Ex. P-13 and gave it to the Sub-Inspector. The Sub-Inspector of Police P. W. 14 who received express reports at about 11-30 P.M., immediately proceeded to the spot and found both Yellayya and Akkamma dead and the appellant lying wounded by their side. The appellant was arrested and sent to the hospital for treatment. It may be mentioned that while he was undergoing treatment, the appellant ran away from the hospital without the knowledge of the hospital authorities. The doctors who conducted the *post mortem* examination on the dead bodies of Yellayya and Akkamma were of opinion that both of them died of shock and hæmorrhage as a result of the multiple injuries caused to them. The appellant who was examined in the hospital by P. W. 6 on 30th May, 1950, was found to have sustained five injuries on his person of which injury No. 1 was a grievous one. After further investigation the appellant was charge-sheeted for the offences of murders under section 302, Indian Penal Code.

The plea of the appellant was this. As usual he visited Akkamma with whom he was on terms of criminal intimacy, that night. Yellayya who was away from the house at that time suddenly appeared on the scene and seeing the appellant and Akkamma together, he first pierced the appellant with a sword, then he caught hold of his wife and stabbed her with the same weapon on several vital parts of the body. Thereafter the appellant lost consciousness and did not know what happened subsequently.

Rejecting this theory and accepting the prosecution case *in toto* the learned Sessions Judge found the appellant guilty of the offences of murder and sentenced him to death.

The prosecution case rests mainly on the evidence of the boy, Pydireddi, who was the only inmate of the house at the time of the occurrence. He was examined at the time of the preliminary enquiry but subsequently he could not be traced in spite of the diligent searches made by the concerned police authorities. P.W. 1, the aunt of the boy, stated that he was staying with her subsequent to the death of his parents and suddenly disappeared one day from the house when she had taken ill. P.Ws. 2 to 4 the police officers deposed that they searched for the boy at all places where he was likely to be found in vain. They could not trace him either in the East Godavari district or in the Visakhapatnam district. In these circumstances, the Sessions Judge had to admit the evidence of the boy given in the preliminary enquiry under section 33 of the Evidence Act. This is marked as Ex. P-8 in the case. We are satisfied that every possible effort was made to trace Pydireddi and that he could not be found. The Sessions Judge was therefore right in having marked his deposition in the preliminary enquiry under section 33 of the Evidence Act. The relevant portion of Ex. P-8 is as follows :

"On the night of the date of death we all took our supper. I slept at the gate. Father slept on a cot in the front yard. My mother cleaned the pots, etc., went into the house and came out. I was awake then. Accused came from the road side. He pierced my mother with a sword on her upper arm first. I did not get in. Next he pierced on the chest. She fell down on her back crying 'Ammo, Ammo'. My father got up at once and caught hold of the accused's hair. He asked him 'why did you pierce?' Then he pierced on a side of my father's chest with the sword and rent it. My father fell aside crying 'Ammo. You have killed me.' Accused also rent on his stomach with the sword. He also fell on my father's side. Karri Venkanna and Dokkali Bangarayya came by this time. I and Bangarayya went to the clerk's house in Guduvari Street. I, Bangarayya, and the clerk then went to the police station and gave a report. I told Bangarayya and the clerk how the accused stabbed my father and mother."

The evidence of this boy, if accepted, would prove the guilt of the appellant beyond all reasonable doubt. There is nothing to suggest that the boy was speaking to something that he had not witnessed. Nor is there any motive for the boy to give false evidence against the appellant. It may also be mentioned that immediately after the occurrence when P. W. 12 rushed to the spot on hearing the cries of the boy, the boy mentioned to the former that it was the appellant that had stabbed both his parents and stabbed himself.

Mr. Narayanaswami, learned counsel for the appellant, contended that it is not safe to act on Ex. P-8 inasmuch as the appellant did not have an opportunity of cross-examining the witness effectively. Section 33 of the Evidence Act makes a statement made by a witness in a judicial proceeding admissible in a subsequent judicial proceeding or at some stage of the same judicial proceeding provided the person against whom it is sought to be used had a right and opportunity of cross-examining the witness. In this case it could not be said that the appellant had no right or opportunity to cross-examine Pydireddi. It may be that the appellant was not represented by a counsel to effectually cross-examine the witness as contended for by Mr. Narayanaswami. What is contemplated under section 33 is an opportunity and not an effective use of it. All that we have to do in such cases is to exercise caution before admitting such a statement. It could not be postulated, that in every case where the accused is not represented by counsel and could not submit the witness to a searching cross-examination, he had no opportunity to cross-examine and therefore that the evidence of the witness should not be admitted under section 33 of the Evidence Act. It must also be remembered that in this case the accused did cross-examine, though not elaborately. On a careful consideration of all the circumstances and on a perusal of the statement we think that this statement could safely be acted upon. No case has been brought to our notice which has gone to the extent of laying down that where an accused had not got the advantage of being represented by a counsel who could effectively cross-examine a witness, the statement given by a witness either in a previous judicial proceeding or in the same proceeding, could not be admitted in evidence. We think that there is not much substance in the contention advanced on behalf of the appellant based on the want of an opportunity for effective cross-examination. It follows that the Sessions Judge was justified in admitting the statement of Pydireddi made in the Committal Court as evidence. We have no hesitation in coming to the conclusion that this evidence could safely form the basis of the appellant's convictions.

In our opinion the convictions of the appellant are right. There are no mitigating circumstances which would entitle the appellant to a lesser sentence. The convictions and sentences are confirmed and the appeal is dismissed.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Venugopal Mudaliar ... *Petitioner.**

Criminal trial—Prosecution witness given up—Court deciding to examine him as a Court-witness—Right of such witness to apply to quash the proceedings in issuing a warrant for his appearance and to ask for a transfer of the case.

On a complaint by the petitioner that the accused, a dismissed employee of his, threatened to cause bodily harm to him and two ladies living in his house, the police after investigation filed a charge-sheet against the accused and cited the complainant as P. W. 1. The petitioner applied to have his name struck out from the list of witnesses and to dispense with his examination as a witness. The Assistant Public Prosecutor who was in charge of the prosecution also applied to dispense with the evidence of the petitioner. The Magistrate allowed the petition of the Assistant Public Prosecutor but at the same time decided to examine the petitioner as a Court-witness and issued a warrant against the petitioner. On an application by the petitioner to quash the proceedings in issuing the warrant, and also to transfer the case to some other Court,

Held, the petitioner being a person who gave the information was a very material and important witness in the case. It was highly improper for the Assistant Public Prosecutor to have given up such a witness. As the prosecution had given up its witness, the only alternative open to the Court was to examine him as a Court-witness. There is no restriction as to the stage at which a witness may be called by a Court. An application by a witness to quash the proceedings in issuing a warrant against him is an extraordinary one for which there is no precedent and has to be refused. The application by a witness to transfer the case is still more extraordinary when neither the prosecution nor the defence seek a transfer and cannot be allowed.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to quash the proceedings of the Additional Sub-Magistrate, Vellore, in C. C. No. 5 of 1950, in issuing a warrant of arrest against the petitioner therein, etc.

V. M. Ramaswami Mudaliar for Petitioner.

The Court made the following

ORDER.—This is an extraordinary application filed by one Venugopal Mudaliar who is cited as P. W. 1 in the charge-sheet filed by the police in C. C. No. 5 of 1950 on the file of the Additional Sub-Magistrate, Vellore.

The circumstances which have given rise to this petition are these: The petitioner complained to the police that one Thandavarayan who was employed under him and dismissed by him, entered into his house and abused and threatened to cause bodily injuries to two ladies by name Rukmani Ammal and Saradambal Ammal who were said to be in occupation of the house at the time. The petitioner further alleges that he apprehended danger to his life and that of Rukmani Ammal. The police after investigation has filed a charge-sheet against the accused in the case and as the petitioner is the informant he is cited as P.W. 1 in the charge-sheet. The Assistant Public Prosecutor appears to be in charge of the prosecution. The petitioner has also engaged an advocate to assist the Assistant Public Prosecutor in the conduct of the prosecution.

On 4th October, 1950, the advocate engaged by the petitioner presented a petition on behalf of the petitioner to strike out his name from the list of witnesses and to dispense with the examination of the petitioner as a witness in the case on the ground that the petitioner is not an eye-witness to the occurrence. Under what section of the Code of Criminal Procedure or the Indian Evidence Act this petition is filed is not clear. Nor is it clear under what section of the Code of Criminal Procedure the petitioner's advocate was permitted to interfere with the course and conduct of the prosecution which is in charge of the Assistant Public Prosecutor. However, strangely enough, the Assistant Public Prosecutor himself inspired by the petitioner or his advocate (*vide* the allegations in paragraph 5 of the petitioner's affidavit) filed a petition on 13th October, 1950, similar to the one filed by the

* Crl. M. P. Nos. 2410, 2411 and 2412 of 1950. 8th November, 1950.

petitioner's advocate to dispense with the evidence of the petitioner herein. The Magistrate very properly questioned the right of the petitioner's advocate to appear in the case and finally allowed the petition of the Assistant Public Prosecutor to dispense with the evidence of the petitioner. The Magistrate however seems to have decided to examine the petitioner as a Court-witness; and it is stated that he has issued a warrant against the petitioner. It is this procedure of the Magistrate and the proceedings in issuing the warrant that are sought to be questioned and quashed. The petitioner also seeks the transfer of this case from the file of the present Magistrate to some other Court.

It is contended by Mr. V. M. Ramaswami Mudaliar who appears for the petitioner that the prosecution has a right to pick and call its own witnesses and when it dispenses with a witness the Court has no right to call that witness to come to Court to give evidence. It is further contended that as the enquiry has not begun the Court has no right to call the petitioner to give evidence before the prosecution lets in its evidence.

It is true that the prosecution cannot be compelled to call a witness given up by it. But it must not be forgotten that a duty is cast on the Public Prosecutor to place before the Court all material and important available evidence in the case. The first information in this case was given by the petitioner and it is stated to be in writing. The record is an important piece of evidence and the best way of proving it is by examining the person who gave the information. The petitioner being a person who gave the information, is a very important and material witness in the case. The prosecution would be failing in its duty if it does not examine such a person as its witness. The Court can draw an adverse inference for the non-examination of such an important and material witness. However, in this case, very surprisingly the Assistant Public Prosecutor has thought fit not to examine such a witness and gave him up. I must say that the conduct of the Assistant Public Prosecutor in giving up the petitioner as a witness is highly improper and he deserves censure.

The Assistant Public Prosecutor having given up such an important and material witness, the only alternative is for the Court to examine him as a Court-witness. It is the duty of the Court to call him and examine him as a Court-witness. The Magistrate has very rightly and properly called the petitioner to give evidence in the case. The discretion given to a Court to examine any person as a Court-witness is very wide; and in its discretion it can call a witness at any stage of the case. There is no restriction as to the stage at which a witness may be called by a Court. The contention of the learned advocate for the petitioner that the Court can call a witness only after the prosecution and the defence have closed their evidence is not warranted by the language of the section. As already stated, it is the duty of the Magistrate to examine the petitioner as a witness in the case; and the learned Magistrate was, therefore, perfectly justified in insisting on the petitioner coming to Court to give evidence in the case. It is open to him either to examine him first or after one or two witnesses for the prosecution are examined. In his discretion he can examine the petitioner at any stage.

It is stated in the affidavit of the petitioner that no subpoena was served on him and a warrant has straightaway been issued against him. I am not quite certain as to the truth or otherwise of this allegation. The anxiety displayed by the petitioner not to enter the witness box shows that it is possible that he might have kept out of the way from the service of the subpoena and that has resulted in a warrant being issued; or the Magistrate has materials from which he has concluded that it is only by a warrant he can secure the presence of the petitioner in Court. In any event, on the materials placed before me I am not prepared to say that the action of the Magistrate in issuing a warrant to secure the presence of the petitioner is either wrong or illegal. As already stated, this is an extraordinary application by a witness, in the case and there is no precedent for it. The application to quash the proceedings is refused and it must be dismissed.

As regards the prayer for transfer I should say that it is still more extraordinary than the application to quash the proceedings. The petitioner is only cited as a witness for the prosecution in a case in which the police have filed a charge-sheet. The prosecution does not seek a transfer nor the accused but the witness (petitioner) wants it. Herein lies the extraordinary nature of the application. The petitioner is making all attempts to see that he is not examined as a witness ; and he is very anxious and eager to make the Court understand that he cannot give any useful evidence in the case. Still like a party interested, which alone can give him right to apply for transfer he has applied for a transfer of this case. The petitioner is either interested or not interested in the case. If he is interested in the case, then I cannot understand his attitude to avoid getting into the witness box and give evidence in respect of the complaint which he himself gave. If he is not interested in the case, then this application for transfer cannot lie. Either way the conduct of the petitioner is inexplicable. I am satisfied in this case that what the Magistrate did was right and the allegations for transfer are ill-founded. The prayer for transfer is therefore refused and the petition is dismissed.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Sri Dhana Lakshmi Ginning and Rice Oil Working Co., Mangalagiri .. *Petitioners**

v.

Yelukuru Yellappa Chetti .. *Respondent.*

Civil Procedure Code (V of 1908), Order 9, rule 13 and Order 17, rule 3—Ex parte judgment and judgment on merits—Vakil for defendant reporting no instructions on adjournment being refused—Court proceeding with the case on the evidence before it.

When a vakil is asked by his client by wire merely to take an adjournment and he applies for an adjournment and it is refused, and he reports " no instructions" on the adjournment being refused, if the Court proceeds to deliver judgment, it can only be an *ex parte* judgment and not one on merits, even if the Court purports to deliver a judgment on merits.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court, Krishna, dated 21st November, 1949, in A. A. O. No. 26 of 1949 (C. M. P. No. 383 of 1949 in O. S. No. 164 of 1946, Sub-Court, Vijayawada).

C. V. Dikshitulu for *N. Rammohan Rao* for Petitioners.

A. Raghaviah for Respondent.

The Court delivered the following

JUDGMENT.—This is a petition to revise the order of the District Judge, Krishna at Masulipatam, dated 21st November, 1949, in C. M. A. No. 26 of 1949, restoring C. M. P. No. 383 of 1949 a petition to set aside the *ex parte* decree in O. S. No. 164 of 1946, a suit involving some Rs. 4,000 on the file of the Sub-Judge, Vijayawada. The Additional Subordinate Judge, Mr. Narayanamurthi, decreed the suit on 10th December, 1948, and he considered that he had decided the suit on merits on the evidence available. The civil miscellaneous petition was filed on 27th December, 1948 and was dismissed by the Additional Sub-Judge on 9th April, 1949, on the ground that an application under Order 9, rule 13, Civil Procedure Code, would not lie as it was not an *ex parte* decree. The District Judge held that Order 9, rule 13, Civil Procedure Code, would apply to the decree in the facts of the case and remanded the civil miscellaneous petition for disposal *on merits* directing the costs in the civil miscellaneous appeal to abide the result in the lower Court of the remanded civil miscellaneous petition.

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* C. R. P. No. 202 of 1950. 9th February, 1951.

The facts are rather interesting. The defendant, Yellayya Chetti, was present with his vakil in the Sub-Court on 9th December, 1948, when the suit plaintiff's witnesses in the suit were examined and cross-examined. He took an adjournment for the next day for producing his defence witnesses and examining them. But on 10th December, 1948, to which date the suit stood posted for examining his witnesses at his own request, he was absent. He sent a telegram to his vakil stating that he and his witnesses were *all ill*, and asking him to take an adjournment from Court that day so that he might attend Court with his witnesses on the adjourned date and examine them. The Sub-Judge naturally *refused an adjournment* as the defendant had taken an adjournment for him *to that date* for producing and examining his witnesses and had then sent a mere telegram like this without any medical certificate. The learned counsel for the defendant found himself, after the refusal of the adjournment, at a loose end, with no witnesses to examine and no client to instruct him. His client had only wired to him to apply for an adjournment and had not authorised him to go on with the suit. So he reported " no instructions," though the learned Subordinate Judge in his order set aside by the learned District Judge, omitted to note it and noted the name of the vakil in the judgment passed that day in that suit as if he had taken part in the trial that day. This matter becomes very relevant for considering whether the judgment delivered that day by the learned Subordinate Judge was an *ex parte judgment* or a *judgment on merits*. Mr. Dikshitulu, for the petitioner in this civil revision petition, fairly conceded that it would be an *ex parte* judgment if there had been a report of " no instructions," and not taking part in the trial that day by the defendant's vakil. That will be so in view of the decisions in *Ram Adhin* v. *Ram Bharose*[1] and *Madan Gopal* v. *Budhu*[2]. Mr. Dikshitulu, however, urged that the vakil's endorsement of the " no instructions " was not recited in the Subordinate Judge's order dated 9th April, 1949, in the civil miscellaneous petition, and that the District Judge, though he referred to it in paragraph 4 of his judgment, did not hold further that the vakil had only instructions to apply for an adjournment and that he had not taken any further part in the trial that day. The learned District Judge has said :

" But it is seen from the records that on that day he had filed a memo. representing 'no instructions'."

I am satisfied that the defendant's vakil took no part in the *trial* that day, and that his name was wrongly noted in the judgment. It is clear to me that when a vakil is asked by his client by wire, merely to take an adjournment, and he applies for an adjournment and it is refused and he reports "no instructions" on the adjournment being refused, if the Court proceeds to deliver judgment, it can only be an *ex parte* judgment and not one on merits, even if the Court purports to deliver a judgment *on merits*. The two rulings quoted above and the rulings in *Satish Chandra Mukherjee* v. *Ahara Prasad Mukherjee*[3] and *Lalta Prasad* v. *Nanda Kishore*[4], will show this. No doubt, in such a case the party trying to set aside that *ex parte* judgment must be drastically dealt with, especially when the plaintiff had let in all his evidence and the Court believed that it was delivering a judgment *on merits*, so that he may not repeat such tactics of, promising to come with his witnesses on a certain day and taking an adjournment for that specific purpose and not coming on that day and sending a mere telegram alleging *all-round illness* to his vakil instead. The learned counsel for the defendant frankly conceded that the defendant, in the circumstances of this case, deserved to be punished for his laches by imposing a heavy solatium even for getting a remand like the one the learned District Judge gave. Mr. Dikshitulu's contention that it cannot be taken as proved that the defendant's vakil reported " no instructions " on 10th December, 1948, and took no part in the trial that day, cannot be upheld because there is not only a definite assertion by the learned counsel for the defendant before me that the defendant's vakil did report " no instructions " in the Sub-Court on 10th December, 1948,

1. (1924) I.L.R. 47 All. 181.
2. A.I.R. 1932 Lah. 477.
3. (1907) I.L.R. 34 Cal. 403 (F.B.).
4. (1899) I.L.R. 22 All. 66.

and took no part in the trial that day, but there is also a recital by the learned District Judge to that effect in his judgment *after perusing the records and seeing a memo. of the defendant's vakil.* A remark to that effect in a judgment of an appellate judicial officer, like a District Judge, cannot be attacked as unreliable or incorrect simply because the subordinate judicial officer who tried the case does not refer to the memo. or the endorsement of " no instructions." Mr. Dikshitulu was not prepared to deny the existence of such a memo. on record, or to attack it as a subsequent fabrication or interpolation. It will be against public policy to allow counsel to attack *statement of fact* in judgments of judicial officers, as that will be dragging the judicial officers into an unnecessary and undignified controversy in which they cannot take part. A reading of the Subordinate Judge's order in the civil miscellaneous petition shows that he delivered the judgment only on the available evidence left with him ; that is not inconsistent with the defendant's counsel's reporting " no instructions " in a memo. like that and ceasing to take any part in the trial that day. In that view, the rulings in *Govindarajulu* v. *Imperial Bank of Vellore*[1] and *Dakshinamurthi* v. *Ponnuswami*[2] will not apply to the facts of this case, as the defendant was not really represented in Court on 10th December, 1948, and he and his vakil took no part in the trial that day. So the learned District Judge's order of remand deserves modification only in one respect, *viz.*, the saddling of the respondent-defendant with a substantial condition precedent solatium calculated to punish him for his laches before granting him the luxury of a remand in a case like this where the judgment and decree had been passed by the Sub-Judge after discussing the entire available evidence on record and on the basis that it was a judgment *on merits* because of the defendant's failure to bring the witnesses that day as promised. His counsel has no objection to the imposition of a solatium of Rs. 100 as a condition precedent. He merely wants a Sub-Judge of Vijayawada Sub-Court other than Mr. Narayanamurthi, who must have formed an opinion even about the merits, to hear the remanded civil miscellaneous petition, not an unreasonable request in the circumstances.

In the end, therefore, I pass an order on terms ; I direct the respondent to pay the counsel for the petitioner, by 3 P.M., on the 15th March, 1951, a consolidated sum of Rs. 100 (Rupees one hundred) which will not be costs in this petition or in the civil miscellaneous petition or in the suit or in any other proceedings whatever, to compensate the petitioner for the waste of time, money and energy caused to him by his laches. On such payment by such date, the order of the learned District Judge remanding the civil miscellaneous petition for fresh disposal will stand, and this revision petition will stand dismissed without costs. On failure to pay the said amount by such date, the judgment and decree of the learned District Judge remanding the civil miscellaneous petition for fresh disposal will be set aside and this petition will stand allowed without costs. The remanded civil miscellaneous petition (if the condition imposed above is satisfied) will be heard by some Subordinate Judge of Vijayawada Sub-Court other than Mr. Narayanamurti who heard it before, as requested by the learned counsel for the respondent. Of course, I say nothing about the merits of the civil miscellaneous petition or the desirability or otherwise of setting aside the *ex parte* decree. All that will depend on the evidence and findings at the remanded hearing.

V.S. *Order passed on terms.*

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1. (1934) 68 M.L.J. 123 : I.L.R. 58 Mad. 817. 2. (1948) 1 M.L.J. 65.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRA REDDI.

T. Kunhikkalavan .. *Appellant**

v.

E. Kochuraman and others .. *Respondents.*

Will—Construction—Bequest to nephews of the testator and their descendants after the death of the testator's wife—Wish also expressed by testator that the legatees and their descendants will look after his daughters—Nature of the estate bequeathed.

Where a testator makes a bequest to a person and his heirs or to a person and children or descendants, it confers an absolute estate on that person. These words do not mean that a life estate alone was given to the legatee and a vested remainder conferred on his children or descendants.

A Hindu executed a will giving a life estate to his wife and the remainder to his nephews and the will recited that after the death of his wife, his nephews and their descendants should enjoy the properties. There was also a pious wish expressed therein that these legatees and their descendants will look after his daughters. On a question as to the nature of the estate bequeathed to the nephews,

Held, the words in the will that the nephews and their descendants will enjoy the property cannot lend themselves to the construction that the legatees, the nephews, were given only a life estate, while their children should get a remainder in those properties. The expression of the wish by the testator that the legatees will look after his daughters does not indicate that it was the testator's intention to give only a life estate to the legatees. They take an absolute interest.

Appeal against the decree of the Court of the Subordinate Judge, Ottapalam, in A. S. No. 54 of 1946, preferred against the decree of the Court of the District Munsif, Chowghat, in O. S. No. 409 of 1944.

T. C. Raghavan and *M. Sekara Menon* for Appellant.

S. Venkatachala Sastri and *N. Sundaram Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff, whose claim to recover the suit property was dismissed by the District Munsiff of Chowghat and confirmed by the Subordinate Judge of Ottapalam, has preferred this second appeal. The suit came to be instituted by the appellant in the following circumstances: The suit properties originally belonged to one Kunhikkalavan. He executed a will marked Ex. P-1 in the case, on the 26th of July, 1895, giving a life estate to his wife, Kunhikurumba, and the remainder to his nephews, that is, his brother's sons, Raman and Kunhayappan. The will recited that after the death of his wife Kunhikurumba the sons of his younger brother Paru, namely, Raman and Kunhayappan, and their descendants should enjoy the properties. There was also a pious wish expressed therein that these legatees and their descendants will look after his daughters. During the lifetime of Kunhikkalavan one of the legatees, Kunhayappan, died with the result that Raman became the sole legatee under the will. On the death of Kunhikkalavan and his widow Kunhikurumba, Raman got into possession and enjoyment of the properties.

In execution of a decree in a small cause suit, one Aydross, the predecessor-in-interest of the present respondent, brought the suit properties to sale and purchased them himself in Court auction in or about the year 1932, and a sale certificate was issued to him on 24th October, 1932.

Twelve years later, that is, in the year 1944, the appellant instituted the present suit for recovering the suit property on the basis that under the will, Ex. P-1, Raman and his brother had only a life estate in the suit properties and the vested remainder was given to the children of Raman and Kunhayappan by the testator and, therefore, the only interest which the decree-holder-auction-purchaser acquired in the suit properties by virtue of the Court sale, is only what Raman had in the property, namely, life estate which came to an end with the death of Raman and that, in any event, since the children of Raman acquired a joint interest along with Raman under the terms of the will, the purchaser in the Court auction sale

* S. A. No. 1918 of 1947. 17th November, 1950.

was entitled only to the share of Raman. The suit was resisted by the defendant on the ground that the bequest to Raman and Kunhayappan under the will was a vested remainder and not a mere life estate, and therefore the auction purchaser acquired the absolute right possessed by Raman in the suit properties by virtue of the Court sale. Another defence raised to the suit was that since the debts incurred by Raman were not incurred for any illegal or immoral purpose, the sale in pursuance of the execution of the decree obtained for these debts was valid and binding upon the sons.

Accepting the contentions advanced on behalf of the defendants, the trial Court dismissed the suit, which was confirmed on appeal by the District Judge. The defeated plaintiff has preferred this second appeal. In this appeal it is contended by Mr. Raghavan on behalf of the appellant, that the construction placed upon the will by the Courts below is erroneous and the will conferred on Raman only a life estate, the remainder having been given to his descendants. According to him, the intention of the testator, as could be gathered from a reading of the relevant clauses in the will, was not to confer an absolute estate upon the legatees, Raman and Kunhayappan, but only to give them a life estate, and he lays particular stress on the passage in paragraph 6 of the will which recites that the legatees and their descendants will enjoy the properties and look after his two daughters to whom some provision was made for maintenance under the will.

I do not think I can accept this contention. The words " Raman and Kunhayappan and their descendants will enjoy the property " cannot lend themselves to the construction that the legatees, Raman and Kunhayappan were given only a life estate, while their children should get a remainder in those properties. In this connection a reference may be made to the provisions of section 97 of the Indian Succession Act which provides that where property is bequeathed to a person and words are added which describes a class of persons but do not denote them as direct objects of a distinct and independent gift, such person is entitled to the whole interest of the testator therein, unless a contrary intention appears by the will. One of the illustrations given under that section is " a bequest to *A* and his heirs." The section lays down that in such a case *A* takes the whole interest which the testator had in the property.

Though the provisions of this section do not in terms apply to Hindu wills, yet the principle embodied in that section applies to such wills. Vide *Damodara Moothan* v. *Ammu Amma*[1]. It has been laid down in a number of decisions that where the testator makes a bequest to a person and his heirs, or to a person and children or descendants, it confers an absolute estate on that person. These words do not mean that a life estate alone was given to the legatee and a vested remainder conferred on his children or his descendants. Such conventional expressions are used to convey the intention of the testator to convey an absolute estate upon the legatee and they are only words of inheritance. These words are frequently employed in Hindu wills and have acquired the force of technical words conferring an alienable and heritable estates. They do not indicate that the heirs of descendants of the legatee were denoted as direct objects of a distinct and independent gift. The decision in *Damodara Moothan* v. *Ammu Amma*[1] is apposite in this context. Reference may also be made in this connection to the principle laid down in *Brij Inder Bahadur Singh* v. *Rani Najaki Koer*[2]. In all these cases it was held that the words " legatee and his heirs " or " legatee and the heirs of his body ", or legatee and " the children born of his loins ", etc., only indicate the intention of the testator to confer an absolute estate on the legatee. Not a single case has been cited, before me, laying down the contrary principle, and the principle stated above cannot be seriously disputed.

Mr. Raghavan urged that the recitals in the will show that the intention of the testator was to give only a life estate to his nephews and the remainder to his descendants, and reliance for this contention was placed on the passage in paragraph

1. (1943) 2 M.L.J. 332.
2. (1877) 1 C.L.R. 318 : L.R. 5 I.A. 1 (P.C.).

6 of the will wherein the testator desired that the legatees and their descendants will take possession of the property and look after his daughters. I do not think this would give any indication of the testator's intention to give only a life estate to the legatee. In this view of the matter it is unnecessary for me to go into the question whether the sale is also valid on the ground of the theory of pious obligation.

This second appeal fails and is dismissed, but having regard to the circumstances of this case, I direct each party to bear his costs in this Court. (Leave refused).

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AYYAR.

R. Lakshmi Narasa Reddi .. *Appellant**

v.

The Official Receiver, Sree Films, Ltd. (in liquidation) .. *Respondent.*

Companies Act (VII of 1913), sections 156 and 101—Person nominally applying for shares to inveigle real subscribers entered on the register of shareholders—Liability to be included in the list of contributories under section 156—Section 101 not applicable to private companies.

Mere dishonourable conduct (like a person nominally applying for shares in order to inveigle other real shareholders into subscribing for shares in the company, would not be a bar to considering the legal objections urged by him to be made liable as a contributory or shareholder. Thus a man may subscribe nominally and bogusly a big sum for a charitable purpose, with a clear understanding with the persons who went to him for subscription, that not a pie should be demanded from him, and that his subscription was only intended to make other men act on it as if it were real and pay up real amounts, though of smaller figures and yet he may not be liable to pay a pie if he set up and proves the above dishonourable conduct or understanding. But it is obvious that any such dishonourable conduct or understanding will not also relieve him from legal liability where it exists otherwise.

Section 101 of the Companies Act as to the conditions for applications for and allotment of shares applies only to public companies and not to private companies. It is not necessary to produce the order of allotment to prove the validity of an entry in the register of shareholders, though it is desirable to do so.

The liability of a member of a company to be included in the list of contributories under section 156 of the Companies Act is not *ex contractu* but *ex lege*, and arises by reason of the fact that the name of the person appears on the register of members of the company, and it is therefore no answer for the contributory against the claim of the company to say that, although his name appears on the register, he is not liable, because the allotment to him was void, or because he has sold his shares to another, and in the absence of rectification of the register by an application by him under section 38 soon after he comes to know that his name is entered in the register of members fraudulently or without sufficient cause, his liability becomes absolute under section 156 of the Companies Act, all the more so when winding-up also has supervened. Where a person allows his name to remain on the register, without having it removed promptly (on some ground or other) he will be liable on the doctrine of holding over.

Authorities reviewed.

On appeal against the judgment and the decree of the Hon'ble Mr. Justice Mack, dated 7th March, 1950 and passed in the exercise of the Ordinary Civil Jurisdiction of the High Court in Application No. 4621 of 1949 in O.P. No. 94 of 1949.

V. Ramaswami Aiyar for *K. Srinivasan* for Appellant.

P. Satyanarayana Raju (the Government Pleader) for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal against the judgment and decree of Mack, J., in Application No. 4621 of 1949 in O.P. No. 94 of 1949 dismissing the application of the appellant Lakshmi Narasa Reddi for excluding his name from the list of contributories settled by the Official Receiver in Sri Films, Limited, in liquidation. The relevant facts are briefly these. Sri Films, Ltd., went into liquidation by an

* O.S. Appeal No. 36 of 1950. 23rd January, 1951.

order of this Court on the Original Side on 4th July, 1949. It seems to have been started as a private company, limited, in an informal kind of way, in December 1945; for, the minutes show that it was in existence on 26th December, 1945. One Lakshminarayana, one of the partners of Lakshmi and Company, the Managing Agents of Sri Films, Ltd., was the moving spirit, getting subscribers and shareholders. Under the Articles of Association, the Directors were the normal persons to allot shares. But there is also an article giving wide powers, including, obviously, the power to allot shares, to the Managing Agents. This Lakshminarayana is alleged by the appellant to have been his class-mate and intimate friend. The minutes book shows a meeting of the Board of Directors on 23rd February, 1946, though it is not clear when these directors were elected. The next meeting of the Board of Directors recorded in the minutes book is on 6th April, 1946, when the appellant was elected as the chairman of the Board of Directors and the fact said to have been intimated to him, though he denied it. It is admitted that the appellant signed an application, Exhibit R-1, on 31st March, 1946, applying for five shares of Rs. 1,000 each in Sri Films, Ltd. But, according to him, he did so nominally and without any intention at all of taking any share in this company and simply because Lakshminarayana who was his friend and class-mate, assured him that the application was only intended to lend prestige to the company, as the appellant was then the Chairman of Nellore Municipality, in the public eye, as the inclusion of his name in the list of shareholders would induce other people to subscribe and pay for shares, though he need not pay himself a pie towards the five shares applied for by him. The appellant admitted that he was receiving notices, informing him from time to time of the Directors' meetings and also of the general body meetings and that the company was dealing with him as a Director. He denied that he had received the originals of Exhibits R-3 and R-4 though his learned counsel before us did not want to argue against the finding of Mack, J., to the contrary, regarding this. He urged that even if he had received Exhibits R-3 and R-4, they would not bind him as there was no valid application by him, remitting Rs. 1,000 per share, as shown in the form of application, or Rs. 250 per share as demanded later on from him, or 5 per cent. of the share money as required by section 101 of the Indian Companies Act. He admitted that on 10th April, 1946, the Managing Agent required him to send his consent to be Chairman of the Board of Directors but added that he did not reply to that letter for obvious reasons, namely, to avoid any obligation to pay for the shares. But, in spite of this, the Managing Agent drew a bill against him, for Rs. 5,000 the value of the five shares, and sent it through his bankers, the Andhra Bank, Limited, Nellore, for collection. The appellant then instructed his bankers orally to dishonour that bill which was accordingly dishonoured. According to the appellant, he met Lakshminarayana later on and protested to him that it was unfair to worry him for payment when he had repeatedly told him that he was not interested in the concern and had merely lent his name to inveigle other shareholders, as requested by Lakshminarayana, and asked Lakshminarayana to take early steps to remove his name from the register of members. The appellant went on to say that the company issued a notice on 22nd May, 1947, calling for a general body meeting of the company to be held on 15th June, 1947, the agenda for the meeting including an item to consider the forfeiture of shares of the shareholders who were in arrears, that the meeting was held on 15th June, 1947, and that the appellant understood that a resolution was passed then giving the defaulting shareholders a month's time to pay the balance, failing which the defaulters were to forfeit their shares as a matter of course, and that the appellant's name was removed that day from the list of Directors as he was a defaulting shareholder. The appellant went on to say that he considered that his shares stood forfeited automatically, as he did not pay any money within the time fixed, and that he therefore kept quiet without taking any action to remove his name from the register of shareholders under the *bona fide* impression that nothing further need be done by him. But to his surprise when the company went into liquidation by an order of this Court on the Original Side on 4th July, 1949, a notice was sent to him by the Official Receiver on 4th August, 1949, to show cause why

his name should not be included in the list of contributories regarding the said sum of Rs. 5,000 due in respect of his five shares. He went and showed cause before the Official Receiver, protesting that he had never intended to be a real shareholder of the company, for the reasons mentioned already, and that, even if he had become a shareholder, he had ceased to be one after the resolution of the company, dated 15th June, 1947, and that he was therefore not liable to be included in the list of contributories, or bound to contribute anything. The Official Receiver, nevertheless, included him in the list of the contributories for Rs. 5;000 in respect of his five shares. So, he filed the petition which was dismissed by Mack, J., who rejected his contention that there was no valid acceptance by the company of his application for five shares as there was no resolution by the company or the Directors allotting the shares to him. Mack, J., went on to say :—

" Even assuming his intentions at the time he signed Exhibit R-1 to be true, and that he never intended to pay for shares himself, he was not acting honourably as Chairman of the Municipality in lending his signature to a document to induce other people to become shareholders on the mistaken impression that he had himself become one to the tune of Rs. 5,000. It is regrettable that in this matter a liability has been sought to be evaded on grounds such as these."

We have perused the entire records, and heard the arguments of Mr. V. Ramaswami Ayyar, for the appellant, and of Mr. P. Satyanarayana Raju for the Official Receiver. Mr. V. Ramaswami Ayyar raised many contentions. He did not rely on the pleas of the appellant before Mack, J., namely, that he had lent his name nominally as shareholder for five shares in order to inveigle other shareholders to subscribe and pay up and was therefore not liable, or that he had not received Exhibits R-3 and R-4, but only raised grounds of law said to make the appellant not legally liable to be included as a contributory and urged that mere dishonourable conduct, like the appellant's nominally applying for shares in order to inveigle other real shareholders into subscribing for shares in this company, would not be a bar to considering the legal objections urged by him. Of course, we agree that mere dishonourable conduct will be no bar to considering legal objections. There is a considerable distinction between law and morality. Thus, a man may subscribe nominally and bogusly a big sum for a charitable purpose, like Leprosy Relief Fund, Tuberculosis Fund, Maternity and Child Welfare Fund, etc., with a clear understanding with the persons who went to him for subscription, that not a pie should be demanded from him, and that his subscription was only intended to make other men act on it as if it were real and pay up real amounts, though of smaller figures and yet he may not be liable to pay a pie if he sets up and proves the above dishonourable understanding. But it is obvious that any such dishonourable conduct or understanding will not also relieve him from legal liability where it exists otherwise.

Mr. V. Ramaswami Ayyar, for the appellant, contended vigorously that there was no valid application for shares by the appellant, and, so, no offer capable of being acted on and followed by allotment, as the appellant had not sent at least 5 per cent. of the share money with his application, as required under section 101 (3) of Indian Companies Act, section 101 (6) expressly making it impossible to waive this condition imposed by section 101 (3). This contention took Mr. P. Satyanarayana Raju by surprise, as it had not been urged before Mack, J., the only legal argument put forward before Mack, J., being that there was no resolution allotting the shares to the appellant. But Mr. Satyanarayana Raju soon recovered from the surprise, and discovered that this argument had not been urged before Mack, J., for an excellent reason, namely, that this company was a *private company*, to which section 101 which is applicable only to public companies, would not apply. The Articles of Association produced by Mr. Satyanarayana Raju, clearly showed that this was only a private company, and the order, dated 4th July, 1949, also showed this.

Then it was urged, somewhat feebly by Mr. Ramaswami Ayyar's junior that section 101 (1) to (6) will apply to private companies also, since section 101 (8)

says that sub-section (7) shall not apply to a private company; implying thereby that sub-sections 1 to 6 would apply to private companies also. We are satisfied that there is no substance in this contention. Section 101 (1) expressly shows that the entire section 101, with all its sub-sections, applies only to public companies. Section 101 (8) is only intended to clear a possible ambiguity caused by the phrasing of section 101 (7). So, this contention fails.

The next contention of Mr. Ramaswami Ayyar was that there was no valid acceptance of the appellant's application for shares and no valid allotment of the shares to him by a resolution of the company or the Directors or even the Managing Agent. He relied on the rulings in In re *Homer District Consolidated Gold Mines*: Ex parte *Simith*[1], In re *Sly Spink & Co.*[2], *Pusarla Sanyasi* v. *Guntur Cotton Jute and Paper Mills Co., Ltd.*[3], *Bank of Peshawar* v. *Madho Ram*[4], *Sukdeodoss Ramprasad* v. *Govindoss Chathurbhujadoss & Co.*[5], *The Official Liquidator of the Bellary Electric Supply Co., Ltd., in liquidation* v. *Kunniram Rowoothmal*[6], *Indian States Bank, Ltd.* v. *Sardar Singh*[7], *Mutual Bank of India* v. *Sohan Singh*[8], *Ramlalsao* v. *M. E. R. Malak*[9] and *Shiromani Sugar Mills, Ltd.* v. *Debi Prasad*[10], for the position that, in circumstances like these, where there was no satisfactory proof of allotment by the Directors, or by the Managing Agent where he had power under the Articles of Association to allot shares, there was no valid allotment or binding contract, and that the mere entry of five shares, share Nos. 91 to 95 in his name in the register of shareholders of this company on 31st March, 1946, itself would be no proof of any valid allotment in the absence of proof of a valid order of allotment, and that the failure to deliver the share certificate to him would also show that the company itself was aware of the bogus nature of the entry of the five shares in his name in the register of shareholders. It was also urged that Exhibit R-3, dated 16th April, 1946, intimating to him the allotment of these five shares, mentioned the date of his application as 5th April, 1946, instead of the correct date of 31st March, 1946, found in the application itself, and did not mention the date of the allotment and that Exhibit R-4, dated 25th November, 1946, asking him to pay the Rs. 5,000 in pursuance of his promise to Lakshminarayana to do so after his return from Hyderabad, did not also mention the date of the allotment, and that there could have been no real allotment as the allotment, according to the date shown in the register of the shareholders, was made on 31st March, 1946, itself with no visible interval for the company or the Directors to pass a resolution allotting the shares to him. This argument is of doubtful validity. If the Managing Agent, Lakshminarayana, had the right to allot shares, as the Articles of the Association show, he could have allotted them immediately to the appellant and there was sufficient time for such allotment. It is not necessary to produce the order of allotment to prove the validity of an entry in the register of shareholders, though it is desirable to do so. As held by a Bench of the Bombay High Court, in *Mohamed Akbar* v. *Official Liquidator*[11], the liability of a member of a company to be included in the list of contributories under section 156 of the Indian Companies Act is not *ex contractu* but *ex lege*, and arises by reason of the fact that the name of the person appears on the register of members of the company, and it is therefore no answer for the contributory against the claim of the company to say that, although his name appears on the register, he is not liable, because the allotment to him was *void*, or because he has sold his shares to another, and, in the absence of rectification of the register by an application by him under section 38 soon after he comes to know that his name is entered in the register of members fraudulently or without sufficient cause, his liability becomes *absolute* under section 156 of the Act, all the more so when winding-up also has supervened, as here. We may add that in the cases relied on by Mr. V. Ramaswami Ayyar, the shareholders whose names appeared in the register of members were

1. (1888) 39 Ch. 546.
2. (1911) 2 Ch. 430.
3. (1914) 26 I.C. 349.
4. (1919) 51 I.C. 812.
5. (1927) 54 M.L.J. 139 ; I.R. 55 I.A. 32 : I.L.R. 51 Mad. 96 (P.C.).
6. (1932) 64 M.L.J. 130.
7. A.I.R. 1934 All. 855.
8. A.I.R. 1936 Lah. 790.
9. A.I.R. 1939 Nag. 225.
10. A.I.R. 1950 All. 508.
11. A.I.R. 1950 Bom. 217.

not proved to have knowledge of their names having been entered in that register, unlike here, where from the very beginning the appellant had such knowledge and continued to have it for more than three years and took no action till he received the notice, dated 4th August, 1949, from the Official Receiver after the winding-up. The failure to deliver the share certificate to the appellant is, of course, of no consequence, and was not seriously pressed by Mr. V. Ramaswami Ayyar for proving the appellant's non-liability to be a contributory. The appellant could claim the delivery of the share certificate only after he had paid Rs. 5,000, or whatever amount was due on the shares by that time, and, admittedly, he had paid not a pie and was not entitled to the delivery.

Even assuming that there was no valid allotment of the five shares to the appellant, and that the allotment was even *void*, we have no doubt whatever that the order of Mack, J., dismissing the appellant's application, was correct on the doctrine of holding out. This doctrine has been stated in Palmer's Company Law, 19th edition, by Topham, K.C., at page 105, as follows :—

"The result of this doctrine of holding out is that if a person's name is on the register with his consent, and he claims a right to have it removed on some ground or other, he must exercise the right promptly, otherwise, he fortifies it (see Re *Scottish Petroleum Co.*[1]). Even where a name is, pursuant to a void contract, placed on the register, delay after knowledge may be fatal" (see Re *Railway Time Tables Publishing Co.*[2]).

Mr. K. M. Gosh says at page 347 of his Indian Company Law, 8th edition, as follows :—

"Before a company goes into liquidation, the liability to contribute is measured by the contractual obligation arising from membership ; but, after liquidation, this section (section 156) imposes new liabilities on the shareholders in respect of unpaid calls made before or after the winding up ; and such calls can be recovered, though barred by limitation before the order of winding up was made. The liability of a member under this section in respect of the shares is absolute and flows from the fact of his being on the register of members in respect of those shares. The original contract may supply the reason for his name having been placed there, but after the winding up, his liability arises *ex lege* and not *ex contractu*."

Mr. Sen Gupta, in his "Indian Company Manual", 4th edition, holds the same view.

The above views of the text book writers is amply borne out by authoritative rulings. The Privy Council has held in *Hansraj Gupta* v. *Asthanna*[3] as follows :—

"Whatever may have been the rights and liabilities of the testator before the winding-up intervened, the position was altered by the happening of that event. At the commencement of the winding-up he was, and had for over three years been, entered on the register of shareholders as the holder of the shares now in question, with his full knowledge and assent. On the winding-up, section 156 of the Indian Companies Act came into play. His liability under that section in respect of the shares was *absolute* and flowed from the fact of his being on the register in respect of those shares. The original contract may supply the reason for his name having been placed on the register in respect of the shares, but after the winding-up, his liability in respect of the shares arose *ex lege* and not *ex contractu*."

These observations apply, almost completely, to the facts of this case. Even though, after the Independence of India and the severance of its ties with the King of England and the Privy Council, the ruling of the Privy Council is not absolutely binding on us, it is entitled to very great respect, as held by the Federal Court and the Supreme Court in several recent cases, and we have not the slightest hesitation in accepting the observations of the Privy Council quoted above as representing the correct position regarding the liability of a shareholder, like the appellant, for contribution under section 156 of the Indian Companies Act. In *The Garland Petroleum Co. (Madras)*, In re[4], Gentle, J., has held :

"If any person whose name is included in the register of shareholders of a company becomes aware that circumstances are such that, if proceedings are brought against the company, he would succeed in having his name removed and the register rectified he must do so promptly. He must

1. (1882) 23 Ch. D. 413 at page 434.
2. (1888) 42 Ch. D. 107.
3. (1932) 63 M.L.J. 859 at 866.
4. (1939) 2 M.L.J. 122.

not stand by and wait and then, at a later stage, with knowledge that he has been held out to the public as a shareholder of the company, seek to have his name removed. In the cases which I have quoted, the grounds were that the contract, under which the shares were obtained, could be set aside as void."

The case cited by Gentle, J., included Re *Scottish Petroleum Co.*[1], *Sewell's case*[2], *Lawrence's case*[3] and *Central Railway Company of Venezuela* v. *Kisch*[4]. Even a delay of a *fortnight* has been held to be fatal, and, here, the delay is *more than three years*, and the circumstances set up shaky. We have no hesitation in agreeing with the conclusion of Gentle, J., in that case. The same views, as held by the Privy Council and Gentle, J., were expressed by a Bench of the Bombay High Court in *Mahomed Akbar* v. *Official Liquidator*[5] and by a Bench of the Allahabad High Court in *Shiromani Sugar Mills, Ltd.* v. *Debi Prasad*[6]. So, this contention must fail, especially as winding-up has also supervened, adding to the other ground of delay.

The last contention urged on behalf of the appellant was that the appellant's shares should have been forfeited and his name removed from the register of the members as per the resolution of the company, dated 15th June, 1947. This argument too is untenable. It was admitted that the appellant's shares were not forfeited as a matter of fact as per that resolution, and that the company continued to treat the appellant as a shareholder. So, as per the ruling of Gentle, J., in *Guruswami* v. *Indo Carnatic Bank, Ltd.*[7], with which we fully agree, the appellant cannot object to being included in the list of contributories.

In the result, this appeal fails and is dismissed with costs.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

Puzhakkal Kannan .. *Appellant**

v.

Kakkatta Keezhalan Ambu Kurup and others .. *Respondents.*

Hindu Law—Partition—Malabar tarwad—Effect of division by metes and bounds in respect of some items upon other items kept unpartitioned at the division—Partition deed—Construction.

Where the question is, what effect a division by metes and bounds admittedly effected by a partition deed in respect of some items, has upon other items which are kept unpartitioned at the division evidenced by the deed, no distinction can be drawn between a joint Hindu family under the Mitakshara law and a Malabar tarwad with regard to the principles applicable for its decision.

A partition deed between two brothers of Malabar tarwad recited "In the properties which belonged to our tarwad and which are being enjoyed by us with equal rights as we are the only existing members now, *A* has been assigned away this day and the rights over *K.* and *M.* have been kept without being partitioned. It has been decided to partition the rest of the properties belonging to us and the details are as follows."

On a construction of the deed,

Held: In view of the unambiguous language used and the comparatively smallness in value of the items divided as against the items actually left unpartitioned, it was clear that the intention of the parties was not to get divided in respect of the unpartitioned items. Such items are therefore to be treated as joint property of the two brothers.

Appeal against the decree of the District Court, North Malabar, in A.S. No. 52 of 1946, preferred against the decree of the District Munsif Court, Badagara, in O.S. No. 583 of 1944.

C. S. Swaminathan for Appellant.

V. P. Gopalan Nambiar (amicus curiæ).

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1. (1882) 23 Ch.D. 413.
2. (1868) 3 Ch. App. 131.
3. (1867) 2 Ch. App. 412.
4. (1867) 2 H.L. 99.
5. A.I.R. 1950 Bom. 217.
6. A.I.R. 1950 All. 508.
7. A.I.R. 1940 Mad. 873.

* S.A. No. 1847 of 1947. 24th October, 1950.

The Court delivered the following

JUDGMENT.—A rather interesting point has been debated by counsel before me in this second appeal, and that is as to the effect of the admitted division by metes and bounds of certain items of the property of the family of the tenth defendant and his deceased brother, upon the status of the family in relation to certain other items admittedly unpartitioned.

The suit out of which this appeal arises was instituted by the appellant before me as the assignee of the kanom right of the 10th defendant and his deceased brother. The contesting defendants 1 to 9 are sub-kanamdars of the property who are resisting the plaintiff's right to redeem anything more than a half of the kanom right which alone belonged to the tenth defendant at the inception. It is their case that that half interest which so belonged to the tenth defendant did not become enlarged by *jus accrescendi* on the death of his brother because under Exhibit P-4 the two brothers became divided in status in regard to the suit items and one other item with which we are not concerned here. The learned District Munsif of Badagara dismissed the suit altogether. On appeal the learned District Judge of North Malabar has decreed the suit in favour of the plaintiff as the assignee of a half share from the tenth defendant and of defendants 11 to 14 as the heirs of the deceased brother of the tenth defendant. The learned District Judge, however, has not made any direction that the value of the improvements claimed by the contesting defendants 1 to 9 should be reduced by a set-off of the arrears of rent claimed on behalf of the plaintiff and defendants 11 to 14. Nor has the learned District Judge awarded interest on the amount of arrears claimed in the suit. The plaintiff accordingly appeals to this Court.

It is not disputed by Mr. Gopalan Nambiar appearing as *amicus curiæ* for the respondents, that even if only the half interest of the tenth defendant should be made the subject-matter of the decree for redemption, the plaintiff is entitled to the set-off of the arrears and to the interest as claimed by him to which reference has just been made.

The real and only question for determination, therefore is whether the plaintiff is entitled to have redemption decreed in respect of the entirety of the suit item in his favour on the basis that with the death of the tenth defendant's brother the tenth defendant became entitled to the whole of the item and entitled, therefore, to make an assignment of it in favour of the plaintiff. That turns upon the construction of Exhibit P-4, the partition deed, as it is called, executed by the tenth defendant and his deceased brother which is as follows :—

"In the properties which belonged to our tarwad and which are being enjoyed by us with equal rights as we are the only existing members now, Mooli Nilam has been assigned away this day and the rights over Kotarath paramba and Mingili Nilam have been kept without being partitioned. It has been decided to partition the rest of the properties belonging to us and the details are as follows. Out of the properties described in schedules A and B below the properties in schedule A are allotted to No. 1 and those in schedule B are allotted to No. 2. In future from this day No. 2 has no manner of right or claim to the jenm, kuzhikoor, reclamation, etc., rights in the properties in schedule A and No. 1 has no manner of right or claim to jenm, kuzhikoor, reclamation, etc, rights in the properties in schedule B."

It may be mentioned that the Kotarath paramba referred to in the document is the only item with which we are concerned in the present suit. We are not concerned with the Mingli Nilam referred to in the document as also left unpartitioned.

Mr. Swaminathan, learned counsel for the appellant, contends that the reference to Kotarath paramba as an item of property "which has been kept without being partitioned" suggests that the undivided status of the brothers continued in respect of it notwithstanding the division of other items belonging to the family. He also stresses the comparative smallness in value of the items divided as against the items actually left unpartitioned as a circumstance showing the intention of the parties not to get divided in respect of the unpartitioned item. In support of his contention he places reliance on a passage in "Malabar and Aliyasanthana

Law" by P. R. Sundara Aiyar, page 19. The learned author there observes as follows :—

"It sometimes happens that while some properties are divided, the rest are undivided. In most cases, the properties divided form the bulk of the family properties and the property left undivided is so left merely to maintain a quasistanom or to meet the expenses of the common family ceremonies and charities. But it sometimes happens that the property left undivided is very considerable and difficult questions arise for determination as to the status of the family and the rights *inter se* of the branches. These problems are not dissimilar to the problems arising in similar circumstances under the Hindu law. There is no textual authority in the Marumakkattayam law as there is in the Hindu law, *viz.*, 'Once a partition made' which has given rise to the presumption in favour of a complete partition in the absence of proof to the contrary. As such and having regard to the general prohibition of partition under the former system a presumption of that nature is possibly out of place."

The learned author then proceeds to quote certain observations in a judgment of the High Court in S.A. No. 1815 of 1911 as adequately summing up the position and winds up with the remark made at page 20 which is in these terms :

"Where there is substantially the intention to be divided the mere fact that some property is left undivided, would not make the family undivided in status even in respect of the property left undivided. Where the property divided bears an inconsiderable proportion to the family property or where attempt is made to keep up a nominal unity of the family merely to enhance its dignity and whatever property is left undivided is ear-marked solely for that purpose the status of the family is in substance a divided one."

I am not satisfied that there is any distinction to be drawn between a joint Hindu family under the Mitakshara law and a Malabar tarwad with reference to the principles governing a situation like the one with which we are concerned here. As pointed out in the headnote in *Kunchi Amma* v. *Minakshi Amma*[1], which correctly brings out the decision of the Court (Mr. Justice Burn and Mr. Justice K. S. Menon),

"The change in the law introduced by the enactment of the Madras Marumakkattayam Act XXII of 1933, has made the doctrine of severance of status applicable to tavazhis under the Marumakkattayam law, as it is to persons under the Mitakshara law and for precisely the same reason. Under the new law, every tavazhi in a joint undivided Marumakkattayam family has an indefeasible right to demand partition of its own share in the joint family property, and all the other tavazhis must submit to it whether they like it or not. Section 38 of the Act indicates that so far as a tavazhi is concerned the separation from the tarwad is effected on its claiming to take its share of the properties of the tarwad. There is thus an express provision in the Act itself that severance of status is effected when a tavazhi claims to take its share of the tarwad properties. Such a claim must be deemed to have been made when a notice demanding its share is given, or at least when a suit is filed for that purpose."

That being so, the question is, whether under the document before me now, Exhibit P-4 although not one executed by members of a joint Hindu family, the admitted division by metes and bounds of certain items of property would necessarily make the parties divided in status, or keep them still joint in regard to the unpartitioned items. On that my attention has been drawn by learned counsel for the appellant to a ruling of a Divisional Bench of this Court (Sir Alfred Henry Lionel Leach, Chief Justice and Mr. Justice Rajamannar) reported in *Appavu* v. *Manickam Pillai*[2], which related to a joint Hindu family. What is ruled by the Court in that case is correctly and succinctly brought out in the headnote in the following terms :—

"The partition of some of the joint assets does not of itself imply a division in status. In deciding whether a joint family has become divided, the Court must naturally have regard to the terms of any instrument bearing on the question and, if the wording is ambiguous, to the subsequent conduct of the parties. The division of the income of the agricultural lands may not in itself be sufficient to evidence a division in status. Nor is the division of the outstandings or other moveable property a clear indication of a division in status. The fact that the family owned a considerable amount of immoveable property and left that completely undivided is a strong indication that the members did not intend to effect a severance especially when they agree that two of the brothers were to have charge of the future management of the family and that no brother could independently borrow money for a family necessity."

In support of the view taken in that case, the learned Chief Justice delivering the judgment of the Court, refers to the entire case-law on the subject beginning with

1. (1935) 70 M.L.J. 114 : I.L.R. 59 Mad. 693. 2. (1945) 2 M.L.J. 504.

Sonatun Bysak v. *Sreemutty Juggatsoondaree Dossee*[1] and ending with *Ramalinga Annavi* v. *Narayana Annavi*[2]. Says the learned Chief Justice after the discussion :

"There is here ample authority for the statement that the partition of some of the joint assets does not of itself imply a division in status . . . . . The division of the income of the agricultural lands is not in itself sufficient basis for the defendants' contention that there is in the agreement of the 30th September, 1925, clear indication of a division in status . . . . . Now, does the fact that the brothers divided the outstandings and other moveable property make any difference ? We consider it does not."

The learned Chief Justice thereafter makes reference to the subsequent conduct of the parties as revealed by the evidence in the case, and arrives at the conclusion that the agreement in that case did not effect a division in status because it was one made in order to meet the situation created by the three brothers living in different places and the illness of one of them. I have, on a careful consideration of the law as laid down in this ruling, arrived at the conclusion that it must apply to the construction of the document in the case before me.

The document is on the whole, in my opinion, perfectly clear and does indicate the intention that the suit property must remain joint property of the brothers. May be, if the document were ambiguous in its language I should have to determine and give effect to the rule of law laid down in Mulla's " Principles of Hindu Law ", 10th Edn., p. 417, which crossed my mind during the course of the argument. That principle is this : where there is evidence to show that the parties intended to sever, the joint family status is put an end to and with regard to any portion of the property which remained unpartitioned the presumption would be that the members of the family would hold as tenants-in-common unless and until a special agreement to hold as joint tenants is proved. I do not find anything ambiguous about Exhibit P-4 such as would justify the importation into its construction of the presumption referred to in the passage cited above. Even if the presumption otherwise applied, I should think that a special agreement on the part of the brothers to hold the item in question as joint tenants which would exclude such a presumption may be taken as sufficiently proved in the case.

For the reasons indicated in the foregoing I must decree the suit for redemption in respect of the entirety of the suit property with the further directions as to set-off and interest indicated in an early part of this judgment. I feel highly indebted to Mr. Gopalan Nambiar, who as *amicus curiæ* has with his usual thoroughness brought before me all the considerations pertaining to the case of the respondents before me. Besides drawing my attention the case in *Kunchi Ammal* v. *Minakshi Amma*[3], above referred to, he has also referred me to a case in *Ramanathan Chettiar* v. *Ramanathan Chettiar*[4]. That case however does not assist the respondents because all that that ruling says is that if a division by metes and bounds of a certain portion only of joint family properties is possible in law it is equally possible in law for members of a joint family to effect a division not by metes and bounds, but merely in status in respect of that portion of the joint family properties only. As I have indicated, that is not the question with which we are concerned here. The question here is, what effect a division by metes and bounds admittedly effected by a partition deed in respect of some items, has upon other items which are kept unpartitioned at the division evidenced by the deed. The decree of the lower appellate Court will accordingly be modified in the manner indicated above. The appellant will have his costs from the respondents 1 to 9 in all the three Courts. Time for redemption will be extended by three months from this date. No leave.

V.S. *Decree modified.*

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1. (1859) 8 M.I.A. 66.
2. (1922) 43 M.L.J. 428 : L.R. 49 I.A. 168 : I.L.R. 45 Mad. 489 (P.C.).
3. (1935) 70 M.L.J. 114 : I.L.R. 59 Mad. 693.
4. (1949) 2 M.L.J. 751.

[FULL BENCH].

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, MR. JUSTICE VISWANATHA SASTRI AND MR. JUSTICE PANCHAPAKESA AYYAR.

Puthiyatuth Parvathi *alias* Kunhi Kava Amma .. *Petitioner**

v.

Nelliyoth Makkam Amma (died) and others .. *Respondents.*

Court-Fees Act (VII of 1870), sections 7 (ix) and 17—Suit for redemption of kanom—Court-fee payable—Incorporation of prayer for accounts and arrears of rent—Effect—Section 11 of the Court-Fees Act—If applicable to such suits.

A suit for redemption of a Malabar *kanom*, like any other suit for redemption of a possessory mortgage, can be valued under section 7 (ix) of the Court-Fees Act even though the plaintiff incorporates in his plaint a prayer for the taking of accounts and the payment of arrears of rent due from the *kanomdar*. The arrear of rent would have to be applied in reduction of the *kanom* amount and the value of improvements payable to the *kanomdar* and the plaintiff would be entitled to a decree only for such balance as might be found payable to him on taking the account.

Case-law discussed.

Section 11 of the Court-Fees Act is a special provision applicable only to those suits specified therein and cannot be extended analogically to suits on mortgages or for damages. The section does not apply to a suit for redemption though the prayer for redemption is coupled with a claim for damages in respect of waste or default committed by the mortgagee while he was in possession.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order dated 19th September, 1948, of the District Munsiff's Court, Badagara, in O. S. No. 953 of 1945.

V. P. Gopalan Nambiar for Appellant.

The Government Pleader (*P. Satyanarayana Raju*) for Respondents.

The Judgment of the Court was delivered by

Viswanatha Sastri, J.—The plaintiff in the Court below, here petitioner, seeks a revision of the order of the District Munsiff of Badagara requiring her to pay court-fee in a suit for recovery of possession of land held under a *kanom* demise together with arrears of rent, not only on the principal amount of the *kanom* but also on the arrears of rent claimed by her. The *kanom* amount was Rs. 60 while the arrears of rent sought to be recovered and on which additional court-fee was directed to be paid was Rs. 1,145-7-0. The plaintiff prayed that the amount due to her for arrears of rent should be set off against the amount of the *kanom* and the value of the improvements due to the defendants and that the latter should be directed to restore possession of the demised land and pay whatever might be found due to her on accounts being taken. There has been a difference of opinion in this Court as regards the proper method of valuing suits of this kind for purposes of court-fees and jurisdiction. The divergence of views is due to the anomalous character of a *kanom* which is neither wholly a mortgage nor wholly a lease. The incidents of a *kanom* tenure originally recognised by custom and judicial decisions have been incorporated in subsequent legislation to which regard must be had in reaching a conclusion.

Under section 17 of the Court-Fees Act if a suit " embraces two or more distinct subjects " the plaint is chargeable with the aggregate amount of court-fees to which plaints in suits embracing each of such subjects separately would be chargeable under the Act. In a suit " for recovery of mortgaged property ", that is to say, in a suit for redemption, court-fee is payable " on the principl expressly secured by the instrument of mortgage ", under section 7 (*ix*) of the Act. The petitioner argues that the present suit is one for redemption chargeable under section 7 (*ix*), while the Government Pleader maintains that court-fee is payable both on the claim for redemption and on the claim for arrears of rent under section 17 of the Act.

*C.R.P. No. 1315 of 1946.

2nd January, 1951.

A mortgagee in possession is required by section 76 of the Transfer of Property Act to manage the property prudently, collect the rents, pay Government revenue, abstain from committing waste, effect necessary repairs to the property and keep clear and full accounts of receipts and disbursements. Some of these obligations may be qualified or their performance dispensed with by a contract between the parties. The last paragraph of section 76 runs as follows :—

"If the mortgagee fails to perform any of the duties imposed upon him by this section, he may, when accounts are taken in pursuance of a decree made under this chapter, be debited with the loss, if any, occasioned by such failure".

A decree for redemption is contemplated by section 60 occurring in Chapter IV of the Transfer of Property Act. Under Order 34, rule 7, Civil Procedure Code. the preliminary decree in a suit for redemption of a mortgage directs an account to be taken of the amount due to the mortgagee, presumably having regard to the stipulations in the mortgage deed and the obligations imposed by section 76 of the Transfer of Property Act on a mortgagee in possession. The right of the mortgagor to require an account from the mortgagee in possession is incidental to his right of redemption. A suit for redemption involves a taking of the account between the mortgagor and the mortgagee in order to ascertain the sum due from the one to the other on payment of which sum alone a mortgagor is entitled to recover possession of the property. If, on taking the account, the mortgagee is found to have been over-paid, the Court is rquired by Order 34, rule 9, Civil Procedure Code, to pass a decree directing him to pay the surplus to the mortgagor in addition to restoring possession of the property to him. A claim by the mortgagor for surplus profits, that is, profits realised by the mortgagee in excess of what was due to him, is incidental to the main relief of redemption, and the valuation of the main relief and payment of court-fee thereon as required by section 7 (*ix*) of the Court-Fees Act would cover also an incidental relief in regard to surplus profits. No separate court-fee need be paid in respect of a prayer for the taking of accounts or for payment of the surplus profits in a suit for redemption of a possessory mortgage. *Devadas* v. *Sadasiva Reddiar*[1].

Is there anything in the nature of a Malabar *kanom* which requires the application of a different principle to a suit for redemption and recovery of arrears of rent due from the *kanomdar*? There is this difference between a usufructuary mortgage and a *kanom*, namely, that there is always a liability on the part of the *kanomdar* to pay rent to the *jenmi* or the owner of the land. The rent payable by the *kanomdar* may also be substantial, and the *kanom* amount itself might be small as compared with the annual rent payable. All the same as early as *Kunji Velan* v. *Manavikrama Zamorin Raja*[2] and *Shaik Rautan* v. *Kadangot Shupan*[3], this Court held that a Malabar *kanom* was a mortgage and not a tenancy liable to forfeiture for non-payment of *porapad* by the *kanomdar*. In *Silpani* v. *Ashtamurti Nambudiri*[4], a suit by a *jenmi* for recovery of possession of land he had held under a *kanom* demise was held to be a suit for redemption of a mortgage governed by the period of limitation applicable to such suits. Innes, J., speaking for a Full Bench of five Judges, said :—

"Rent is payable in the case of every *kanom*, but all *kanoms* partake also to a certain extent of the incidents of a usufructuary mortgage. The mortgagee in all such holdings is assumed to be able to derive from the lands placed in his possession enough to pay the interest, at least of the money advanced. The discharge of the principal is not immediately contemplated. The holder of the *kanom*, therefore, pays himself the interest and also pays the Government tax, either directly or through the landlord. The over-plus or a certain fixed amount in grain or money is to be paid to the landlord. If, when viewed scientifically, it cannot be wholly regarded as a mortgage, it certainly cannot be wholly regarded as a lease as undoubtedly the land enures as security, if not for the principal, at least for the interest of the loan advanced".

A *kanom* partakes of the nature of a mortgage with possession and a lease. The *kanomdar* is a tenant liable to pay the rent stipulated in the *kanom* deed to his *jenmi*. But he does not forfeit his right to hold the land for 12 years by allowing the rent to fall into arrears. He is also a mortgagee, the *kanom* amount and interest thereon

1. (1947) 1 M.L.J. 339.
2. (1862) 1 M.H.C.R. 113 (Note).
3. (1862) 1 M.H.C.R. 112.
4. (1880) I.L.R. 3 Mad. 382 (F.B.).

being secured by the land and its usufruct. A *kanom* demise carries with it, in the absence of a contract to the contrary, the right to erect a dwelling house and appurtenances on the land and to plant cocoanut, mango, jack and other trees on any land not already under grain cultivation. The *kanomdar* is entitled to be paid the value of improvements effected by him unfettered by the restrictions imposed by section 72 of the Transfer of Property Act and has a right to remain in possession for the period of 12 years and even thereafter, until he is paid the *kanom* amount together with the value of improvements. The *jenmi* or owner is entitled to sue for and recover the rent payable by the *kanomdar* during the subsistence of the kanom. But if he does not so recover, he is entitled, on redemption of the land, to set off the arrears of rent due to him by the *kanomdar* against the claim of the latter for the *kanom* amount and compensation for improvements. The *kanom* amount is looked upon as a security for the rent due to the *jenmi* and is itself secured by the land demised on *kanom*. On the expiry of the term an account has to be taken between the *jenmi* and the *kanom-holder*, credit being given to the latter for the value of the improvements in addition to the *kanom* amount and interest thereon and to the former for all the rent in arrear. These are incidents annexed by the custom of the country to a *kanom* tenure and repeatedly recognised by the decisions of this Court.

It has been held in this Court that a *kanom* is an anomalous mortgage within the meaning of section 98, Transfer of Property Act, with certain well-known incidents attached to it under the customary law of Malabar. The requirements of the Stamp Act as to the stamp duty payable on mortgages, and of the Transfer of Property Act as to the attestation and registration of mortgages, have been held to apply to *kanoms* in Malabar. *Reference under the Stamp Act, section 46*[1], *Raman Nair* v. *Vasudevan Nambudiripad*[2], *Gopalan Nair* v. *Kunhan Menon*[3] and *Kanna Kurup* v. *Sankara Varma*[4]. Section 60 of the Transfer of Property Act, giving a right of redemption in respect of mortgages, has been applied to Malabar *kanoms*, *Kunhoti* v. *Mohamed Koya*[5] and *Virupakshan Nambudiri* v. *Chembu Nayar*[6]. A suit for recovery of property held under a *kanom* has been held to be a suit for redemption on which court-fee is payable under section 7, clause (*ix*) of the Court-Fees Act, *Moopil Nayar* v. *Ammalu Amma*[7].

Nevertheless it is contended by the learned Government Pleader that if a suit is filed not only for recovery of possession of land held under a *kanom* demise but also for recovery of arrears of rent, the two reliefs are separate and distinct and must be valued separately for purposes of court-fees. There is, it is said, in addition to a claim for redemption by a mortgagor, a claim by a landlord against his tenant for arrears of rent and these claims are different in their nature and are based on different causes of action. The decisions relied upon in support of this contention are *Konna Panikkar* v. *Karunakara*[8], and *Rama Varma Rajah* v. *Kadar*[9], C. R. P. No. 1467 of 1945 (decided by Bell, J.) and C. R. P. No. 194 of 1946 (decided by Happell, J.). These decisions were given in suits for redemption of Malabar *kanoms*. The two unreported decisions merely purport to follow the two reported cases and do not add to the reasons contained in them. In the two reported cases there is no adequate discussion of the point now under consideration. In the first of the two cases the whole of the judgment, now relevant, ran thus :

> "We consider that there are two distinct causes of action in the suit, namely, the claim for redemption and that for the arrears of rent, and that, therefore, the value of the subject-matter of the suit is the aggregate value of these two heads of relief, that is, Rs. 5,000 for the suit to redeem and Rs. 122 for the claim for arrears of rent".

In the second of the two cases, the judgment of the learned Judges was as follows :

1. (1898) I.L.R. 22 Mad. 164.
2. (1903) I.L.R. 27 Mad. 26.
3. (1907) 17 M.L.J. 189 : I.L.R. 30 Mad. 300.
4. (1920) 40 M.L.J. 282 : I.L.R. 44 Mad. 344.
5. (1948) 2 M.L.J. 293.
6. (1937) 2 M.L.J. 83 : I.L.R. (1937) Mad. 545 (F.B.).
7. (1926) 23 L.W. 758.
8. (1892) I.L.R. 16 Mad. 328.
9. (1892) I.L.R. 16 Mad. 415.

"The claim to arrears of rent and the right to redeem are two distinct causes of action. It does not appear that the arrears were intended to be set off against the mortgage debt and rendered items of account to be taken between the mortgagor and the mortgagee. The District Judge is right in holding that the court-fee ought to be computed on the principal amount of the *paraya*m debt and on the amount of arrears of rent disallowed by the Subordinate Judge and claimed on appeal".

It may be that on the frame of the plaint in that case the arrears of rent were not intended to be set off against the *kanom* amount and rendered items of account between the mortgagor and the mortgagee. We cannot, with great respect, regard these decisions as laying down the correct rule applicable to cases where, in addition to redemption, recovery of arrears of rent due from the *kanomdar* is also sought.

The learned advocate for the petitioner has referred us to a large number of decisions in support of his contention. In *Zamorin of Calicut* v. *Narayana Bhatta*[1], this Court held that a *jenmi* suing for redemption of a *kanom* is entitled to value his suit for purposes of jurisdiction and court-fees at the amount of the principal sum expressed to be payable by the *kanom* deed even though he might have to pay a sum far exceeding the *kanom* amount as the value of improvements, before he could get a decree for redemption. In respect of suits for redemption, section 7 (*ix*) of the Court-Fees Act has fixed a somewhat arbitrary mode of valuation on the basis of the principal sum secured by the mortgage even though the sum ultimately found payable by the plaintiff to the mortgagee on taking accounts is very much lower or higher than the principal sum. The Court, however, is bound to apply the statutory rule irrespective of its hardship to litigants and its adverse effect on the revenue. In C.R.P. No. 387 of 1889 the plaintiff sought to redeem a *kanom* of Rs. 2,000 with arrears of rent amounting to Rs. 900. It was held that the suit was cognizable by a District Munsif (whose jurisdiction then extended only to Rs. 2,000) the ground of decision being that though *michavaram* was payable annually by the *kanomdar* to the *jenmi* yet when it was allowed to remain in arrear and accumulate until a suit was brought to redeem the *kanom*, it became a matter of account to be taken between the *jenmi* and the *kanomdar*. In *Eacharan Pattar* v. *Appu Pattar*[2], the plaintiff in a suit for redemption of a *kanom* claimed arrears of rent due under the demise and prayed for recovery of the land on payment of the *kanom* amount *minus* the arrears of rent. Sheppard and Best, JJ., held that the court-fee to be paid was on the principal amount of the *kanom* under section 7, clause (*ix*) of the Court-Fees Act. The learned Judges distinguished the decision in *Konna Panikkar* v. *Karunakara*[3], on the ground that there the suit was to redeem the land and to recover arrears of rent. In our opinion, it ought not to make any difference in principle whether the rent in arrear exceeds the *kanom* amount and the value of the improvements or whether it falls short of the aggregate of these two sums. In either case the suit is essentially one for redemption with an incidental relief by way of accounting for the rents and improvements. *Jallaldeen Marakayar* v. *Vijayasami*[4], decided that in a redemption suit the valuation for purposes of court-fee and jurisdiction was the principal sum secured by the mortgage even though the decree might direct the plaintiff to pay a much larger sum exceeding the Court's pecuniary jurisdiction, as a condition of redemption. In *Gopala Menon* v. *Raman Menon*[5], Jackson, J., held that where a suit was filed for redemption of a *kanom* with an added prayer for a certain sum by way of damages, the valuation for the purpose of jurisdiction was the principal amount secured by the *kanom* and not that amount *plus* the damages claimed. The learned Judge rested his decision on the language of section 6 of the Malabar Compensation for Tenants' Improvements Act. In *Govinda Nayar* v. *Ithaletty*[6], Jackson, J., held that a mortgagor suing for redemption of a *kanom* with an added claim for damages for waste committed by the *kanomdar* need initially pay court-fee only on the principal amount of the *kanom*. The learned Judge however added a rider that he

"is entitled the pay the court-fee after the amount recoverable by way of damages has been ascertained and set off against the amount payable by way of improvements."

1. (1882) I.L.R. 5 Mad. 284 (F.B.).
2. (1895) I.L.R. 19 Mad. 16.
3. (1892) I.L.R. 16 Mad. 328.
4. (1915) I.L.R. 39 Mad. 447.
5. A.I.R. 1932 Mad. 217.
6. (1925) 50 M.L.J. 493.

Evidently the learned Judge was of the opinion that court-fee on the claim for damages should be paid after the amount of damages had been ascertained on the analogy of section 11 of the Court-Fees Act. Section 11 of the Court-Fees Act is, however, a special provision applicable only to those suits specified therein and cannot be extended analogically to suits on mortgages or for damages. In our opinion, section 11 of the Court-Fees Act does not apply to a suit for redemption though the prayer for redemption is coupled with a claim for damages in respect of waste or default committed by the mortgagee while he was in possession.

We prefer to rest our decision on certain well-recognised incidents of the *kanom* tenure. The *michavaram* or the net rent payable to the *jenmi* by the *kanomdar*, if allowed to remain in arrear, becomes a matter of account in a suit for redemption by the *jenmi*. To the extent to which the arrears of rent satisfy the *kanom* amount and the value of improvements payable to the *kanomdar*, the amount payable by the *jenmi* for redemption is reduced. If the arrears of rent exceed the *kanom* amount and the value of improvements, the *kanomdar* must not only submit to a redemption free of any payment by the *jenmi* but also pay over the surplus to him. Though a *jenmi* could have instituted a suit for recovery of the rent from the *kanomdar* as and when it fell due during the subsistence of the *kanom*, still, the rent in arrear becomes a matter of account to be taken between the *jenmi* and the *kanomdar* in a suit for redemption of the *kanom*. The fact that the *kanomdar* had to pay *porappad* or *michavaram* every year does not exempt him from liability to pay it at the time of redemption if he failed to pay it at the stipulated time. This is established by numerous decisions of this Court beginning from *Kunji Velan* v. *Manavikrama Zamorin Raja*[1]. The later cases are found collected in *Narayanan* v. *Chathukutti*[2]. Section 6 (2) of the Malabar Compensation for Tenants' Improvements Act (I of 1900) expressly recognises the right of the *jenmi* to set off arrears of rent due to him from the *kanomdar* against the *kanom* amount and the value of the improvements. The intention of the Legislature in enacting sections 5 and 6 of Madras Act I of 1900 appears to be that there should be a complete and final settlement between the the *jenmi* and the *kanomdar* of all that is due from the former to the latter and from the latter to the former up to the date when possession is transferred to the *jenmi*. The lease cannot be separated from the mortgage in a *kanom* transaction. The position is the same as if a usufructuary mortgagee had agreed under the mortgage contract, to pay the mortgagor out of the income of the property, a fixed sum either monthly or annually during the term of the mortgage but had defaulted in payment. Surely the sums which the mortgagee defaulted to pay should be debited to him on taking accounts in a suit for redemption, even though the mortgagee might have brought a suit for recovery of the instalments of money stipulated to be paid to him before he filed a suit for redemption. The question is not whether there was a separate cause of action for recovery of rent from the *kanomdar* apart from the cause of action for redemption but whether in a suit for redemption, an account could be taken of all arrears of rent due from the *kanomdar* and such arrears applied in reduction of the *kanom* amount and the value of improvements payable to him. The question admits of only one answer in view of section 6 of Madras Act I of 1900 and the decisions of this Court in *Shaik Rautan* v. *Kadangot Shupan*[3], *Silapani* v. *Ashtamurti Nambudiri*[4], *Achuta* v. *Kali*[5], *Kanna Pisharadi* v. *Kombi Achan*[6], *Unnian* v. *Rama*[7], *Parasurama Pattar* v. *Venkatachala Pattar*[8] and *Narayanan* v. *Chathukutti*[2].

It follows, therefore, that a suit for redemption of a Malabar *kanom*, like any other suit for redemption of a possessory mortgage, can be valued under section 7 (*ix*) of the Court-Fees Act even though the plaintiff incorporates in his plaint a prayer for the taking of accounts and the payment of arrears of rent due from the *kanomdar*. The arrear of rent would have to be applied in reduction of the *kanom*

1. (1862) 1 M.H.C.R. 113. (Note).
2. (1942) 1 M.L.J. 166 : I.L.R. (1942) Mad. 550.
3. (1861) 1 M.H.C.R. 112.
4. (1880) I.L.R. 3 Mad. 382 (F.B.).
5. (1884) I.L.R. 7 Mad. 545.
6. (1885) I.L.R. 8 Mad. 381.
7. (1885) I.L.R. 8 Mad. 415.
8. (1913) 25 M.L.J. 561.

amount and the value of improvements payable to the *kanomdar* and the plaintiff would be entitled to a decree only for such balance as might be found payable to him on taking the account. The order of the Court below demanding additional court-fee on arrears of rent claimed by the plaintiff is set aside. There will be no order as to costs of this Civil Revision Petition.

K.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VISWANATHA SASTRI.

Sistla Yagnanarayana Sastri .. *Appellant* *

v.

Chilukuri Lakshminarayana and others .. *Respondents.*

Hindu Law—Widow—Compromise by, of suit against estate—When binding—Suit by reversioner to declare that compromise was fraudulent and to have it set aside—Limitation—Limitation Act (IX of 1908), article 125—Applicability.

A Hindu widow or other limited owner has power to compromise claims against the estate represented by her. But a compromise of a litigation entered into by the limited owner must, in order to bind the reversioner, be *bona fide*, fair and reasonable, or for the benefit of the estate and not for the personal advantage of the limited owner at the expense of the estate. If the compromise is fair, reasonable and prudent in the circumstances in which a widow is placed, the alienation which is involved in the compromise must bind the reversioners. The alienation cannot be considered apart from the compromise. If the arrangement or settlement is not *bona fide*, any property which the claimant takes from the widow under such arrangement will be held by him only as an alienee, from a limited owner and with no higher rights. If a compromise decree or an award or a release is used by the widow as a pretext or cloak for parting with property belonging to the estate in favour of another person, there is an "alienation" by the widow, though no formal conveyance of the property is executed by her. Article 125 of the Limitation Act would apply to a suit by a reversioner to have such a compromise or other transaction which resulted in an alienation declared invalid.

Case-law discussed.

Appeal against the decree of the Court of the Subordinate Judge of Tenali, dated 8th August, 1946 and passed in O.S. No. 60 of 1945.

C. V. Dikshitulu and *N. Rajeswara Rao* for Appellant.

V. Subrahmanyam for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal by the second defendant against a decree of the Court of the Subordinate Judge of Tenali granting a declaration that a compromise of a prior suit effected as between the first defendant, the widow of the last male owner and the second defendant, who claimed a title adverse to the widow, was not binding on the plaintiffs, the reversioners. Mr. Dikshitulu for the appellant raised two main contentions, namely, that the suit was barred by limitation and that the compromise was a *bona fide* settlement of a dispute by the widow of the last male owner and was therefore binding on the reversioners. There were subsidiary contentions which would be noticed when dealing with these main points.

The relevant facts have to be stated. Narayanamurthi, a merchant and land-owner, died in 1931, leaving his widow, the second plaintiff, and two sons, Lakshminarayana the first plaintiff, and Anjaneyulu who died after his father leaving his widow, the first defendant. Narayanamurthi became heavily involved in debts and was adjudicated an insolvent on 28th February, 1931 on a petition, I.P. No. 30 of 1930, filed by his creditors on 22nd August, 1930. On 4th December, 1930, the two sons of Narayanamurthi filed a suit for partition, each claiming an 1/3rd share of his properties on the footing that they were joint family properties. A preliminary decree passed on 10th January, 1931 was followed by a final decree dated 3rd February, 1931. Lakshminarayana, the first plaintiff, and Anjaneyulu, his brother, obtained possession in December 1931, of the properties allotted to each of them by the final decree. On 30th June, 1934, Kushaljee, a creditor of Narayanamurthi, sued on a pre-partition debt and obtained a decree in O.S.

*Appeal No. 301 of 1947. 30th November, 1950.

No. 390 of 1933 against the sons' shares of the family properties and was taking steps by way of execution. Lakshminarayana, the first plaintiff, conveyed all the properties he got under the partition decree in favour of his wife. Anjaneyulu died leaving his widow Krishnaveni Amma, the first defendant, who entered into possession of her husband's properties which consisted of 2 acres 30 cents of agricultural land, a separate portion of a house and some sites.

On 17th January, 1936, the Official Receiver in the insolvency of Narayanamurthi sold for Rs. 1,100 the right, title and interest of the insolvent in the entire properties to the present second defendant, who immediately thereafter filed O.S. No. 14 of 1936 on the file of the Court of the Subordinate Judge of Tenali for recovery of possession of the properties sold to him, impleading among others, Lakshminarayana (the present first plaintiff) as the first defendant, his wife in whose favour he had conveyed his share of the properties as the fifth defendant, the widow of Anjaneyulu (the present first defendant) as the second defendant, Kushaljee the decree-holder in O.S. No. 390 of 1933 as the third defendant. The suit was filed on the allegation that the properties purchased by the plaintiff from the Official Receiver were the self-acquired properties of the insolvent Narayanamurthi, that the partition decree obtained by the sons against him was fraudulent and collusive and that the sale by the Official Receiver conveyed the entire interest in the properties and not merely a third share of the insolvent. Defendans 1, 2, 3 and 5 among others filed written statements denying the plaintiff's allegations and repudiating the claim of the plaintiff to anything more than the third share of the insolvent. Anjaneyulu's widow (the present first defendant) then second defendant, was a minor when the suit was instituted and was declared a major on 2nd February, 1938. On the same day I.A. No. 74 of 1938 was filed into Court signed by the plaintiff (now second defendant), and the second defendant (now first defendant) praying for a decree in terms of a compromise under which she withdrew her defence and consented to a decree for possession as prayed for by the plaintiff, and the latter gave up his claim for mesne profits and costs against her. On 3rd February, 1938, the Court passed an order on I.A. No. 74 of 1938 in these terms :—

"Plaintiff and defendants 2 and 20 admit. Decree in terms".

The suit O.S. No. 14 of 1936 was tried on the merits against the other defendants and was dismissed except with regard to one item of property, the Court holding that the properties purchased by the plaintiff were the joint family properties of Narayanamurthi and his sons and that the partition decree obtained by the sons in respect of those properties had been validly passed. The decree in O.S. No. 14 of 1936 was drawn up on 21st September, 1939. An appeal against the decree was dismissed by the District Court on 23rd February, 1942.

The present suit was instituted on 9th August, 1945, by Lakshminarayana, the brother of Anjaneyulu, for a declaration that the compromise in I.A. No. 74 of 1938 on which a decree was passed by the Court in O.S. No. 14 of 1936 was a fraudulent and collusive arrangement entered into between Anjaneyulu's widow, the present first defendant, and the plaintiff in O.S. No. 14 of 1936 (the present second defendant) and was not binding on the reversioners of Anjaneyulu. At the close of the trial the mother of Lakshminarayana was impleaded as the second plaintiff on 8th August, 1946, in order to overcome an objection that the suit was not filed by the presumptive reversioner. The suit was decreed in favour of the plaintiffs on 8th August, 1946. Hence the appeal by the second defendant.

It would be inconvenient to deal with the merits of the case relating to the binding character of the compromise decree before I consider the question of limitation. The properties now in suit consist of 1 acre 64 cents of wet land and a separate part of a house and a site in Tenali, which the first defendant inherited as heir to her husband. The wet lands had been purchased in 1926 at about Rs. 1,500 per acre. The house is valued by the plaintiff at Rs. 2,000 in his evidence, but this is probably an exaggerated valuation. The second defendant would value

the properties at Rs. 700 or Rs. 800 which is an absurdly low figure. The value of the properties in suit might safely be assumed to be somehere between Rs. 3,000 and Rs. 4,000. O.S. No. 14 of 1936 was brought by the present second defendant on the allegation that the suit properties and others which formed the subject of the partition decree, were the self-acquired properties of Narayanamurthi and that the partition decree obtained by his sons in respect of these properties was fraudulent and collusive. The first defendant, along with other defendants, had filed a written statement denying these allegations. She was a minor represented by her father as guardian-ad-litem when the written statement was filed. Directly she attained majority she withdrew her defence and suffered a decree in favour of the second defendant in respect of the whole of his claim against her except mesne profits and costs. If the compromise had been entered into during her minority, the Court might have had an opportunity to consider if it was beneficial to her. It was however effected immediately after she attained majority, and the Court had to record the compromise irrespective of its fairness or otherwise. The Court tried the suit on the merits as between the plaintiff and the other defendants who had raised the same defence as the first defendant and dismissed it except as regards a small item. The appellate Court also confirmed the decision of the trial Court. I am not relying on this circumstance as decisive one way or the other. A *bona fide* compromise might validly be entered into, even though a trial might have resulted in the contentions of one or other of the parties being upheld in their entirety. I am referring to the further course of the litigation in order to show that the first defendant had a good and honest defence to the suit. There was a prior decree of Court for partition in favour of her husband. There were other defendants contesting the suit on the same grounds as she did when she filed her written statement. It is not as if the burden of the defence or any part of the defence rested exclusively on her. It is not as if the widow gave up only a portion of the properties claimed by the plaintiff retaining the rest for the estate of her husband. She withdrew her defence and suffered a decree in favour of the plaintiff (present second defendant) in respect of the entire claim against her except mesne profits. The benefit that she is supposed to have got by way of exoneration from liability from mesne profits was in my opinion, illusory. Her liability was, to say the least, highly problematical. There is one circumstance which, in my opinion, tells strongly against the fairness and *bona fides* of the compromise. The first and second defendants entered into a secret bargain by which the latter allowed the former to enjoy 1 acre 11 cents of the lands absolutely as if it was a free gift by him to her. She has been in enjoyment of this land since the compromise. She has also paid the kist for the land and the second defendant has been paying kist only for the rest of the property. This appears clearly from the evidence of P.W. 1 and the karnam P.W. 2. D.W. 1, the father of the first defendant, is not in a position to state whether his daughter would retain the 1 acre 11 cents or disclaim her right. D.W. 2, the second defendant, states that he gave the land on lease to one Ramayya for 20 or 25 years and that he does not know whether Ramayya gave the land to the first defendant or whether he is paying rent to her. This is merely a disingenuous explanation for covering up the fact that the first defendant is in possession of 1 acre 11 cents. The first defendant herself has not been examined as to how she retains possession of 1 acre 11 cents of land in spite of the compromise decree and under what circumstances the compromise was entered into. She filed a written statement in the present suit fully supporting the case of the second defendant, and the omission of the second defendant to examine her as a witness in support of the compromise is a serious defect in his case. Her father, D.W. 1, who had filed a written statement on her behalf in the previous suit contesting the claim of the second defendant, admits that the compromise was not entered into on account of any apprehension that the defence would fail as a result of the evidence adduced or likely to be adduced on behalf of the second defendant. The property formed the bulk of the estate inherited by the first defendant, and it is not likely that she would have suffered a decree to be passed in favour of the second defendant on a confession of judgment unless she had bargained for and obtained 1 acre 11 cents

for herself. Under the guise of the compromise she gave away her husband's property to the second defendant receiving a portion of it absolutely for herself as a secret benefit.

A Hindu widow or other limited owner has power to compromise claims against the estate represented by her. But a compromise of a litigation entered into by the limited owner must, in order to bind the reversioner, be *bona fide*, fair and reasonable, or for the benefit of the estate and not for the personal advantage of the limited owner at the expense of the estate. *Ram Sumran Prasad* v. *Shyam Kumari*[1], *Mata Prasad* v. *Nageshar Sahai*[2], *Ram Gowda Anna Gowda* v. *Bhau Saheb*[3], *Appaswami* v. *Thyammal*[4] and *Perireddi* v. *Venkataraju*[5]. It has been urged by Mr. Dikshitulu that a compromise of a disputed claim does not amount to an alienation but is based on the antecedent title of the parties which it acknowledges, reliance being placed on the well-known decision of the Judicial Committee in *Kunni Lal* v. *Gobinda Krishna Narain*[6] and the cases which followed it. The effect of these decisions is that when a person puts forward a *bona fide* claim based on a pre-existing title and that title is to some extent recognised by a compromise, the estate which passes under the compromise to a limited owner would be of the same quality and amplitude as that of the title put forward. The true position is thus stated in Mayne's Hindu Law, 11th edition, at pages 794 and 895 :—

"If the compromise is fair, reasonable and prudent in the circumstances in which a widow is placed, the alienation which is involved in the compromise must bind the reversioners. The alienation cannot be considered apart from the compromise . . . . . If the arrangement or settlement is between the limited owner on the one hand and a person who has no claims on the estate and who could not have had any *bona fide* belief in the justice of his claim on the other, any property which the latter takes under such arrangement will be held by him only as an alienee from a limited owner and with no higher rights".

It is not possible to hold that the widow acted *bona fide* in the interests of the estate when she withdrew her defence and confessed judgment. The circumstances referred to by Mr. Dikshitulu for the appellant are, in my opinion insufficient to repel the inference that follows from the circumstances already adverted to. The fact that there was a decree-holder in the person of Khushaljee who had to be paid is not a relevant consideration. The debt was scaled down to Rs. 405; Madras Act IV of 1937 having been passed by the Provincial Legislature was awaiting the assent of the Governor-General at the time when the compromise was entered into. The decree-holder had a right to proceed against the properties allotted not only to the share, of the first defendant's husband, but also against the properties of his brother. In any case I do not see what connection that decree debt had with the withdrawal of her defence to the suit by the widow. Nor has the fact that the second defendant paid the decree-holder a sum of Rs. 629 in 1945, long after the compromise, any significance in this connection. It was suggested that there was some trouble from the tenants of the land. But this trouble assuming there was much of a trouble was long after the compromise and did not relate to the lands in the possession of the widow. It was said that the value of the property given up must have been only about Rs. 1,000 judging by the price stated in the sale deeds, Exhibits D-6 and D-7 effected by the first plaintiff in favour of his wife. As the first plaintiff himself naively stated they were after all sales effected by a husband in favour of his wife. They were evidently intended as a ruse to put off his creditors and there was no need to waste more money on stamp and registration charges than was absolutely necessary for the end designed. The Court below has reached the conclusion that the compromise was brought about with the object of defeating the reversionary right of the plaintiff. The second defendant was a speculative purchaser of property for about a tenth of its value and the widow

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1. (1922) I.L.R. 1 Pat. 741.
2. (1925) 50 M.L.J. 18 : L.R. 52 I.A. 398 : I.L.R. 47 All. 883 (P.C.).
3. (1927) 53 M.L.J. 350 : I.L.R. 52 Bom. 1 (P.C.).
4. (1939) 2 M.L.J. 236, 245.
5. (1947) 2 M.L.J. 87 : I.L.R. (1947) Mad. 681, 688.
6. (1911) 21 M.L.J. 645 : L.R. 38 I.A. 87 : I.L.R. 33 All. 356 (P.C.).

played into his hands in consideration of a secret advantage which she gained at the expense of the reversioners. I agree with the Court below in its finding on issue (3).

Mr. C. V. Dikshitulu contends that the suit should have been dismissed as barred by limitation under Article 120 of the Limitation Act. The suit was filed by the brother of the last male owner while a nearest reversioner, the mother, was living for a declaration that the compromise decree in O.S. No. 14 of 1936 was fraudulent and collusive and not binding on the reversioners. The brother admitted in his evidence that he was aware of the compromise in O.S. No. 14 of 1936 before it was filed into Court on 2nd February, 1938. The Court made an order " decree in terms " of the compromise on 3rd February, 1938. The suit was filed more than six years after the compromise was recorded and an order thereon was made. The fact that the suit was tried on the merits against the other defendants and a formal decree in respect of the whole suit was drawn up by the Court on 21st September, 1939, would not give a fresh starting point of limitation, time having begun to run from 3rd February, 1938, the date of the Court's order. This defect could not be cured by the addition of the nearer reversioner, the mother, as a party to the suit on 8th August, 1946.

The compromise decree could not be considered to be an alienation so as to attract the operation of Article 125 of the Limitation Act and save the suit from the bar of limitation. So ran an elaborate and strenuous argument which I have summarised as above.

I am of the opinion that Article 125 of the Limitation Act governs this case. Where a person in assertion of an ostensible title sues to recover properties from a Hindu widow of which she is in possession as heir of her husband, and the widow having entered upon her defence, withdraws it and confesses judgment and suffers a decree for possession to be passed in favour of the plaintiff, on foot of a compromise entered into by her in fraud of the rights of the reversioners and in consideration of a personal benefit to herself, the transaction can well be regarded as an alienation by the widow within the meaning of Article 125. " Alienation " in Article 125 is not used as synonymous with a transfer by way of sale, mortgage, exchange, lease or gift. These are the kinds of transfers dealt with by the Transfer of Property Act, but they are not exhaustive of the modes in which the alienation contemplated in Article 125 of the Limitation Act could be effected. If a compromise decree or an award or a release is used by the widow as a pretext or cloak for parting with property belonging to the estate in favour of another person, there is an " alienation " by the widow, though no formal conveyance of the property is executed by her. In the present case the widow effectively, though indirectly, parted with her proprietary right in the suit properties in favour of the second defendant under the compromise decree and also put him in possession thereof. There has been in truth and substance an alienation by the widow through the medium of a compromise. The Court was bound to record the compromise and pass a decree according to its terms so far as they related to the suit, its jurisdiction being limited to an enquiry into the lawfulness of the compromise. The basis of the compromise was only the contract between the parties. Article 125 would apply to a suit by a reversioner to have such a compromise which resulted in an alienation declared invalid. See *Ranga Rao* v. *Ranganayaki Ammal*[1], *Kamakshi Ammal* v. *Poochammal*[2], *Shee Singh* v. *Jeoni*[3], *Ram Sarup* v. *Ramdei*[4], *Anant Bahadur Singh* v. *Tirathraj*[5]. In *Kambinayaki Timmaji* v. *Kambinayani Subba Raju*[6], relied upon by the appellant the question was whether the possession of a person who merely maintained his antecedent possession of the property under a compromise with the widow and who did not get any title or possession from the widow herself under the compromise, was adverse to the reversioner. The learned Judges while holding that the possession was not a derivative possession from the widow

1. (1918) 35 M.L.J. 364.
2. (1924) 21 L.W. 277.
3. (1897) I.L.R. 19 All. 524.
4. (1906) I.L.R. 29 All. 239.
5. A.I.R. 1939 All. 526.
6. (1910) 20 M.L.J. 204 : I.L.R. 33 Mad. 473.

recognised that a compromise might be regarded as an alienation so as to enable a reversioner to sue for a declaration of its invalidity beyond the lifetime of the limited owner who entered into the compromise. All that they said was that in that case the possession of the adverse claimant was adverse throughout and not a possession derived from the widow under the compromise. Where the nearest reversioner is a female who would only be entitled to a limited interest, it is open to the next male reversioner to sue for a declaration that an alienation by a widow is not binding beyond her lifetime. In such a case it is not necessary for the plaintiff to allege or prove that the presumptive reversioner has disabled himself from suing or has refused without sufficient cause, to institute a suit. *Kandaswami* v. *Akkammal*[1], *Raghupathi* v. *Tirumalai*[2], *Chidambara Reddiar* v. *Nallammal*[3]. Though a literal interpretation of the first column of Article 125 would make it applicable to a suit only by a presumptive reversioner, a wider interpretation has been put upon it so as to make it applicable even to a suit by a remoter reversioner in view of the fact that a suit by a reversioner to set aside an alienation by a limited owner is a representative one brought on behalf of all the reversioners and that all of them have only a single cause of action. At any rate, this is the view of a Full Bench of this Court in *Varamma* v. *Gopaladasayya*[4]. See also *Neelakantamier* v. *Chinna Ammal*[5]. I have the less hesitation in applying Article 125 to a case like the present where the nearest male reversioner sues to declare the invalidity of an alienation by the widow and where the presumptive reversioner is herself a limited owner for, it is not even necessary for the plaintiff to allege that the presumptive reversioner refused without sufficient cause to sue or has disabled herself from suing for the relief sought by the plaintiff.

For these reasons I hold that the suit was governed by Article 125 of the Limitation Act and was instituted in time by the first plaintiff. The addition of the second plaintiff was unnecessary and in no way have affected the result of the suit.

This appeal fails and is dismissed with costs.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRA REDDI.

Palakkadvath Chanthu's children Achuthan and others .. *Appellants* *

v.

Poothakandiyil Choyi .. *Respondent.*

Malabar Tenancy Act (XIV of 1930), section 3 (j) and Madras Tenants and Ryots Protection Act (XXIV of 1949) as amended by Act (VIII of 1950), section 4—Intermediary—Usufructuary mortgagee who has parted with a portion of the mortgaged property—If entitled to the benefits of the provisions of Madras Tenants and Ryots Protection Act.

A usufructuary mortgagee who has parted with a portion of the mortgaged property is not an intermediary within the meaning of clause (*j*) of section 3 of the Malabar Tenancy Act and so would not be entitled to the benefits of the provisions of the Madras Tenants and Ryots Protection Act, XXIV of 1949, as amended by Act VIII of 1950.

Appeal against the decree of the District Court, South Malabar, dated 12th July, 1950, in A.S. No. 218 of 1950 (E.P. No. 141 of 1950, in O.S. No. 309 of 1942, Additional District Munsif Court, Kozhikode).

M. C. Sridharan for Appellants.

The Advocate-General (*K. Kuttikrishna Menon*) and *K. N. Karunakaran* for Respondent.

The Court delivered the following

JUDGMENT.—The main question that falls to be decided in this case is whether the usufructuary mortgagee who parted with a portion of the mortgaged property

1. (1889) I.L.R. 13 Mad. 195.
2. (1892) 2 M.L.J. 91 ; I.L.R. 15 Mad. 422.
3. (1909) I.L.R. 33 Mad. 410.
4. (1917) 35 M.L.J. 57 : I.L.R. 41 Mad. 659 (F.B.).
5. (1926) 52 M.L.J. 13.

*A.A.A.O. No. 117 of 1950. 29th November, 1950.

is an intermediary within the meaning of clause (*j*) of section 3 of the Malabar Tenancy Act so as to be entitled to the benefits of the provisions of Act XXIV of 1949 as amended by Act VIII of 1950. The judgment-debtors in O.S. No. 309 of 1942 are the appellants in the appeal.

The circumstances that culminated in this Civil Miscellaneous Second Appeal may be briefly mentioned. The respondents herein filed a suit O.S. No. 309 of 1942 for redemption of the usufructuary mortgage created by them in favour of the appellants. The suit was contested on various grounds but ultimately it was decreed and the time for redemption was fixed. While this matter was pending appeal in this Court, an attempt was made to have the proceedings in appeal stayed by making a deposit under section 4 of Act XXIV of 1949. But it proved infructuous as no deposit was made in time as contemplated by the provisions of that section. Ultimately when the plaintiff decree-holder levied execution the appellants applied for stay for execution of the decree under section 4 (1) of the Act XXIV of 1949.

This was opposed by the decree-holder on the ground that the provisions of section 4 of Act XXIV of 1949 as amended by Act VIII of 1950 have no application to a decree for redemption of the usufructuary mortgage, that the judgment-debtor having only sub-mortgaged a portion of the property mortgaged, his case is not governed by the provisions of section 4 (1) of Act XXIV of 1949 or sub-sections (2-A) or (2-B) of section 4 added by Act VIII of 1950 as they apply only to a case where the usufructuary mortgagee has leased out the property to a third party and that in any event the judgment-debtor is not entitled to the benefits of the Act as he has not parted with the entire extent of land mortgaged to him and therefore does not come within the meaning of "intermediary" under section 3 (*j*) of the Malabar Tenancy Act. These objections found favour with the trial court which dismissed the application of the judgment-debtors for a stay of execution of the decree.

On appeal the District Judge while upholding the contention of the judgment-debtor that the provisions of sub-sections (2-A) or (2-B) of section 4 of Act XXIV of 1949 are applicable to a decree for redemption of the mortgagee confirmed the decision of the trial Court agreeing with his reasoning on other aspects of the case. The present appeal is filed against the decree and judgment of the District Judge.

In this appeal Mr. K. Bashyam, the learned counsel for the appellants, raised three contentions. First is that the lower Court, having held that the trial Court erred in assuming that the usufructuary mortgagee has only sub-mortgaged the property, proceeded on the basis that the provisions of these enactments have no application to the case of a sub-mortgage without either considering himself that point on the material on record or calling for a finding. It was next argued that even assuming that the judgment-debtor only sub-mortgaged the property mortgaged to him still the appellant could claim relief under the provisions of Act XXIV of 1949 as he comes under the definition of an intermediary. And lastly he contended that the expression "such possession" in the definition of "intermediary" in clause (*j*) of section 3 of the Malabar Tenancy Act covers not only the case where a mortgagee has parted with the possession of entire extent of the land mortgaged to him but the case of a mortgagee who has transferred only a portion of the land. According to him the expression "such possession" does not refer to the extent of the possession but only to the nature of the possession.

On the other side the learned Advocate-General seeks to support the judgment of the Courts below on alternative grounds, namely, that the provisions of sub-sections (2-A) or (2-B) of section 4 added by Act VIII of 1950 have no application to a decree for redemption of the usufructuary mortgage.

I shall first take up the last argument of Mr. Bashyam, the learned counsel for the appellants, as that will dispose of this appeal. An answer to this question depends upon the interpretation to be put to the expression "such possession" in the definition of an intermediary in section 3 (*j*) of the Malabar Tenancy Act.

Mr. Bashyam urges that the expression "such possession" can only have reference to the kind of possession which the mortgagee himself had and cannot

refer to the entire extent of the land. I am not able to understand what the nature of possession can mean in that context. It can only have reference to the extent of the land which is in his possession. In order to appreciate the relative contentions of the parties it is useful to set out the relevant provision of section 2 of the Madras Act XXIV of 1949. Section 2 (*b*) of the Act says :

"The expressions 'eviction', 'holding', 'rent' and 'tenant' shall in relation to cases governed by the Malabar Tenancy Act, 1929, have the same meaning respectively as in that Act".

Now I shall refer to definition of tenant as given in the Malabar Tenancy Act :

"'Tenant' means any person who has paid or has agreed to pay rent or other consideration for his being allowed by another to enjoy the land of the latter and includes an intermediary, a kanamdar, a kuzhikanamdar and a verumpattamdar of any other description."

Intermediary is defined in clause (*j*) of the same section as

"any person who, not being a jenmi has an interest in land and is entitled by reason of such interest to possession thereof, but has transferred such possession to others."

Mr. Bashyam contends on this point that the expression "transferred such possession to others" can only mean "transferred such kind of possession to others which he himself had in it", and therefore it is not necessary in order to get the benefits of the Act that the person who had an interest in the land and entitled by reason of such interest to possession thereof to part with the possession of all the land that was in his possession.

For the other side, the learned Advocate-General urges that the expression "has transferred such possession" cannot apply to the case where the mortgagee with possession has transferred possession of only a part of the property usufructuarily mortgaged to him. In support of these arguments he relies upon three decisions of this Court. They are *Krishnan Namboodiri* v. *Narayana Namboodiri*[1] and an unreported decision of a single Judge of this Court in C.M.A. No. 367 of 1944 and a connected C.M.S.A. No. 207 of 1944. In *Krishnan Namboodiri* v. *Narayana Namboodiri*[1], Wadsworth and Patanjalai Sastri, JJ., held that the words "is in possession of the property mortgaged" in section 10 (2) of the Madras Agriculturists Relief Act can only mean is in possession of the entire extent of the property mortgaged and even if a very small portion of the property mortgaged was not delivered to the mortgagee it was not a usufructuary mortgage which would attract the provisions of section 10 (2) of the Act and therefore the mortgagor was entitled to the benefits of the Madras Agriculturists Relief Act.

In the unreported decision in C.M.A. No. 367 of 1944, Kuppuswami Ayyar, J., held that an assignor of a portion of the *Kanam* property was not entitled to a renewal of the *kanam*. On the analogy of these decisions, the Advocate-General maintains that unless the usufructuary mortgagee has parted with the possession of the entire property he will not be an intermediary within the meaning of clause (*j*) of section 3 of the Malabar Tenancy Act. The principle underlying these decisions renders this interpretation more acceptable. Further an analysis o provisions of clause (*j*) leads me to the conclusion that unless the mortgagee parts with possession of the entire extent of land he would not come within the purview of that clause.

A person is an intermediary within the meaning of clause (*j*) who not being a *jenmi* has an interest in the land and is entitled to possession of such land by virtue of this interest but transferred such possession to others. That it covers the case of an usufructuary mortgagee does not admit of any doubt. But when does he become an intermediary as defined in that clause? In other words what is the connotation of the words such possession? They can only mean the possession of the land which he himself is entitled to. Since he is entitled to the possession of all the land mortgaged to him the expression can have reference only to the entirety of the land to the possession of which the mortgagee is entitled by virtue of the interest which he has in the land.

1. (1943) 2 M.L.J. 642.

If the legislature intended to apply this to a case of transfer of a portion of interest which the mortgagee has in the lands mortgaged to him it would have certainly made specific provision for that purpose as is done in some of the sections of the same Act. In this connection the learned Advocate-General drew my attention to the definition of holding in clause (*h*) in Malabar Tenancy Act which specifically provides for a portion of the holding and also to sections 14, 20 and 33, which contains a reference to portions of a holding, and argues that as in those cases specific provision for transfer of a portion or part of such property mortgaged would have been made if it was meant to include within the ambit of the clause mortgagees who have parted with a portion of the mortgaged property. It is manifest from this sub-clause and from reference to the scheme of the Act that it applies only to a case where the mortgagee has parted with possession of the entire extent of land mortgaged to him and does not cover a case where only a portion of the property mortgaged to him was transferred. If I accept the contentions sought to be placed by Mr. Bashyam on clause (*j*) of section 3 it will lead to the frustration of the very object of the enactment. The usufructuary mortgagee by transferring a small fraction of the property mortgaged to him may claim the benefit of the provision of this Act which do not seem to have been intended to be conferred upon such persons. No doubt a Court has to give effect to the provisions of enactments irrespective of a consideration of the hardship involved to the persons affected thereby but a Court will not be justified in enabling persons to circumvent the provisions of the Act and get undeserved benefit by placing strained construction. I do not think I will be placing reasonable interpretation on the words "who has transferred such possession to others" if I should hold that it includes a usufructuary mortgagee who has parted with a portion of the property mortgaged to him.

I, therefore, should hold that the conclusion of the Courts below that the judgment-debtor is not entitled to any relief under the provisions of Act XXIV of 1949 as amended by Act VIII of 1950 is correct and ought to be affirmed. In this view of the matter it is not necessary for me to go into other contentions raised on behalf of the respondents or the appellants.

The Civil Miscellaneous Second Appeal fails and is dismissed with costs. No leave.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Marútha Goundan *alias* Kulla Goundan .. *Petitioner* *

Madras Prohibition Act (X of 1937), section 4 (1) (a)—Possession of 1/16 tola of ganja—If an offence —Madras Prohibition Supplementary Act (XI of 1941), section 2—Effect.

In view of section 2 of the Madras Prohibition Supplementary Act, (XI of 1941) it cannot be held that rule 29 of the Hemp Drug Rules which allows any person to be in possession of a certain quantity of ganja is in force after the enactment of that Act and therefore a person in possession of 1/16 tola of ganja is liable to be convicted of an offence under section 4 (1) (*a*) of the Madras Prohibition Act.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional Magistrate, Coimbatore, dated 29th September, 1949, in C.A. No. 96 of 1949, preferred against the order of the Court of the Taluk Sub-Magistrate, Coimbatore, in C.C. No. 377 of 1949.

R. V. Raghavan for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

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* Cr. R.C. No. 1287 of 1949. 30th November, 1950.
(Cr. R.P. No. 1213 of 1949).

The Court made the following

ORDER.—Under the Hemp Drug Rules dated 1st February, 1936, framed under the Indian Abkari Act, there is rule 23 which allows any person to be in possession of not more than three tolas of ganja in the districts of the State of Madras except in the district of Madras and the Agency tracts of Ganjam, Vizagapatam and East Godavari. The accused here has been convicted under section 4 (1) (*a*) of the Madras Prohibition Act for being in possession of 1/16 tola of ganja and the lower Courts have held that he is guilty of the offence with which he is charged. In a Full Bench decision in *Adi Lakshmiammal*, In re[1], it has been held that in so far as the Prohibition Act repeals the provisions of the Madras Abkari Act, they have not been reserved for the assent of the Governor-General or for the signification of His Majesty's pleasure and therefore the Madras Legislature had no power to interfere with the Madras Abkari Act so far as possession of dangerous drug is concerned. In that view, the Full Bench held that section 4 (1) (*a*) as it stands being entirely repugnant to an existing law is completely *ultra vires* so far as possession of ganja or any other dangerous drug is concerned. At page 44 of the report, Leach, C.J., delivering the judgment of the Bench observed as follows :—

"The Hemp Drug Rules framed under the statutory authority were notified on 1st Februsry, 1936. By rule 23 a person may have in his possession in Agency tracts of Ganjam, Vizagapatam and East Godavari any quantity of ganja not exceeding two tolas and elsewhere in the presidency, any quantity not exceeding three tolas. Therefore, before the application of the Prohibition Act to the North Arcot district, a person there could lawfully possess three tolas of ganja ".

As a result of this observation the Full Bench set aside the conviction of a person who was found to be in possession of ganja not exceeding three tolas in the district of North Arcot. This decision would have applied in its entirety to the facts of the present case had it not been for the fact that the Madras Prohibition Supplementary Act XI of 1941 rectified the mistake pointed out by the Full Bench. Madras Act XI of 1941 by section 2 provided that the provisions of the Madras Prohibition Act in regard to intoxicating drugs shall apply to every intoxicating drug as therein specified although such drug may also be a dangerous drug. In view of this rectifying clause, it cannot be held that the rules framed under the Hemp Drug Rules are in force after the enactment of the Madras Prohibition Supplementary Act XI of 1941. The conviction of the petitioner must therefore be held to be right. But the sentence of two months rigorous imprisonment in the circumstances of the case seems to be excessive for the possession of 1/16 tolas of ganja. It has been brought to my notice that the accused has undergone a period of ten days sentence prior to his being released on bail. I would therefore reduce the sentence to the period already undergone. Otherwise the petition is dismissed.

V.S. *Sentence reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

The Public Prosecutor .. *Appellant**

v.

K. Jacob Nadar .. *Respondent.*

Madras General Sales Tax Act (IX of 1939), section 15 (a)—Assessment on the firm—Notice issued to the firm—Default in payment of tax—Prosecution of a partner on whom no notice was served and his conviction for contravention of section 15 (a)—Legality.

Under the Madras General Sales Tax Act, a firm is a person and for the purpose of assessment the firm is treated as one entity and in default of payment pursuant to the notice the firm is liable to be prosecuted.

Where an assessment is made on a firm and the notice is issued to the firm and served on one of the partners and there is a default in payment of the tax, another former partner of the firm on whom no notice has been served cannot be prosecuted in his personal capacity and convicted for contravention of section 15 (*a*) of the Act.

1. (1941) 2 M.L.J. 41 : I.L.R. 1941 Mad. 687 (F.B.).

* Cr. App. No. 181 of 1950. 30th January, 1951.

Appeal under section 417 of the Criminal Procedure Code, 1898, against the acquittal of the aforesaid respondent (Accused) by the Court of the Joint Magistrate of Tuticorn in C.C. No. 256 of 1949 on its file.

The State Prosecutor (*S. Govind Swaminathan*) for the Appellant.

K. Kalyanasundaram for Respondent.

The Court delivered the following

JUDGMENT.—The accused was charged under two counts for having contravened sections 15 (*a*) and (*b*) of the Madras General Sales Tax Act. He was convicted for the offence of contravening the provisions of section 15 (*a*) but acquitted of the charge of contravening the provisions of section 15 (*b*). The Public Prosecutor preferred the appeal against the order of acquittal.

The facts are not in dispute and thay may be stated briefly. Jacob Nadar and Mylappan were partners of the firm Mylappan & Company. Jacob ceased to be a partner of the firm in December, 1947. The firm was liable to pay sales tax to the extent of Rs. 3,953-8-0 for the year 1946-47. Notice demanding the payment of the arrears of tax from the firm was served upon Mylappan on 31st March, 1948. As the amount was not paid in time the Asssistant-Commercial Tax Officer filed a complaint against Jacob Nadar, the other partner. The question is whether Jacob Nadar, on whom no notice was served is guilty of the offence.

The relevant provisions of the Madras General Sales Tax Act read as follows :—

"(2) (*b*) "dealer" means any person who carries on the business of buying or selling goods.

EXPLANATION : A co-operative society, a club, a firm or any association which sells goods to its members is a dealer within the meaning of this clause.

9. (1) Every dealer whose turn over is ten thousand rupees or more in a year shall submit such return or returns relating to his turnover, in such manner, and within such periods as may be prescribed.

(2). (*a*) If the assessing authority is satisfied that any return submitted under sub-section (1) is correct and complete, he shall assess the dealer on the basis thereof.

(*b*) If no return is submitted by the dealer under sub-section (1) before the date prescribed or specified in that behalf or if the return submitted by him appears to the assessing authority to be incorrect or incomplete the assessing authority shall assess the dealer to the best of his judgment.

15. Any person who—

* * * * *

(*b*) fails to pay within the time allowed any tax assessed on him, or any fee due from him, under this act . . . . . .

shall on conviction by a Presidency Magistrate or a Magistrate of the first class be liable to a fine which may extend to one thousand rupees and in the case of a conviction under clause (*b*), (*d*), (*f*) or (*g*), the Magistrate shall specify in the order the tax, fee or other amount, which the person convicted has failed or evaded to pay or has wrongfully collected, and the tax, fee or amount so specified shall be recoverable as if it were a fine."

A combined reading of the aforesaid sections establishes that a firm is a person and that for the purpose of assessment the firm is treated as one entity and that in default of payment pursuant to the notice the firm is liable to be prosecuted. It is true that under rule 19 of the Madras General Sales Tax Rules if a dealer or licensee enters into partnership with regard to his business he shall report the fact to the assessing authority within 30 days of his entering into such partnership and that the dealer or licensee and the partner shall jointly and severally be responsible for the payment of the tax leviable under the Act. But that rule does not override the provisions of the Act which enable the authorities concerned to deal with the firm as one entity for the purpose of assessment and prosecution. In the instant case the assessment was made on the firm. The notice was issued to the firm. But a partner of the firm was prosecuted. As a defaulter in this case is the firm, the firm should have been prosecuted for contravening the provisions of section 15. But instead, one of the partners on whom no notice was served at all has been prosecuted in his personal capacity. The firm which is a person under section 2 (*b*) and who

committed the offence, is not the accused in the case. Though Jacob may be made liable if the proper procedure had been followed as a partner of the firm—on that question I do not express my final opinion, he is not liable as the firm is the person who made the default and who should have been prosecuted.

The learned State Prosecutor relied upon the judgment of Chandrasekhara Aiyar, J., in *Akula Paddayya Naidu*, In re[1]. In that case the notice was served on the firm represented by one of the partners and both the partners of the firm were accused. As both the partners were made accused, the learned Judge presumably treated the firm as accused and convicted both the partners who constituted the firm. In this case I cannot treat the firm as the accused as one of the accused only was prosecuted in his personal capacity.

I agree with the Court below and hold that the order of acquittal is correct. The appeal is therefore dismissed.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE SOMASUNDARAM.

K. Murugappa Chettiar .. *Petitioner* *

v.

C. Balasundaram Chetty and another .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XV of 1946), section 7—Application for eviction on the ground of default in payment of rent—Application by tenant for fixation of fair rent—Excess in the hands of the landlord on the basis of fair rent—If saves tenant from consequences of default.

Where admittedly there has been a default in the payment of rent, the fact that there was another application by the tenant for fixation of fair rent and that according to the rent fixed in that application the landlord would have with him sufficient money to discharge the arrears relating to the period of the alleged default, would not save the tenant from the consequences of the admitted default he has made.

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records in H.R.A. No. 1752 of 1949 on the file of the Court of the Additional Judge, Court of Small Causes, Madras preferred against the order in H.R.C. No. 6147 of 1949, on the file of the Second Additional Rent Controller, Madras and to quash the order, dated 19th April, 1950, and made in the said H.R.A. No. 1752 of 1949.

V. Srinivasan for Petitioner.

A. Narasimhachari and *K. S. Narayana Aiyar* for first Respondent.

The Court made the following

ORDER.—There is no error of law apparent on the face of the order of the Appellate Tribunal, which directed eviction of the petitioner for default in payment of rent. The rent was payable daily and admittedly the petitioner did not pay or tender any rent after 29th August, 1949. As the rent was payable daily, the default would occur under section 7 of the Madras Buildings (Lease and Rent Control) Act, 1946, after the lapse of fifteen days in respect of every day's rent. The only point pressed on us by petitioner's learned counsel, is that, there was another application for fixation of fair rent and according to the rent fixed in that application the landlord would have with him sufficient money to discharge the arrears relating to the period of the alleged default. That may be so. But, that does not save the tenant from the consequence of the admitted default he has made. It is one thing to say that the tenant has a right to have the excess amount, on the basis of the fair

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1. (1947) 2 M.L.J. 255.

*C. M. P. No. 4564 of 1950. 22nd February, 1951.

rent, adjusted towards the arrears ; it is another thing to say that he can escape the consequences of not tendering or paying the rent on or before the date allowed under section 7 of the Act. This petition is therefore dismissed with costs.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE SOMA-SUNDARAM.

Lingambhotla Subbayya .. *Petitioner**

v.

The Subordinate Judge, Vijayawada and another .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XV of 1946), section 7—Default—Proof of fact of house owner not having insisted on regular monthly payment of rent—If affects his right to ask for eviction.

Where in fact there is a default in the payment of rent, it would be wrong to hold that default by itself cannot be regarded as a valid ground to eject a tenant in cases where the tenant proves that by long practice the house-owner did not insist on regular monthly payment of rent. There cannot be an agreement under which rent is payable at irregular intervals. Though a landlord may not have been insisting on regular payments and was accepting without protest arrears of rent which had accumulated, if he chooses to apply under section 7 of the Madras Buildings (Lease and Rent Control) Act, he will be entitled to an order of eviction, if he proves there has been a default as contemplated by the section.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the proceedings in Misc. App. No. 52 of 1949 on the file of the Court of the Subordinate Judge of Vijayawada arising out of H. R C. No. 81 of 1949 on the file of the Court of the Rent Controller, Vijayawada, and quash the said proceedings.

D. P. Narayana Rao for Petitioner.

J. Sithamahalakshmi, M. Satyavathi and *N. Ramamohan* for 2nd Respondent.

The Order of the Court was made by

The Chief Justice.—The petitioner filed an application for eviction on the ground of default in payment of rent. Both the Rent Controller and the Appellate Tribunal found that there was default, but held that default by itself cannot be regarded as a valid ground to eject a tenant in a case where the tenant proves that by long practice the house owner did not insist on regular monthly payment of rent. The Appellate Tribunal thought that this conclusion was justified by the spirit of Act XV of 1946. We have no hesitation in saying that both the Rent Controller and the Appellate Tribunal committed a clear error of law. There cannot be an agreement under which rent is payable at irregular intervals. It may be that the landlord was not insisting on regular payments and was accepting without protest arrears of rent which had accumulated. But when he chooses to apply under section 7 of the Act, he will be entitled to an order of eviction if he can prove that the tenant has not paid or tendered the rent by the last day of the month next following that for which the rent is payable. It is not suggested that the tenancy was not a monthly tenancy ; therefore the rent for each month was payable before the last day of the month next following. Both the Rent Controller and the Appellate Tribunal have found that there was default in payment of rent according to this provision. They ought to have therefore passed an order of eviction. The orders of the Rent Controller and the Appellate Tribunal are quashed and there will be an order for eviction in favour of the petitioner.

V.S. *Orders quashed.*

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*C. M. P. No. 5099 of 1950. 14th February, 1951.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Malli K. Dhanalakshmi Ammal .. *Appellant**

v.

Malli Krishnamurthi .. *Respondent.*

Civil Procedure Code (V of 1908), section 58—Judgment-debtor committed to civil prison in execution of maintenance decree and remaining in prison for six months—If can be sent to civil prison again for recurring maintenance amounts for later periods.

Where a judgment-debtor husband in a maintenance decree has been committed to a civil prison for six months in an execution petition for recovering the movables and costs, and has been there for the entire period prescribed under section 58 (1), Civil Procedure Code, he cannot, in another execution for recovering the maintenance which had accrued by then, be again sent to the civil prison for recurring periods of six months for recurring maintenance amounts for later periods.

Appeal against the appellate order of the District Court, Mathurai, dated 16th September, 1948, in A. S. No. 197 of 1948, preferred against the decree of the Court of the District Munsiff, Mathurai Town, in E. P. No. 58 of 1948, in O. S. No. 313 of 1946.

T. S. Vaidyanatha Ayyar for Appellant.

M. R. Narayanaswami for Respondent.

The Court delivered the following

JUDGMENT.—This second appeal raises a very interesting point of law, namely, whether a judgment-debtor husband in a maintenance decree, after having been committed to a civil prison for six months, in an execution petition for recovering the movables and costs, and been there for the entire period prescribed in section 58 (1), Civil Procedure Code, can, in another execution for recovering the maintenance which had accrued by then, be again sent to the civil prison for another period of six months, and so on and so forth, for recurring periods of six months for recurring maintenance amounts for later periods. The trial Court held that he can be so sent if he having means to pay the maintenance amount, refuses to pay, but confessed that the matter was not free from doubt, and gave the judgment-debtor some time to pay up before ordering his arrest again. On appeal, by the judgment-debtor, the District Judge of Mathurai held that a maintenance decree cannot be held to be a *different decree* in respect of each matter adjudicated in it, for the purpose of re-arrest and committal to civil prison under section 58 (1) and 58 (2), Civil Procedure Code, distinguishing the rulings in *Harak Narain Singh* v. *Babban*[1], and *Mt. Prem Kuer* v. *Ram Lagan Rai*[2], as not applicable to arrests at all. He relied on the ruling in *Damodar Shaligram* v. *Malhari*[3], and the plain wording of section 58 (2), Civil Procedure Code and held that once the judgment-debtor has been arrested and detained in civil prison for the full period of six months mentioned in section 58, Civil Procedure Code, in execution of a maintenance decree, he is not liable to be arrested again in execution of the same decree though for an amount due under a different head in the decree. He relied most strongly on the clause :

"But he shall not be liable to be re-arrested under the decree in execution of which he was detained in the civil prison".

in section 58 (2), Civil Procedure Code, and held that the judgment-debtor was not liable to be arrested again and committed to jail for this maintenance amount accruing after he had been previously arrested and committed to jail.

Mr. T. S. Vaidyanatha Ayyar, for the maintenance-holder wife, urged that the learned District Judge's view was wrong and unsustainable in law and that it virtully condemned the wife to death by starvation by the husband's abuse of law.

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* A. A. A. No. 6 of 1949. 29th September, 1950.

1. (1933) I.L.R. 55 All. 672.
2. A.I.R. 1948 Pat. 199.
3. (1882) I.L.R. 7 Bom. 106.

He urged that a maintenance decree is a *composite decree* and that every time the decree-holder is proceeding by way of execution it is a *fresh decree* that is being put in execution, as held in *Debendranath* v. *Trinayani Dasi*[1], and that, therefore, a judgment-debtor husband can be sent to civil jail *for six months* at a time, for every maintenance amount above Rs. 50 accruing for each period, and that as the first arrest and committal were for the value of the movables and costs awarded to the appellant, and the re-arrest was applied for the first maintenance amount due the case for re-arrest was even stronger. I cannot agree. I have no doubt whatever that the learned District Judge was right in his view in the circumstances of this case, as the re-arrest was being asked for :

" Under the decree in execution of which he was detained in the civil prison "

within the meaning of section 58 (2), Civil Procedure Code. If any man, layman or lawyer is asked, he will have certainly to reply that the re-arrest was being asked for only in execution of the decree in O. S. No. 313 of 1946, though under a *different branch of it*. The tree was the same. So, when section 58 (2), Civil Procedure Code cut the trunk at the root, all the branches fell down automatically with it, and no re-arrest was possible. Of course, the *debt* and the liability for maintenance remain, under section 58 (2), Civil Procedure Code, itself, despite the release after a six months period in the civil prison, and can be recovered by other methods, like proceeding against the charged properties, and other properties of the judgment-debtor. Sending a judgment-debtor to the civil prison, though once very frequent is, in every civilised country, now hedged in with many restrictions, and is only allowed in rare cases, mostly cases, of fraud, contumacious refusal to pay though there are ample means, etc. It has been held in another way also, by fixing the maximum duration of the stay in civil prison in respect of each decree, section 58 (1) making it six months in cases like this. Of course, Mr. Vaidyanatha Ayyar is right in saying that section 58, Civil Procedure Code, will not make the maximum period in civil prison for any man in his lifetime six months. The maximum applies only for the execution of *the same decree*. The decree-holder in a *different decree* can take advantage of section 58 and send the same man to the civil prison for another period of six months, if he is liable otherwise. A " decree " clearly includes the adjudication of " all or any of the matters in controversy in the suit " under section 2 (2), Civil Procedure Code. So the adjudication on various matters in the *same suit* cannot be termed to constitute *separate decrees* or *fresh decrees* for the purposes of section 58, Civil Procedure Code, as urged by Mr. Vaidyanatha Aiyar. As remarked by the learned Judges in *Damodar Shaligram* v. *Malhari*[2] :

" The section (section 58) is one clearly intended to operate in restriction of the power of arrest and in favour of personal liberty and should be construed according to the plain meaning of the terms."

Mr. Vaidyanatha Ayyar urged that this construction would put intolerable restrictions on the rights of the decree-holder. But where the law puts such restriction deliberately, in the interests of the public or of personal liberty Courts are bound to carry it out as in the case of the Madras Agriculturists Relief Act, Slavery Abolition Act, Devadasi Act, Zamindari Abolition Act, etc., If Mr. Vaidyanatha Ayyar's contention is accepted, a wife holding a maintenance decree can make the husband go to jail the day after he comes back, for the maintenance which has accrued for the six months, when he was in jail. The old story of Vikramaditya, of spending six months in one place and six months in another, every year, will be repeated, with the sole difference that the alternation of six months will not be in town and forest, as in the romantic case of Vikramaditya, but in jail and hiding ! The cases relied on by Mr. Vaidyanatha Ayyar, like *Debendranath* v. *Trinayani Dasi*[1], do not relate to section 58, Civil Procedure Code, or to sending a judgment-debtor who had undergone six months civil imprisonment once more to civil jail for another sum of maintenance which accrued since. They refer only to enforcing

1. (1943) I.L.R. 24 Pat. 245. 2. (1882) I.L.R. 7 Bom. 106.

subsequent amounts payable by the judgment-debtor by sale of his charged properties.

Mr. Vaidyanatha Ayyar says that this judgment-debtor sets up frivolous defences when his charged properties are proceeded against, by falsely alleging that they are trust properties. It is up to his client and Advocate to prick those frivolous defences and convince the executing Court that the charged properties are not trust properties and can be sold. The right to raise a defence is elementary, and is given to every party under the law, and the judgment-debtor cannot be sent to civil prison for raising any defence allowed by law, for the *use* of law can never be an *abuse* of law. Nor can the hardship caused to the wife by postponing payment of her maintenance by setting up absence of means be any ground for overlooking the clear dictates of law. I may add also that the trial Court was not right in holding that the finding in E. P. No. 212 of 1947 against the decree-holder's plea of no means when he was arrested and committed concluded the matter regarding his pleas of no means in E. P. No. 58 of 1948 when sought to be arrested again. A man's plea of no means may be false in 1947, but may be true in 1948. Means and health may change rapidly during a year, and a year-old finding may not be safe to rely on. Being a question of fact, liable to quick change by time, the former finding cannot be conclusive in the later E. P., where a distinct finding would have been necessary if there was a legal possibility of re-arrest and re-committal.

It was urged next that a maintenance decree is a compsosite decree, and really a bundle of many different or separate decrees, and, so, many re-arrests and re-commitments are possible. I cannot agree. A composite decree is like a many-branched tree, like a mango tree or tamarind tree. Other decrees are like cocoanut trees, having no branches. But both kinds of trees have only one main trunk which can be cut at the root. It is not as if a composite decree will become *many different decrees* which are capable of independent execution, and with different periods of limitation, incidents, etc., any more than a many-branched tree has many roots and trunks. Though the original branches are many and new branches spring into being, the trunk and root are one. The origin of a maintenance decree, like this, is the date when it was passed. The end of it is the date when the maintenance-holder dies. In essence, newly accruing maintenance amounts are like newly accruing instalments, as in *Damodar Shaligram* v. *Malhari*[1], and a re-arrest and re-commitment to civil prison will be barred under section 58 (2), Civil Procedure Code, in the circumstances of this case. The ruling in *Ghanasamdas Goorsamull* v. *Johorimull Kedarinath*[2], also shows that in such cases the total period in civil prison *in execution of the decree in the same suit* can never exceed six months.

It was lastly urged by Mr. Vaidyanatha Aiyar that the decree-holder wife gains nothing by sending her husband to jail again at her own expense, like this, and that, therefore, it must be presumed that she is driven to it by sheer necessity and is not doing it for pleasure. We are not concerned with gain or loss, pleasure or pain, when considering a mandatory provision of law, as here. But I may add that Mr. Vaidyanatha Ayyar himself admitted that the husband in this case has married another woman and is living with her alone. So, the judgment-creditor, aggrieved at his not living with her, may probably derive some pleasure by keeping him in jail and preventing him from living with the other wife, even by spending more money of hers on maintaining him in jail than the Rs. 15 awarded to her as monthly maintenance against him. Persons acquainted with human psychology will not be surprised at such an act.

In the end, therefore, I see no merits in this Civil Miscellaneous Second Appeal, It deserves to be and is hereby dismissed with costs.

V. S. *Leave refused.*

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1. (1882) I.L.R. 7 Bom. 106. 2. (1883) I.L.R. 7 Bom. 431.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

The Andhra University, a Corporate body with its headquarters at Vizakhapatnam .. *Appellant**

v.

Korada Durga Lakshmi Manoharam .. *Respondent.*

Master and servant—Dismissal of clerk of the Andhra University—Suit for declaration that dismissal was unjust and illegal—Maintainability.

The rule of an office being held during pleasure cannot be extended to offices under a University or such other authority. It cannot be presumed solely from the power of appointment and dismissal provided for in favour of the Syndicate in the Andhra University Act that the officers and servants of the University are persons holding their offices and places during the pleasure of the Syndicate. In the case of dismissal of a clerk of the University for alleged misconduct when the dismissed clerk files a suit for a declaration that the order of dismissal was wrong and illegal it is incumbent on the University to satisfy the Court about the propriety of its dismissal of the clerk. But the dismissal cannot be challenged on the ground that no opportunity had been given to the plaintiff to show cause or that the plaintiff was not heard.

It cannot be said that a suit for a declaration of breach of contract lying in the wrongful dismissal of the plaintiff from the defendant's service uncoupled with a claim for damages for such breach but conceived solely with a view to the vindication of the plaintiff's character which stands tarnished by such wrongful dismissal is unmaintainable. Nor can it be said that in every such case there can only be a suit for damages or a suit for restoration to office and that there cannot be a *tertium quid*—in the nature of a suit for a bare declaration to vindicate character, though that is ordinarily so. Further, no Court ought to be unduly solicitous to throw out a declaratory suit unless its maintainability or the inexpediency of its entertainment is made out in *strictissima juris* and beyond the slightest shadow of a doubt.

Appeal against the order of the Court of the District Judge, Vizagapatnam, dated 8th December, 1947, in A. S. No. 62 of 1945, preferred against the decree of the Court of the Subordinate Judge, Vizagapatnam, in O. S. No. 44 of 1943.

Alladi Krishnaswami Aiyar and *P. S. Raghavarama Sastri* for Appellant.

D. Narasaraju and *K. B. Krishnamurthi* for Respondent.

The Court delivered the following

JUDGMENT.—The facts of this case are simple and further not many. They lie in a short and narrow compass and require but a brief statement. The plaintiff was a clerk in the service of the defendant, the Andhra University, down to 3rd January, 1940, the date of his dismissal by its Vice-Chancellor, Sir C. R. Reddi, after his inquiry into the offence of theft of a B. Ed., diploma from the record of the University of which he found the plaintiff guilty. On appeal taken by the plaintiff to the Syndicate, the Syndicate finding no power of dismissal vested in the Vice-Chancellor treated his order as a recommendation which it accepted by its order dated 20th June, 1940, after constituting a Committee to go into the matter and obtaining a report from it without any independent inquiry by the committee. The plaintiff thereupon sued for a declaration that the orders were unjust and illegal. The defendant resisted the suit by pleading that the orders were just and legal, as also that the suit for a bare declaration was not maintainable without a consequential prayer as for damages. The Additional Subordinate Judge of Vizagapatam who tried the cause held the dismissal to be wrongful for want of an inquiry by the Syndicate notwithstanding the fairness of the inquiry by the Vice-Chancellor and on the ground of a violation of rules of natural justice by the Syndicate in that neither the Syndicate nor the Committee appointed by it gave the plaintiff any chance of any hearing of his case or any notice to show cause why the dismissal order of the Vice-Chancellor should not be treated as a recommendation which it might accept and act upon. The learned Subordinate Judge however non-suited the plaintiff on the ground that even assuming the suit for a bare declaration to be otherwise maintainable, no declaratory relief could be granted to the plaintiff who had already earned employment elsewhere, since the granting of such

* A. A. O. No. 113 of 1948. 17th August, 1950.

relief would only serve as a stepping stone for further litigation to get himself restored to his position before dismissal which must end in a futility. On appeal by the plaintiff to the learned District Judge of Vizakapatnam, that Judge reversing the trial Court has held that the jural relationship between the defendant and the plaintiff was the ordinary one of master and servant under which the servant can always be dismissed for misconduct which however is a matter for proof by the master in Court when the dismissal is challenged, and that the suit for a mere declaration was maintainable and would not end in a futility, as the declaration, if granted, although ineffective to reinstate the plaintiff except on the good sense of the master, would be a valuable gain to him as a vindication of his character. In the result, the learned District Judge remanded the case to the Court of first instance for the trial of an additional issue framed by him, " Was the plaintiff guilty or not guilty of the charge of theft made against him ?", and for fresh disposal of the suit in the light of the finding to be recorded by the trial Court on that issue. Against the order of remand by the learned District Judge the defendant has preferred this appeal.

Although in the initial stages of the argument stress was laid by Sri Alladi Krishnaswami Aiyar, learned counsel for the appellant, on cases like *Lennox Arthur Patrick O'Reilly* v. *Cyril Cuthbert Gittens*[1], laying down that :

" Provided that a domestic tribunal (like the stewards of a turf club) does not exceed its jurisdiction and acts honestly and in good faith, the civil Court cannot intervene, even if it thinks that the penalty is severe or that a very strict standard has been applied ".

Learned counsel in the later stages of the argument gave up such stress, maintaining only that, if as also contended by him, the contract of service in the present case is to be regarded as containing an implied term that the defendant should have the power to dismiss the plaintiff on due inquiry into suspected misconduct in accordance with rules of natural justice, the question of honesty and *bona fides* about the conduct of the defendant would become relevant. This line of contention was not raised in the Courts below and cannot be entertained by me, turning as it does on evidence as to the intention of the parties which could and would have been adduced and canvassed, had it been appropriately raised. Moreover, I am not satisfied *prima facie* that any such term can be implied by the Court into the contract of service in the present case and any question of honesty and good faith about the conduct of the Vice-Chancellor and the Syndicate in suspending and dismissing the plaintiff falls to be considered as at all relevant to the present case. The rule as to implication of terms not expressly found in a contract is stated thus in Halsbury's Laws of England, 2nd Edn., Vol. VII, at page 322 :

" Such an implication must in all cases be founded on the presumed intention of the parties and upon reason and will only be made when it is necessary in order to give the transaction that efficacy that both parties must have intended it to have and to prevent such a failure of consideration as could not have been within the contemplation of the parties."

The terms sought to be implied in the present case is not, strictly speaking, necessary in the sense indicated in the passage quoted and cannot be allowed to be imported into the interpretation of the conduct of service between the plaintiff and the defendant.

The two main contentions for the appellant before me have been (1) that the office of the plaintiff under the defendant is one held during pleasure and no misconduct need be proved by the master as in the case of an office held during good behaviour but subject to reasonable notice, and (2) that the learned District Judge should, like the learned Subordinate Judge, have refused the declaratory relief sought in the circumstances of the case.

In support of the first contention reliance has been placed on *Chellam Aiyar* v. *Corporation of Madras*[2], which was the case of a servant under the Corporation of Madras dismissed by its President. The office of the servant was regarded by

1. ((1949) 2 M.L.J. 574 (P.C.).
2. (1917) 6 L.W. 284.

the Court (Wallis, C.J., and Oldfield, J.) as one held at pleasure, and it was ruled that in the case of such an office, no notice or framing of charges was necessary to validate the dismissal of its holder and that the servant had no cause of action against the Corporation for his dismissal by its President. Notwithstanding the highly critical and erudite scrutiny to which this decision has been subjected by Varadachariar, J., in *Venkateswara Aiyar* v. *Sri Minakshi Sundareswarar*[1], so far as it was sought to be applied to the case of the servant of a Devasthanam holding office in accordance with a scheme of management governing it, I am satisfied that this decision is still good authority with reference to the kind of office dealt with by it. It is urged by Mr. Narasaraju that Varadachariar, J., must be taken to have disapproved of the reasoning of the case in *Chellam Aiyar* v. *Corporation of Madras*[2], so far as it is founded on the two English decisions in *Smyth* v. *Latham*[3] and *Notley* v. *London County Council*[4]. That may be ; but the decision, as being that of a Bench was binding as much on the learned Judge as it is on me. His Lordship could not and did not dissent from it. It is also urged by Mr. Narasaraju that another single Judge of this Court (Newsam, J.) has in *Lakshminarayana Deo* v. *Imperial Bank of India, Guntur*[5], accepted and acted upon Varadachariar, J.'s critical appreciation of *Chellam Aiyar* v. *Corporation of Madras*[2], in *Venkateswara Aiyar* v. *Sri Minakshi Sundareswarar*[1], as expressing the true legal position. In *Lakshminarayana Deo* v. *Imperial Bank of India, Guntur*[5], the Courts below having held that a servant of the Imperial Bank of India holds his office at pleasure and is liable to be dismissed without notice, the learned Judge here observes :

"This view is based on *Chellam Aiyar* v. *Corporation of Madras*[2], in which case provisions similar to section 50 of schedule II of the Imperial Bank of India Act were considered and interpreted in that light. The decision along with others has been fully considered in *Venkateswara Aiyar* v. *Sri Minakshi Sundareswarar*[1], which I take as my authority for the true position. Servants of the Crown hold office during the pleasure of the Crown—not by virtue of any special prerogative of the Crown but because such are the terms of their engagement (*Shenton* v. *Smith*[6]). But servants even of a statutory body do not hold office at their pleasure merely because the statute provides the body or persons by whom they may be dismissed. It is not right to *assume* that the power of dismissal is a power of summary dismissal".

With the actual decision or even the real reasoning in *Lakshminarayana Deo* v. *Imperial Bank of India, Guntur*[5], I have no quarrel ; but I must at the same time discountenance any suggestion that *Chellam Aiyar* v. *Corporation of Madras*[2] has ceased to be authoritative in this Court by reason of *Venkateswara Aiyar* v. *Sri Minakshi Sundareswarar*[1] and *Lakshminarayana Deo* v. *Imperial Bank of India, Guntur*[5], with reference to the kind of office with which the Court was concerned in that case. Newsam, J., even like Varadachariar, J., had no power to say any such thing as that ; nor do I understand them to have meant, much less said, any such thing. I consider the ruling in *Chellam Aiyar* v. *Corporation of Madras*[2], to be correct, not merely and generally with reference to the distinction made by it between offices which are held during good behaviour or freehold offices and offices which are held at pleasure but also with reference to the conclusion reached therein on the basis of the English decisions in *Smyth* v. *Latham*[3] and *Notley* v. *London County Council*[4], that it is well settled that when an officer in the position of the President of the Madras Corporation is empowered by statute to appoint and dismiss subordinate officers and servants, these officers and servants hold their office at pleasure. As observed in Halsbury's Laws of England, 2nd Edn., Vol. XXII, at page 146 :

"Public servants hold their office during the pleasure of the Crown. Officers of local authorities usually hold the office during the pleasure of the local authority."

I need only observe that the word "usually" in the second sentence of the quotation rather suggests that in the case of Crown offices the rule is absolute while in the case of offices under local authorities the rule is one of presumption liable to

1. (1935) 69 M.L.J. 206.
2. (1917) 6 L.W. 284.
3. (1839) Bing. 692 : 131 E.R. 773.
4. (1915) 3 K.B. 580.
5. (1939) 1 M.L.J. 615.
6. (1895) A.C. 229.

rebuttal by proof to the contrary. I am not satisfied however that the kind of office with which I am concerned here is governed by the ruling in *Chellam Aiyar* v. *Corporation of Madras*[1]. No authority English or Indian has been brought to my notice which has extended the rule of office held during pleasure beyond offices under the Crown and offices under local authorities to offices under a University or such other authority. Nor am I prepared solely from the power of appointment and dismissal provided for in favour of the Syndicate in the Andhra University Act, to presume that officers and servants of the University are persons holding their offices and places during the pleasure of the Syndicate. Such a view would, however high the legitimate place of honour which a statutory body like the University ought to enjoy in the public life of the country, not only exalt it to a higher place then is warranted by needlessly assimilating it to a Governmental authority or a body connected with Local Self-Government but also involve far-reaching consequences which ought not to be countenanced in regard to the security of tenure which ought to be assured to public officers and servants holding employment under it.

It is significant too to bear in mind in this connection what the learned District Judge says in paragraph 6 of his judgment :

> "Not the slightest attempt has been made before me to contend that the service of the plaintiff was at the pleasure of the University. It must be held that the service was during good behaviour subject to reasonable notice. In this case notice was not given and the question is whether the dismissal was or was not for proper reason."

On the whole it seems to me that the proper approach to the case has been made by the learned District Judge with due regard to the legal status and authority of the University as appears from his observations in paragraph 13 to this effect :

> "In the circumstances it was not necessary for the Syndicate to frame charges against the plaintiff or to give a hearing to the plaintiff. The Syndicate had the power of dismissal. No enquiry was needed. If the cause for dismissal was not true or proper, that dismissal would be wrong. But the dismissal cannot be challenged on the ground that no opportunity had been given to the plaintiff to show cause or that the plaintiff was not heard."

He has rightly reversed the learned Subordinate Judge who proceeded on the basis that an inquiry on the part of the Syndicate in accordance with rules of natural justice was necessary, and he has at the same time rightly held it incumbent on the defendant to satisfy the Court about the propriety of its dismissal of the plaintiff. The issue framed by him has been correctly raised, and the order of remand must accordingly stand, subject to the next contention of the petitioner already indicated and to be immediately dealt with.

On this contention the point is put by counsel in a twofold way : (*a*) This case attracts section 42 of the Specific Relief Act and falls within its proviso. The plaintiff must therefore sue for damages, nominal though they may be ; (*b*) Even quite apart from that section and its proviso, a suit for a bare declaration of the present kind is something unheard of in and unknown to law. The plaintiff cannot sue for such declaration if it only be to vindicate his character. That will be a suit for damages in tort, not in contract. Where there is a breach of contract plaintiff may accept it and ask for damages or repudiate it and ask for reinstatement in office if possible. He cannot have a *tertium quid*—a bare declaration to vindicate character. In the present case the plaintiff has accepted the breach and gone about employment elsewhere and in fact got it. Therefore the suit must go.

As to the first way of putting the point I am perfectly clear that it must fail. The present suit is not one of the kind contemplated by section 42 of the Specific Relief Act and no question of the proviso applying or not applying therefore arises. The section contemplates only a suit for a judicial declaration of the legal character or status of a party or of his right as to any property, and this suit is not of that kind. As Mr. Narasaraju rightly argues, the section is not, according to well-settled authority of this Court, exhaustive of all possible declaratory suits ; but the question still remains whether the present one is maintainable otherwise than with reference

1. (1917) 6 L.W. 284.

to the section. This leads me to a consideration of the second breach of the contention.

On this branch the appellant cites first *Ramakrishna* v. *Narayana*[1]. There the suit was by a purchaser of rights from the second defendant, a subscriber to a half ticket in a kuri started by the first defendant as its proprietor and sought a declaration against the latter that the plaintiff was not a defaulter and was in a position to continue to pay subscriptions to the kuri. The Court (Sadasiva Aiyar and Napier, JJ.) after holding section 42 of the Specific Relief Act not to be exhaustive ruled that :

"a declaratory relief will not be given in respect of rights arising out of a contract which would affect *only* the pecuniary relationship between the parties to the contract, unless there are exceptional circumstances in a case to take it out of the ordinary rule".

In the particular case before the Court the learned Judges held that there were no such exceptional circumstances. I am not prepared to say that in the present case the declaratory relief if granted would affect *only* the pecuniary relationship between the parties or that there are not, at any rate, exceptional circumstances taking this case out of the ordinary rule, if regard is had to the view of the learned District Judge that the relief, if granted, would be a valuable gain to the plaintiff as vindicating his character and preserving his reputation. The ruling in *Ramakrishna* v. *Narayana*[1], has been followed in *Nathuram* v. *Nula and others*[2] and *Gopaldas Parmanand* v. *Mulraj*[3], which take the appellant's case no further. It may be, by the way, observed that in these two Lahore cases decided by the same learned Judges (Abdul Rashid and Addison, JJ.) the mistake is committed of supposing that *Ramakrishna* v. *Narayana*[1], ruled the unmaintainability of a suit for a declaration affecting only the pecuniary relationship between the parties with reference to section 42, Specific Relief Act only. *Ramakrishna* v. *Narayana*[1], ruled such unmaintainability also quite apart from that section on the footing that it is not exhaustive of all declaratory suits.

The next case cited worth considering is *Addis* v. *Gramophone Co, Ltd.*[4], which holds as the headnote rightly bears, that

"Where a servant is wrongfully dismissed from his employment the damages for the dismissal cannot include compensation for the manner of the dismissal, for his injured feelings, or for the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment".

Although the actual conclusion of the majority of the House in that case does not cover the point on hand, what counsel stresses is the following passage in the judgment of Lord Atkinson at page 496 of the report :

"In many other cases of breach of contract there may be circumstances of malice, fraud, defamation, or violence, which would sustain an action of tort as an alternative remedy to an action for breach of contract. If one should select the former mode of redress, he may, no doubt, recover exemplary damages, or what is sometimes styled vindictive damages ; but if he should choose to seek redress in the form of an action for breach of contract, he lets in all the consequences of that form of action, *Thorpe* v. *Thorpe*[5]. One of these consequences is, I think, this : that he is to be paid adequate compensation in money for the loss of that which he would have received had his contract been kept and no more".

The passage cited does no doubt draw a distinction between the two forms of action —*in delicto* and *in contractu*—arising out of the same wrongful act of the defendant in the matter of damages recoverable in each. It has hardly any bearing, in my opinion, on the maintainability of a suit for a bare declaration of the present kind framed without reference to a claim for damages of the one kind or the other and purely with a view to the vindication of character and preservation of the reputation of the plaintiff.

The last case cited worth considering is *Thomas* v. *Moore*[6]. There was a contention in that case that the declaration as to conspiracy to slander on the part of the

1. (1914) 27 M.L.J. 634 : I.L.R. 39 Mad. 80.
2. A.I.R. 1937 Lah. 25.
3. A.I.R. 1937 Lah. 389.
4. (1909) A.C. 488.
5. (1892) 9 B. & Ad. 580 110 : E.R. 211.
6. L.R. (1918) 1 K.B. 555.

several defendants could be made, although damages with regard to the conspiracy had been waived. Pickford, L.J., dealing with the contention observes thus at page 567 of the report somewhere about the bottom of the page :

"If what Bowen, L.J., called the gist of the action is waived, it seems to me that the cause of action is abandoned. But I will not put it that the plaintiffs abandoned their cause of action. It may be convenient to have a claim for a declaration as to the rights of the parties in respect of contracts extending over a long space of time, and not to wait until there is a breach to have the rights determined. But I have never heard of a declaration that a defendant is doing wrong, unless perhaps it is followed by a statement that damage has accrued or is likely to accrue, and that the defendant threatens to continue his wrongful act against the plaintiff".

The learned Lord Justice was dealing with a case of tort—conspiracy to slander—in which as observed by His Lordship earlier in the judgment at page 566 (bottom) and page 567 (top) of the report quoting from Bowen, L.J., in *The Mogul Steamship Co., Ltd.* v. *Mcgregor Gow & Co.*[1], it is the damage wrongfully done, and not the conspiracy that is the gist of the action. His Lordship was not dealing with a case of contract in respect to which a declaration as to breach is sought by one party as against the other without a claim of damages. On the other hand, His Lordship's observations recognise the possibility of suits for declarations as to contracts although not of a suit precisely like the present. It cannot be said of a contract broken, as it can and must be said of the tort of slander committed, that damage is the gist of the action. It may be that damage cannot be waived in the latter case. It does not follow that it cannot be waived in the former. Divorced from the context the last sentence of the *locus citatus* may seem to warrant its applicability as much to the case of a declaration that the defendant is doing or has done wrong in respect of a contract as to the case of a declaration that he is doing or has done wrong by way of tort. Read however in conjunction with the rest of the passage and in the light of the facts of the case before the learned Lord Justice and in the context in which the sentence occurs, that sentence, in my opinion, does not admit of the unqualified interpretation sought to be imposed on it by learned counsel for the appellant.

The position therefore is that there has been no case cited to me which holds that a suit for a declaration of breach of contract lying in the wrongful dismissal of the plaintiff from the defendant's service uncoupled with a claim of damages for such breach but conceived solely with a view to the vindication of the plaintiff's character which stands tarnished by such wrongful dismissal is unmaintainable. The passage cited from *Thomas* v. *Moore*[2], even on the unqualified interpretation pressed by learned counsel for the appellant suggests that if the plaint couples the declaration with a statement that damage has accrued or is likely to accrue the suit may possible be in order. In my judgment, the damage need not compulsorily lie in the loss of remuneration for service or such other pecuniary advantage but may well lie in detriment to reputation which is sometimes far more serious.

I do not and cannot subscribe to the argument of learned counsel for the appellant that in every case like this there can only be a suit for damages or a suit for restoration to office and there cannot be a *tertium quid* in the nature of a suit like the present, although there is no doubt that that is ordinarily so. The fact that the plaintiff may well have pursued the remedy of an action for damages in tort does not, in my opinion, necessarily preclude the present form of suit if otherwise in order. The plaintiff has not accepted the breach, and the circumstance that on account of his procurement of employment elsewhere he has not asked for damages does not disentitle him to sue as he has done. It is said that the plaintiff ought to have asked for damages however nominal—be it a pie at the lowest or at the least. I see no magic about such a claim—that its presence in the plaint should give it life and that its absence should leave it lifeless.

In my view the learned Subordinate Judge did not appreciate the legal or the actual position in the case aright in holding that the declaration sought, if granted,

1. (1889) 23 Q.B.D. 598 at 616.
2. (1918) 1 K.B. 555.

would serve as a stepping stone to further litigation by the plaintiff to get himself restored to his position before dismissal which must end in a futility. The learned District Judge has, on the other hand, appreciated the legal as well as the factual position aright from the standpoint of legal sense as well as commonsense in holding that the declaration, if granted, would not, although ineffective to bring about the plaintiff's restoration to office except on the good sense of the master, end in a futility but in a valuable gain to the plaintiff as he shall have thereby vindicated himself. I need only remark in conclusion that no Court ought to be unduly solicitous to throw out a declaratory suit unless its unmaintainability or the inexpediency of its entertainment is made out in *strictissimi juris* and beyond the slightest shadow of a doubt.

In the result this appeal fails and must be and is hereby dismissed with costs. As regards the advocate's fee, having regard to the importance of the questions raised and the length of time taken up by argument I fix it at Rs. 250 in the exercise of my discretion under the Rules.

No leave.

(The case having been set down for being mentioned, the Court made the following Order) :

I see no reason to re-consider my order refusing leave in this case.

V. S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE BASHEER AHMED SAYEED.

Burra Venkata Kamaraju and others .. *Appellants**

v.

Nemethunissa Begum Saheba and others .. *Respondents.*

Mesne profits—Final decree for, in High Court after inquiry—Decree directing each party to bear his own costs in the lower Court—Court-fee paid by decree-holder on the amount of mesne profits decreed—Right to recover it as costs due to him in execution—Court-Fees Act (VII of 1870), section 11.

The final decree passed by the High Court stated that the decree-holder do recover from the estate of the defendant the sum of Rs. 18,961-13-1 on account of mesne profits with interest thereon at 6 per cent. per annum and that each party do bear his own costs in the lower Court. In the execution proceedings the decree-holder claimed the amount of the court-fee stamp payable on the decree amount as costs due to him in execution. On the question whether he is entitled to it in view of the fact that the decree had directed that each party do bear his own costs.

Held : In the circumstances of the case, it should be deemed as if the Court left the question regarding the liability for the court-fee amount absolutely without any decision. Therefore the words, that each party should bear his own costs should not be understood as if the future court-fees to be paid by the decree-holder should be borne by the decree-holder himself. The decree is neither clear nor explicit, on this point. So it is open to the executing Court to find out as to who is liable for the amount of costs and court-fee which the decree-holder has to pay for realising the amount of mesne profits decreed. In the circumstances, the decree-holder was entitled to the amount paid by him as court-fee on the decree for mesne profits under the provisions of section 11 of the Court-Fees Act.

Appeal against the order of the District Court, Vizakapatnam, dated 18th December, 1946, in E. P. No. 22 of 1945, in O. S. No. 13 of 1936.

Y. Suryanarayana for Appellants.

E. Venkatesam and *C. V. Dikshitulu* for Respondents.

The Judgment of the Court was delivered by

Govinda Menon, J.—In the final decree passed in A. S. No. 50 of 1942 by this Court clause 2 is in the following terms : "That the petitioners do recover from the estate of the first respondent (first defendant) the sum of Rs. 18,961-13-1 on account of mesne profits with interest thereon at 6 per cent. per annum from 3rd May,

* A.A.O. No. 450 of 1947. 12th December, 1950.

...yment of the said amount." Clause 6 of the decree states that ... bear his own costs in the lower Court. In the execution proceedings ...ee, the decree-holder claimed a sum of Rs. 1,117-7-0 being the court-... payable on Rs. 18,961-13-1 as costs due to him in execution. The learned ... Judge found that the decree-holder was not entitled to that amount because ...ecree definitely stated that the decree-holder shall be entitled only to the ...ecific sum and that each party do bear his own costs. In such circumstances the learned District Judge disallowed the sum of Rs. 1,117-7-0 as claimed. The question is whether he is right. The third paragraph of section 11 of the Court-Fees Act states that :

"Where a decree directs an inquiry as to mesne profits from the institution of the suit, and a final decree is passed in accordance with the result of such inquiry, the decree shall not be executed until such fee is paid as would have been payable on the amount claimed in execution if a separate suit had been instituted therefor".

It is admitted that the decree in question which was passed in appeal by this Court was in pursuance to a direction contained in a preliminary decree for mesne profits and therefore, at the time the decree in A. S. No. 50 of 1942 is being executed the decree-holder has to pay the court-fee on the amount which he claimed as mesne profits decreed in his favour. There is no dispute whatever that he has not paid the court-fee costs at the time he applied for the final decree or when he instituted the suit. Such being the case, in order that the decree-holder might be entitled to realise the amount of mesne profits decreed, he should, as a condition precedent, or as a pre-requisite pay the court-fee.

The appellant's contention is based upon the paragraph 3 of section 11 of the Court-Fees Act as well as a decision of this Court reported in *Lakshmanan Chettiar* v. *Chidambaram Chettiar*[1], where Sundaram Chettiar and Walsh, JJ., have held that in view of the express provision in section 11 of the Court-Fees Act which casts the duty on the executing Court to collect the deficit court-fee when it finds that execution is sought for the recovery of an amount over and above what was claimed in the plaint, no direction for the payment of the additional court-fee for the excess sum decreed need be given at all in the final decree, and any such direction, if given in the final decree, should be deemed to be a mere surplusage. It further held that the executing Court, which directs the payment of the additional court-fee under section 11 of the Court-Fees Act, is also competent to determine whether that amount should be borne by the decree-holder himself or can be recovered by him from the judgment-debtors who are liable to pay the amount on which the extra court-fee was paid. On the facts of that case what happened was that a final decree in a suit for dissolution of a partnership and for accounts provided that

"on payment of the additional court-fee the plaintiff do recover the excess amount decreed[1]".

This Court held that there was no express or implied direction in the decree that the plaintiff alone should bear the costs of the additional court-fee without any right to recover the sum from the defendants.

The learned advocate for the respondent contends that since both the original as well as the appellate Courts stated that each party do bear his own costs it should be deemed as if the Courts contemplated that the court-fee which the decree-holder has to pay in order that he might realise the fruits of his decree should also be borne by him and that the judgment-debtor is not bound to bear any portion of it. Mr. E. Venkatesam relies upon a judgment of this Court in *Ramalinga Sethupathi* v. *Andiappan*[2], where Reilly and Anantakrishna Aiyar, JJ., have construed the scope of the various provisions of section 11 of the Court-Fees Act. Reading the decree that is sought to be executed, it seems to us that at the time either the trial Court or the lower appellate Court passed the decree, the Courts did not contemplate, when they stated that each party do bear his own costs, that the future amount of court-fee which the decree-holder had to pay should be borne by the decree-

1. (1933) 65 M.L.J. 526 : I.L.R. 57 Mad. 303.
2. (1931) 61 M.L.J. 424 : I.L.R. 54 Mad. 980.

holder himself. It is seen that the amount of costs which the decree-holder had incurred was a sum of Rs. 134-4-0 whereas the counter-petitioners had incurred a sum of Rs. 285-0-0. Neither of these amounts can be stated to cover any portion of the court-fee. We are of the opinion that in the circumstances of the case it should be deemed as if the Court left the question regarding the liability for the court-fee amount absolutely without any decision. Therefore the words, that each party should bear his own costs should not be understood as if the future court-fees to be paid by the decree-holder should be borne by the decree-holder himself. We do not find the learned District Judge giving any reason for disallowing the execution costs except stating that the decree is clear on the point. We find ourselves unable to agree with the learned District Judge that the decree is either clear or explicit. In our opinion it is open to the executing Court to find out as to who is liable for the amount of costs and court-fee which the decree-holder has to pay for realising the amount of mesne profits decreed. There is no reason why in the particular case, the decree-holder should lose the costs to be incurred by him by way of paying the additional court-fees when the defendants who are bound to pay the same have necessitated him to resort to claim in a suit. Such being the case it seems to us that the amount of Rs. 1,117-7-0 should also have been allowed by the executing Court.

The appeal is therefore allowed and the decree-holder is entitled to get the sum of Rs. 1,117-7-0 also from the respondents. No costs here in this appeal.

V. S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Matha Appa Rao .. *Petitioner**

v.

Naralasetti Suryaprakasa Rao .. *Respondent.*

Evidence Act (I of 1872), section 124—Applicability—Complaint against Sub-Inspector of Police—Statements made by witnesses in an investigation by Circle Inspector under orders of District Superintendent of Police—No action taken—Private complaint against that Sub-Inspector—Accused, if entitled to use statements made in the inquiry—District Superintendent of Police, if can claim privilege in respect of them.

Section 124 of the Evidence Act can be applied only when the communication is made to a public officer in official confidence. On a complaint against a Sub-Inspector of Police made to a District Superintendent of Police the latter directed the Circle Inspector of Police to make an investigation and during the course of it statements were recorded from various persons, but ultimately no action was taken. On a subsequent private complaint being filed, the accused applied for calling of the statements recorded by the Circle Inspector for the purpose of contradicting the witnesses. On a claim of privilege by the District Superintendent,

Held : The statements in question cannot be considered to be statements made in official confidence. The accused is entitled to use those statements to contradict the prosecution witnesses.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Magistrate of Vizianagaram, dated 23rd November, 1950, and made in C. C. No. 2098 of 1949.

J. Krishnamurthi for Petitioner.

The Public Prosecutor on behalf of the State.

S. Suryaprakasa Rao for Respondent.

The Court made the following

ORDER.—The question in this revision is whether a District Superintendent of Police can plead privilege under section 124 of the Indian Evidence Act in respect of statements made by the witnesses in an investigation made by his subordinates. The accused is a Sub-Inspector of Police. A complaint was made against him to the District Superintendent of Police and on the complaint he directed the Circle

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*(Cr.R.P. No. 1364 of 1950).

Inspector of Police to make an investigation. During the course of the investigation statements were recorded from various persons. On enquiry the police did not take any action. Then a private complaint was filed in the Court of the Sub-Magistrate, Vizianagaram. The accused filed an application for calling for the statements recorded by the Inspector for the purpose of contradicting the witnesses. The District Superintendent of Police in his letter dated 6th March, 1950 (R. C. No. 6810 R. 3/99) claimed privilege in respect of those statements. The Stationary Sub-Magistrate, Vizianagaram, accepted his plea and held that the statements could not be given to the accused for the purpose of contradiction. A revision petition was filed to the District Magistrate of Visakhapatam against that order who held that those statements were made in the course of a public enquiry by the police and the District Superintendent could not plead privilege in respect of these statements. But in view of the remarks made by Govinda Menon, J., in *Kotrappa, In re*[1], he thought that that was not a fit case for submission to the High Court and therefore he dismissed the revision. After the revision was dismissed the Sub-Magistrate refused the request of the accused on the ground that his previous order had become final inasmuch as the revision was dismissed by the District Magistrate. The present revision is filed by the accused against that order.

Section 124 of the Indian Evidence Act runs thus,

"No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure".

This section can therefore be applied only when the communication was made to a public officer in official confidence. The statements made by the witnesses in an investigation made by the Circle Inspector under the Code of Criminal Procedure cannot be considered to be statements made in official confidence. The accused is certainly entitled to use those statements to contradict the prosecution witnesses.

The order of the lower Court is therefore set aside.

V. S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE BASHEER AHMED SAYEED.

C. P. Sarathy .. *Petitioner**

v.

State of Madras and others .. *Respondents.*

Industrial Disputes Act (XIV of 1947), section 10 (1)—Reference without specifying what the dispute was—If confers jurisdiction on tribunal to pass award—Award under if valid—Failure of employer to implement such award—Charge filed for—Sustainability—Right to come to High Court and ask for quashing charges—Criminal Procedure Code (V of 1898), sections 435, 439 and 561-A—Applicability—The Industrial Disputes (Madras Amendment) Act (XII of 1949), sections 5 and 6—Validity and effect—Constitution of India (1950), Articles 13, 14, 20, 254 and 372—Effect—Government of India Act (1935), section 107—Scope.

Both the Industrial Disputes Act, XIV of 1947, and the Industrial Disputes (Appellate Tribunal) Act, XLVIII of 1950, endeavour to secure to the industrial worker conditions of work ensuring a decent standard of life and living wage. It cannot be said that there is any restriction on the carrying on of a trade or business by employers (the cinema employers in the instant case) as a result of the Industrial Disputes Act. The Act cannot by the provision for reference of disputes without consent of both parties be said to have in any way contravened, or set at nought, any provision of the Constitution of India. There is no restriction put by the Act upon acquiring, holding, or disposing of property or practising any profession or carrying on any occupation, trade or business. What is sought by these labour legislations is the implementation of the directive principles of State policy contained in Part IV of the Constitution especially that contained in Article 43 which states that the State shall endeavour to secure by suitable legislation to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities.

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1. (1948) 2 M.L.J. 126.

* Crl. M. P. No. 1278 of 1950. 15th November, 1950.

Even if no proceedings had been taken to set aside the award it is possible to quash the criminal proceedings instituted on foot of it, if it is found that the award is the result of conferment of jurisdiction which did not pass on to the arbitrator on account of the absence of any dispute between the contesting parties.

The Legislature (by section 6 of Madras Act XII of 1949) in validating awards which have not been quashed by Courts and in validating awards which though apparently are void but have not been so declared by Courts, has discriminated between persons to whom the same set of circumstances applied, and therefore offended Article 14 of the Constitution which provides for equality before the law or the equal protection of law for all persons. Though Act XII of 1949 could not have been held to be invalid on account of the discrimination contained therein, after 26th January, 1950, in view of Article 13 (1) of the Constitution which lays down that all laws in force in the territory of India immediately before the commencement of this Constitution in so far as they are inconsistent with the provisions of this part shall to the extent of the contravention, be void, it has to be held that the legislation is inconsistent with Article 14, equality before law, and is therefore void.

Section 10 (1) of the Industrial Disputes Act, XIV of 1947, (Central) postulates the existence or the apprehension of an industrial dispute which can be referred to a tribunal for adjudication. The appropriate Government must have, before it, an existing industrial dispute or should feel that an industrial dispute is apprehended. In such a case it gets jurisdiction to refer the dispute existing or potential to a tribunal. But section 5 of Madras Act XII of 1949 validates action taken by the tribunal even in cases where no dispute was referred to the tribunal in accordance with the Act; that section envisages and sets the seal of approval, on an award passed by a tribunal without the necessary pre-requisite of a dispute either existing or apprehended so as to form the basis for a reference. Sections 5 of Madras Act XII of 1949 is inconsistent with section 10 (1) of the Central Act, XIV of 1947. By the application of section 107 of the Government of India Act, 1935, and Article 254 of the Constitution, the Act which ought to prevail is the earlier Dominion law that is, section 10 (1) of Act XIV of 1947 and it should be deemed as if section 5 of Act XII of 1949 (Madras) was not passed at all.

What the Amending Act of 1949 did was not to create any new offence but to cure the illegalities that existed before and as such cannot be said to be retrospective legislation. It cannot be said that keeping current and valid awards which would otherwise have been invalid for one year from 14th June, 1949, constituted an *ex post facto* legislation which violated Article 20 of the Constitution. Where an award on which a charge sheet was filed was without jurisdiction and its enforceability cannot be properly justified by Act XII of 1949, it is open to the petitioner to contend that the Magistrate has no jurisdiction to entertain the charge sheet.

In such a case sections 435 and 439 of the Criminal Procedure Code ordinarily contemplate the approach to the High Court at a stage when the trial Court has done something in continuation of the charge. But the person against whom such a charge sheet was filed has not to wait until something is done before moving the High Court. He can approach the High Court to quash the proceedings under section 561-A of the Code of Criminal Procedure.

(Case-law discussed).

Per *Basheer Ahmed Sayeed, J.*—When there was no dispute between an employer and his employees in existence at all, there can be no question of any reference being made and consequently there is no jurisdiction for the Government to exercise its powers under section 10 of the Industrial Disputes Act. If there was no jurisdiction to make any reference, the whole reference and the award are both invalid and not binding on the employer.

Madras Act XII of 1949 which attempted to validate such awards is *ultra vires* the Legislature in that it offends against Article 14 and other provisions of the Constitution.

Case-law discussed.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to quash the proceedings in C. C. No. 4097 of 1950 on the file of the Third Presidency Magistrate, Madras.

K. S. Jayarama Aiyar for *K. Venkataramani* and *H. Neelakantan* and *Mrs. Padmini Raghavan* for Petitioner.

The State Prosecutor (*S. Govind Swaminathan*) for the State.

V. S. Chandrasekharan for Respondent.

(Order of Reference to a Bench by Somasundaram, J., dated 9th August, 1950) :—

This is a petition by the accused to quash the criminal proceedings in C. C. No. 4097 of 1950 on the file of the Third Presidency Magistrate, Egmore.

The above proceedings arise out of a charge sheet filed by the police against the petitioner who is the Managing Director of Prabhat Talkies, Broadway, Madras. The circumstances under which the police filed the charge sheet are these. On a

report by the Commissioner of Labour that an Industrial Dispute had arisen between the workers and the management of the Cinema Talkies in the City of Madras and that an amicable settlement could not be arrived at the Government by G. O. No. 2227, dated the 20th May, 1947, referred the dispute to the Industrial Tribunal, Madras, for adjudication under section 7 (1) and (2), read with section 10 (1) (*c*) of the Industrial Disputes Act. The Tribunal passed an award on 15th December, 1947, and the Government by its G. O. No. 677, dated 13th February, 1948, declared the said award shall come into operation on 25th February, 1948, and shall remain in force for a period of one year. It would therefore have normally expired on 24th February, 1949.

In the meantime in respect of an award made by the Tribunal constituted for the purpose on a reference made by the Government in an industrial dispute alleged to have arisen between the workers and the managements of certain Engineering firms and type foundries, on application made by one of the firms (Kutty and Rao), Subba Rao, J., held that a general notification of this kind without specification of either the disputes or the firms in which the disputes have arisen is not competent. This decision was affirmed on appeal by a Bench of this Court in *Ramayya Pantulu* v. *Kutty and Rao (Engineers) Ltd.*[1], where Horwill and Rajagopalan, JJ., held,

"The reference made by the Government was not competent because of the generality of the application of the notification".

It may be stated that the reference in this case also is of such general nature that the award will fall within the scope of the decision in the above case.

As a result of the above decision, the Legislature of the State (then Province) amended the Industrial Disputes Act of 1947 by Act XII of 1949. The State had power to amend the Central Act as the subject was in the Concurrent List of the Government of India Act and the assent of the Governor-General was obtained. Section 5 of the Act declared that all awards made . . . . . whether before or after such commencement by such tribunal shall be *deemed* to be valid. Section 6 of the Act declared that,

"All awards passed by Industrial Tribunals and mentioned in the schedule hereto which could not be enforced on account of the proceedings before the High Court, shall be current and valid for a further period of one year from the commencement of this Act".

The award in this dispute between the management and the workers of Cinema theatres is mentioned in the schedule referred to above.

On the authority of the Government the police have now filed a charge sheet dated the 24th April, 1950, against the petitioner herein for an offence under section 29 of the Industrial Disputes Act, 1947. The allegation is that the petitioner has not implemented the provisions of the award relating to payment of wages and dearness allowance with retrospective effect from 20th May, 1947 and 1st January, 1948. It is not disputed that there has been implementation of the award from 25th February, 1948, and the increment was given from 1st March, 1949; but the offence consists in non-implementation in terms of the provisions of the award. The further allegation is that as per the award no chief ticket examiner and advance booking clerk have been appointed.

In this petition to quash the proceedings, several contentions have been raised by Mr. Jayarama Aiyar for the petitioner. One of the contentions is that before the amendment which came into effect on 14th June, 1949, the failure to implement the award would not be an offence as the award under the decisions of this Court is an invalid one and the amendment is an *ex post facto* legislation and this, so far as it is retrospective in the field of criminal law, is forbidden (1) on the general principles and (2) under the Constitution.

Taking the first as to its being forbidden on general principles, it is based on the well recognised policy of all civilised countries, *viz.*, that,

1. (1949) 1 M.L.J. 231.

"A legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with the future acts and ought not to change the character of past transactions carried on upon the faith of the then existing law".

The above quotation is from the "Law in Making" by C. K. Allen, extracted by Govinda Menon, J., in In re *E. P. T. Velayudham*[1]. In the above decision the learned Judge who has dealt with the question exhaustively has pointed out how the *ex post facto* legislation is not prohibited so far as England is concerned. No authority has been cited before me that in Indian law it is otherwise. In my opinion, the argument based on the ground of policy fails.

The other contention and the more important one is that the amendment, *i.e.*, section 5 of Act XII of 1949 offends Articles 13 and 20 of the Constitution. The argument is that the award which was declared to come into operation on 25th February, 1948, was an invalid one and as it had otherwise also expired by 24th February, 1949, there was no law in force at the time of the commission of the offence for the violation of which the petitioner can be convicted, *i.e.*, if the award was valid it would be an offence not to implement it before 25th February, 1949, by which date it had expired and as it was not an offence on account of the award being invalid, the petitioner cannot be convicted subsequent to 26th January, 1950 (the date on which the Constitution came into force), for non-implementation. It appears to me that there is considerable force in this argument of Mr. Jayarama Aiyar. Mr. Govind Swaminathan, State Counsel, meets this argument by contending that the amendment does not create any new offence but it only cures the irregularities that existed before and that it cannot in any sense be called retrospective or *ex post facto* legislation. Section 29 of the Industrial Disputes Act under which the petitioner is liable was already there and the amendment having been passed prior to 26th January, 1950, validating the awards and keeping them current for one year from the commencement of the Act (*see* section 6), *i.e.*, from 14th June, 1949, and as the charge sheet was filed on 14th April, 1950, Article 20 of the Constitution has not been violated. In short as the award is valid in law from 14th June, 1949 and it was in force by virtue of section 6 till 14th June, 1950, the non-implementation of it between these two dates is a violation of a law in force and this does not in any manner contravene Article 20 of the Constitution. I am inclined to agree with this view. The other question relating to this that is raised by Mr. Jayarama Aiyar is that section 5 of the Amending Act only says that the award will be *deemed* to be valid. The words deemed to be valid mean that though the award is not valid in reality the amendment requires it to be treated as if it were real. The question then is whether a citizen can be punished as for an offence for not carrying out the provisions of an award which is not in reality valid but has to be regarded so by virtue of the Amending Act. Whatever validity can be given to the awards generally, such a validity cannot be extended to the field of Criminal Law is the contention of Mr. Jayarama Aiyar. The question, in my opinion, is not free from doubt and it is one of considerable importance.

Another contention of Mr. Jayarama Aiyar is this. That under section 6 of the Amending Act, all awards by the Industrial Tribunals and mentioned in the schedule hereto which could not be enforced on account of the proceedings before the High Court shall be current, etc. It is not disputed, and it is conceded by the learned State Prosecutor that in respect of the award in the dispute between the management of Cinema theatres and workers which is one of those mentioned in the schedule, there were not proceedings before the High Court. Could it be said that the award could not be enforced on account of the proceedings before the High Court as there were none relating to this award.

Mr. Govind Swaminathan says that the unenforceability on account of the proceedings before the High Court means on account of the decision of the High Court in *Ramayya Pantulu* v. *Kutty and Rao (Engineers), Ltd.*[2]. The section does not seem to be happily worded. It lends itself to the interpretation given to it

1. (1950) 1 M.L.J. 508.

2. (1949) 1 M.L.J. 231.

by Mr. Jayarama Aiyar, that the enforceability of the award must be due to some proceedings relating to the award pending in the High Court. It is contended that in none of the four awards mentioned in the schedule was any proceedings pending in the High Court and section 6 which makes it current for one year will not apply if the construction sought to be placed upon it by Mr. Jayarama Aiyar is accepted. A decision on this question is likely to affect such proceedings that may have to be started, if any, in respect of other awards mentioned in the schedule or in respect of awards about which there are no proceedings in the High Court. This question also, in my opinion, is of importance. I consider that it is desirable that these questions should be decided by a Bench of this Court. I therefore direct that this case may be posted before the Criminal Appellate Bench.

(In pursuance of the aforesaid Order of Reference, the Court delivered the following Order :—)

Govinda Menon, J.—The South Indian Cinema Employees Association is a body registered in September, 1946, as a trade union by the Labour Commissioner, under the Indian Trade Unions Act (XVI of 1926). It contains, amongst its members, a large body of employees of the various cinemas and picture houses in the city of Madras, including the Prabhat Talkies, the managing director of which is the petitioner in this Court. Some, and not all the employees of the Prabhat Talkies, were members of this trade union in 1946. On 8th November, 1946, this trade union submitted a memorandum to the Labour Commissioner of Madras demanding increased wages, dearness allowance, annual bonus of three months' wages, increased leave facilities, provident fund and the adoption of proper procedure in imposing punishments. On this memorandum, the Labour Commissioner interviewed the representatives of some of the Cinema Talkies and finally submitted a letter to the Government on 13th May, 1947, to appoint an Industrial Tribunal for adjudication of the matters referred to in his letter. Thereupon, on the 20th May, 1947, by G. O. Ms. No. 2227 Development, the so-called dispute was referred to a Tribunal with the following order of reference :

"Whereas an Industrial Dispute has arisen between the workers and managements of the Cinema Talkies in the Madras City in respect of certain matters :

And whereas in the opinion of H. E. the Governor of Madras, it is necessary to refer the said industrial dispute for adjudication;

Now therefore, in exercise of the powers conferred by section 7 (1) and (2) read with section 10 (1) (c) of the Industrial Disputes Act, 1947 (Central Act XIV of 1947) His Excellency the Governor of Madras hereby constitutes an Industrial Tribunal consisting of one person, namely, Sri Dewan Bahadur K. S. Ramaswami Sastri, Retired District and Sessions Judge, and directs that the said industrial dispute be referred to that Tribunal for adjudication.

3. The Industrial Tribunal may, in its discretion, settle the issues in the light of a preliminary enquiry which it may hold for the purpose and thereafter adjudicate on the said industrial dispute.

4. The Commissioner of Labour is requested to send copies of the order to the Managements of Cinema Talkies concerned."

The Industrial Tribunal proceeded to conduct the enquiry framed issues and finally passed an award embodying its findings on the issues raised for decision. The said award provided for the type of employees in the various cinemas, the number of employees in each category, the basic pay and the annual increments per mensem of each of the employees and various other matters. It also dealt with the dearness allowance to be paid to the employees, the bonus which each employee should get, the period of leave per year, provident fund gratuity, overtime payment, confirmation, increment, and such matters. It further provided that these recommendations should be given effect to in respect of basic wages from the 20th May, 1947, when the proceedings before the Tribunal commenced and that the other recommendations should be given effect from the 1st January, 1948. By G. O. No. 667, Development Department, dated 13th February, 1948, the Government of Madras accepted the award and declared the same to be binding for one year the enforceability of which was to come into operation from 25th February, 1948, and enure thereafter till 24th February, 1949.

On 24th April, 1950, the Sub-Inspector of Police, Central Crimes Department, filed a charge sheet before the Third Presidency Magistrate, Egmore, against the petitioner on the ground that though according to the award, the management of the Prabhat Talkies ought to have implemented the same in respect of wages and dearness allowance with retrospective effect from 20th May, 1947, and 1st January, 1948, respectively, the same was not given effect to in the manner provided for in the award but that the wages and the dearness allowance were implemented only from 25th February, 1948, and the increments were given only from 1st March, 1949. Such being the case, the award had been contravened and moreover, it is alleged in the charge sheet, that the Prabhat Talkies did not employ a chief ticket examiner and an advance booking clerk as required by the award. Hence the charge sheet complained that the managing director of the Prabhat Talkies was liable for an offence punishable under section 29 of the Industrial Disputes Act (Central Act XIV of 1947). The Magistrate took the case on file and issued notice to the person accused of the offence. The accused took the objection that the Court has no jurisdiction to proceed with the enquiry because the award itself was void and *ultra vires* with the result that no offence has been committed. The objection having been overruled the petitioner came up to this Court to quash the proceedings before the learned Magistrate and our learned brother Somasundaram, J., considered that the case involved important questions of law which necessitated its decision by a Bench and that is how this criminal miscellaneous petition comes on before us for disposal.

Before elaborating the contentions on either side, it will be useful to have a bird's eye view of the legislative provisions on which the prosecution justifies the filing of the charge sheet. Prior to 1926, on the anvils of the statute book in India, there had been no enactment providing for the registration and recognition of trade unions and defining the law relating to such trade unions, though acts of parliament on the subject of trade unions were prevalent in England long prior to that. Act XVI of 1926 provided for the registration of trade unions, the rights and liabilities of registered trade unions, the regulations regarding the same and various other matters. The expressions "trade dispute" and "trade union" were also defined, the former meaning any dispute between employers and workmen, or between workmen and workmen, or between employers and employers which is connected with employment or non-employment, or the terms of employment or the conditions of labour of any person; and the latter term as meaning any combination whether temporary or permanent, formed primarily for the purpose of regulating the relations between workmen and employers or between workmen and workmen, or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business, and is said to include any federation of two or more trade unions. The word "workmen" was also defined as meaning all persons employed in trade or industry, whether or not in the employment of the employer with whom the trade dispute has arisen. For the purpose of the present case, it may not be useful to notice the various provisions of the Act dealing with the subject of trade unions. By Act VII of 1929 the Central Government undertook further legislation making provision for the investigation and settlement of trade disputes and for other purposes. This statute provided for reference of disputes to Courts of enquiry and to Boards of conciliation and special provisions were made for illegal strikes and lock-outs. It was by Act XIV of 1947 that the Government of India enacted for the investigation and settlement of industrial disputes and the preamble stated that "it is expedient to make provision for investigation and settlement of industrial disputes and for certain other purposes". Section 2, clause (*k*) defines an "industrial dispute" as a dispute or difference between employers and employers or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour of any person. Clause (*j*) defines "industry" as any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft or indus-

trial occupation or avocation of workmen. Clause (*s*) defines workmen as meaning any person employed (including an apprentice) in any industry or any skilled or unskilled manual or clerical work for hire or reward and includes, for the purpose of any proceedings under this Act in relation to an industrial dispute, a workman discharged during that dispute, but does not include any person employed in the naval, military or air service of the Crown. Section 7 provides for the appointment of industrial tribunals by the appropriate Government. Section 10 (1) is as follows :

"If any industrial dispute exists or is apprehended, the appropriate Government may, by order in writing, (*a*) refer the dispute to a Board for promoting a settlement thereof, or (*b*) refer any matter appearing to be connected with or relevant to the dispute to a Court for enquiry ; or (*c*) refer the dispute to a Tribunal for adjudication. Provided that where the dispute relates to a public utility service and a notice under section 22 has been given, the appropriate Government shall, unless it considers that the notice has been frivolously or vexatiously given or that it would be inexpedient to do so, make a reference under this sub-section notwithstanding that any other proceedings under this Act in respect of the dispute may have commenced."

Section 15 deals with the duties of the tribunals of which sub-section (2) states that on receipt of an award from the tribunal the appropriate Government shall, by order in writing, declare the award to be binding. There is a provision that where the appropriate Government is a party to the dispute, they have to perform certain other duties as well. Section 19, sub-section (3) states that an award declared by the appropriate Government under section 15 to be binding, shall come into operation on such date as may be specified by the appropriate Government and shall remain in operation for such period not exceeding one year, as may be fixed by that Government. The penalty for failure to implement the award is contained in section 29 to the effect that if any person commits a breach of any term of any settlement or award which is binding on him under the Act, he shall, on his first conviction therefor, be punishable with fine which may extend to two hundred rupees and in the event of a second or subsequent conviction with fine which may extend to five hundred rupees. The Government of Madras which claims to have power to legislate regarding such matters, as being included in the Concurrent List of the Government of India Act of 1935, amended the Industrial Disputes Act, 1947, by Madras Act XII of 1949. The Act was called the Industrial Disputes (Madras Amendment) Act of 1949. It amended sections 2, 10 and the schedule to Central Act XIV of 1947. After sub-section (2) of section 10 of the Central Act, another sub-section was inserted as sub-section (2-A) which laid down that notwithstanding anything contained in sub-sections (1) and (2) of section 10, where a tribunal has been constituted under this Act for the adjudication of disputes in any specified industry or industries and a dispute exists or is apprehended in any such industry, the employer or a majority of the workmen concerned may refer the dispute to that tribunal. The result of the insertion of the new sub-section (2-A) is that whereas prior to its enactment, the reference to an industrial tribunal can be made only by an appropriate Government, after the coming into operation of section 10 (2-A), the employer or a majority of the workmen concerned can refer the dispute to the tribunal. By the Amending Act, two new sections are enacted, *viz.*, sections 5 and 6, and a schedule was also added to this enactment. Sections 5 and 6 and the schedule are as follows :

"5. Where, before the commencement of this Act, any Industrial Tribunal has been constituted by the Provincial Government under the said Act, all proceedings taken, all awards made, and all other acts and things done, whether before or after such commencement, by or before such Tribunal in connexion with any industrial dispute, shall be deemed to be valid and shall not be called in question in any Court of law or the ground that the Tribunal was not constituted in accordance with the provisions of the said Act or the dispute to which the proceeding, award, act or thing relates was not referred to the Tribunal in accordance with such provisions.

Nothing contained in this section shall be deemed to invalidate any decision or order of a Court which became final before the commencement of this Act.

6. All awards passed by Industrial Tribunals and mentioned in the schedule hereto which could not be enforced on account of the proceedings before the High Court, shall be current and valid for a further period of one year from the commencement of this Act.

Schedule :—1. The Motor Transport award.

2. The award in the dispute between the managements of Cinema theatres and workers.

3. The awards in the disputes between the Beedi workers and managements.

4. The awards in the disputes between the Cigar workers and managements."

There can be no doubt that the second item of the schedule, *viz.*, the award in the dispute between the managements of cinema theatres and workers, refers to the award which is the subject-matter of consideration in this case. More recently, the Parliament of India has passed Act XLVIII of 1950 providing for the establishment of an Appellate Tribunal in relation to industrial disputes and for certain other matters incidental thereto. In this enactment, Industrial Tribunal among other matters is defined as any industrial tribunal constituted under Act XIV of 1947. Section 20 of Act XLVIII of 1950 provides that any money due from an employer under any award or decision of an industrial tribunal may be recovered as arrears of land revenue or as a public demand by the appropriate Government on an application made to it by the person entitled to the money under that award or decision. The combined result of section 29 of Act XIV of 1947 and section 20 of Act XLVIII of 1950 is that if an employer does not implement the terms of an award passed by an industrial tribunal, not only can the amount due from him be recovered as arrears of land revenue or public demand, but he can be prosecuted in a criminal Court as well.

The first contention raised before us is that Act XIV of 1947 in so far as it makes the employers bound to act in accordance with the terms of an award, which was passed without the employers being consenting parties to the reference, and in spite of the protests of the employers is *ultra vires* by reason of Article 19 (1) (*f*) and (*g*) of the Constitution and that clause (6) of Article 19 can have no application to this statute because it is not a restriction in the interests of the general public but it is a direction to pay money under a threat. Clauses (*f*) and (*g*) of Article 19 (1) of the Constitution lay down that all citizens shall have the right to acquire, hold and dispose of property; and to practice any profession, trade or business. Clause (6) of Article 19 is to the effect that nothing in sub-clause (*g*) shall affect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it prescribes, or empowers any authority to prescribe or prevents the State from making any law prescribing, or empowering any authority to prescribe, the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business. Clause (5) says that nothing in sub-clause (*f*) shall prevent the State from making any law imposing reasonable restrictions in the exercise of any of the rights conferred by the said sub-clause either in the interests of the general public or for the protection of the interests of any scheduled tribe.

It is contended before us that the member of the Cinema Employees Association cannot be said to be the "general public" and therefore restrictions in their interests cannot come within the ambit of either clause (5) or clause (6). For this argument our attention was invited to the observations contained at page 311 of XXXII, Halsbury's Laws of England. Paragraph 429 at page 311 makes a reference to industrial Courts, arbitration and Courts of enquiry, and what we are asked to decide is that since in England, without the consent of both the parties, the reference of a dispute for settlement to the industrial Court for arbitration is not possible, the provisions in the Indian Act by which the appropriate Government is authorised to refer a dispute without the consent of both the parties is illegal. We are not satisfied that sub-clauses (*f*) and (*g*) of Article 19 (1) of the Constitution have any bearing on the present question. There is no restriction put upon acquiring, holding, or disposing of property or practising any profession or carrying on any occupation, trade or business. What is sought to be done

by these labour legislations is the implementation of the directive principles of State policy contained in Part IV of the Constitution, especially that contained in Article 43 which states that the state shall endeavour to secure, by suitable legislation to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities. Both Act XIV of 1947 and Act XLVIII of 1950 endeavour to secure the industrial worker conditions of work ensuring a decent standard of life and a living wage. It cannot be said that there is any restriction on the carrying on of a trade or business by the cinema employers, as a result of the Industrial Disputes Act. Whether, in England, a reference without consent of both parties is allowed or not because our attention has not been invited to any statute like the Industrial Disputes Act, it cannot be said that the Acts in India have, in any way contravened, or set at nought, any provision of the Constitution.

But the more important question that has to be considered is whether the award which has been made on a reference, the terms of which have been set out by us earlier, can be said to be a valid and binding award. The learned counsel contends that there was no material before the State Government to show that there existed any dispute between the workers of Prabhat Talkies and the management at all. The mere fact that some of the workmen of the Prabhat Talkies were members of the Cinema Employees Trade Union, would not give the trade union any authority to create a dispute and have it referred to a tribunal. Secondly, it is contended that the reference does not specify the dispute at all. What is stated in the reference is that an industrial dispute has arisen between the workers and the management of the Cinema talkies in the City of Madras in respect of certain matters. Awards passed on similar references have been the subject of consideration in this Court recently. In *Ramayya Pantulu* v. *Kutty and Rao (Engineer), Ltd.*[1], Horwill and Rajagopalan, JJ., had to consider an award passed on a similar reference without specifying what the dispute was. The reference stated that industrial disputes have arisen between the workers and management of certain engineering firms and type foundries in the Province of Madras and industrial disputes are apprehended in the rest of the Engineering firms and type foundries in respect of certain matters and therefore an industrial tribunal is constituted and the disputes are referred to such tribunal for adjudication. The learned Judges held that such a reference does not give jurisdiction, for before making the reference, the Government must have reason to believe that in a particular business a definite dispute is known to exist or is apprehended by reason of demands and discussions taking place amongst the workers and the management. This decision was followed in *Kandan Textiles, Ltd.* v. *Industrial Tribunal, Madras*[2], by the Hon'ble the Chief Justice and Mack, J. Here also the reference was in similar terms and the learned Judges referred to and accepted with approval the dictum in *Ramayya Pantulu* v. *Kutty and Rao (Engineer), Ltd.*[3]. The Government notification in the two cases already referred to are practically in the same terms as the notification which resulted in the award in question for in none of these cases is the exact industrial dispute specified or any description given of the same. All that is stated is that industrial disputes have arisen between the workers on the one side and the management on the other.

In a more recent case reported in *Lakshmanan Chettiar*, In re[4], Subba Rao and Panchapakesa Aiyar, JJ., quashed criminal proceedings instituted on the basis of an award passed by a tribunal pursuant to a notification which was invalid. There also the notification was in the same terms as the case referred to already and the learned Judges held that since the notification was illegal, the award was invalid and the prosecution launched on the basis of the illegal award cannot be sustained and the proceedings were quashed. A single Judge, Panchapakesa

1. (1949) 1 M.L.J. 231.
2. (1949) 2 M.L.J. 789.
3. (1949) 1 M.L.J. 231 at 231 and 232.
4. (1950) 1 M.L.J. 219.

Aiyar, J., in the *Calicut Hosieries, Calicut*, In re[1], set aside the conviction and sentence passed under section 29 of Act XIV of 1949 on the ground that the reference by the Government to the industrial tribunal was vague and general and therefore invalid and therefore the lock-out by the management and the directors of the firm involving the dispute cannot be said to be illegal. He followed the decisions to which reference has already been made, viz., *Ramayya Pantulu* v. *Kutti and Rao (Engineer), Ltd.*[2] and *Kandan Textiles, Ltd.* v. *Industrial Tribunal, Madras*[3].

Both the learned State Prosecutor and Mr. V. S. Chandrasekharan appearing for the State and the Cinema employees union, respectively have contended that the trend of authority outlined by us above should not be followed in view of the decision of the Federal Court in *India Paper Pulp Co., Ltd.* v. *India Paper Pulp Workers Union*[4]. Their Lordships of the Federal Court in that case have laid down that section 10 (1) of the Industrial Disputes Act does not require that the particular dispute should be mentioned in the reference by the Government to the Tribunal. All that is necessary is that the existence of the dispute and the fact that the dispute is referred to the tribunal should be clear from the order. It is further held that when a reference is attacked on the ground that it is not a reference according to law, the Court has to read the order as a whole and determine whether in effect the order makes such a reference. The order of the West Bengal Government which culminated in the award that was impugned before the Federal Court is printed at page 368 of the report. There also all what is stated is that an industrial dispute has arisen between the India Paper Pulp Co., Ltd. . . . . and their discharged workmen, etc. In considering whether an award passed on such a reference is valid or not, His Lordship the learned Chief Justice of India observes as follows :

"On behalf of the appellant it was contended that there was no jurisdiction in the Industrial Tribunal to decide anything because, firstly, no dispute was referred to the Tribunal. This is admittedly a technical defence and is based on the wording of the order of the Government of West Bengal, dated the 3rd January, 1948. In this connection it was pointed out that the order of the 3rd January, 1948, of the Government of West Bengal did not mention any industrial dispute. Secondly, the order, as worded, was only an order of appointment and there were no words of reference to the Tribunal. It was argued that the words 'and it is expedient that the said dispute should be referred to a tribunal' did not constitute a reference; they were in the preamble and did not form an operative part of the order. The order is far from satisfactory and is not carefully drafted. Section 10 (1) of Act XIV of 1947 provides as follows: 'If any industrial dispute exists or is apprehended, the appropriate Government may by an order in writing . . . . (c) refer the dispute to a tribunal for adjudication.' The section does not require that the particular dispute should be mentioned in the order. It is sufficient if the existence of a dispute and the fact that the dispute is referred to the Tribunal are clear from the order. To that extent the order does not appear to be defective. Section 19 of the Act however requires a reference of the dispute to the Tribunal. The Court has to read the order as a whole and determine whether in effect the order makes such a reference."

Though the judgment of their Lordships of the Federal Court was delivered on the 30th March, 1949, we find no reference to the same in the judgment of this Court in *Kandan Textiles, Ltd.* v. *Industrial Tribunal, Madras*[3] which was delivered on the 26th August, 1949. But it is contended by Mr. Jayarama Aiyar that it is possible to distinguish the observations of His Lordship the Chief Justice of the Federal Court because in the case before the Federal Court the dismissed workmen claimed re-instatement on the ground that their services were illegally terminated and therefore there was actually a dispute in existence between the employer on the one hand and the trade union of which the dismissed workmen were members on the other. In the present case it is contended that there is nothing to show that the employees of the Prabhat Talkies made any demand on the management of the talkies which was not acceded to or that any of the employees of the Prabhat Talkies wanted the trade union to take up their matter with the Labour Commissioner. The award of the arbitrator shows that the Prabhat Talkies was represented before him and that the representative stated that the employees have passed resolutions to the effect that they are content with their service conditions and that there was

1. (1949) 2 M.L.J. 800.
2. (1949) 1 M.L.J. 231.
3. (1949) 2 M.L.J. 789.
4. (1949) F.L.J. 367.

no matter for adjudication in regard to them. In a separate judgment which my learned brother is about to deliver he has discussed in extensive detail how the judgment of their Lordships of the Federal Court is not applicable to the facts of the present case. Though at the outset, *prima facie*, I felt that it is not possible to distinguish the circumstances which brought about the award considered by the Federal Court, after perusing my learned brother's judgment I am inclined to agree with his conclusions that the trend of decisions of this Court exemplified in the three cases referred to by me above has not been overruled by their Lordships of the Federal Court. I, therefore, do not propose to examine the applicability of that case in any detail, contenting myself with agreeing with my learned brother's conclusion on this point.

Our conclusion that the award is *void* and inoperative is reinforced by the fact that by Act XII of 1949 the Legislature intervened to declare as valid, awards of the kind which have become invalid and inoperative on account of the reference not being based upon any tangible industrial dispute. Act XII of 1949 itself contemplates, though not explicitly but by implication, that the "present award" which is mentioned as the second item in the schedule cannot be enforced on account of High Court proceedings. It seems to us, therefore, that the contention of the learned advocate for the trade union as well as the State Prosecutor that the decision of the Federal Court in *India Paper Pulp Co., Ltd.* v. *India Paper Pulp Workers Union*[1], would go to show that the invalidity of the award which would necessarily follow from the decisions of this Court cannot be taken into account, cannot be sustained. The State Prosecutor realised that it would be futile to contend about the validity or justifiability of the award in question in view of the amending legislation; but the counsel for the trade union maintained a contrary position and urged vehemently that the award must be held to be valid. He based his contention not only on the applicability of the Federal Court's judgment, but also on the fact that the award has not been set aside and should be held therefore to be correct. Basing his argument on the principle that an executing Court cannot go behind the decree, Mr. V. S. Chandrasekharan pointed out that unless the award had been set aside or quashed by proceedings of this Court, it remains valid and current unlike the awards which have been set aside by decisions of this Court. He invited our attention to the various decisions like *Lakshmanan Chettiar* v. *Chidambaram Chettiar*[2], *The Villupuram Urban Co-operative Bank* v. *Balasubramania Mudaliar*[3] and other well-known and familiar cases to show that a Court before which a decree is sought to be executed cannot question the correctness of it at all. On the other hand, the principle of law is well known and very familiar that it is open to the executing Court to find out whether the decree, on the face of it, is void and refuse to execute it; *e.g.*, a decree passed against a dead person or a decree passed by a Court which has no territorial jurisdiction over the properties concerned and other instances. In this case, since we have held that the reference itself was *ultra vires* and without the pre-requisite of the existence of a dispute between the employers and workmen, the award cannot be said to be one which can be enforced and should therefore be deemed to have been void. Further the Bench of this Court in *Lakshmanan Chettiar*, In re[4], quashed the proceedings of a criminal case initiated as a result of an invalid award which has not been set aside by proper legal proceedings. Subba Rao and Panchapakesa Aiyar, JJ., interfered under the revisional jurisdiction of the High Court to quash the proceedings instituted before a criminal Court under section 29 of the Industrial Disputes Act for prosecuting an employer for non-implementation of an award which was invalid for want of jurisdiction of the arbitrator on account of the absence of a dispute. Even there the award had not been set aside by proper proceedings before this Court. We are inclined to agree with the learned Judges that even if no proceedings had been taken to

1. (1949) F.L.J. 367.
2. (1934) 68 M.L.J. 318: I.L.R. 58 Mad. 752.
3. (1938) 2 M.L.J. 186.
4. (1950) 1 M.L.J. 219.

set aside the award it is possible to quash the criminal proceedings instituted on foot of it, if it is found that the award is the result of conferment of jurisdiction which did not pass on to the arbitrator on account of the absence of any dispute between the contesting parties.

The second line of argument on which the initiation of proceedings has been justified by the counsel for the trade union as well as the State Prosecutor is that even if the award was void and inoperative, sections 5 and 6 of Act XII of 1949 which amended the Industrial Disputes Act (XIV of 1947) have made the award mentioned in the schedule thereunder current and valid for a period of one year from the commencement of that Amending Act. It is clear from a reading of those sections that wherever the Court has declared awards to be invalid and inoperative on account of the fact that no existing dispute was referred to them, such awards are invalid as a result of the decision of the Court. But awards on exactly similar basis which have not been quashed or set aside by proceedings in Court have been declared to be current and valid by section 6. It seems to us that the Legislature, in validating awards which have not been quashed by Courts and in validating awards which though apparently are void but have not been so declared by Courts, has discriminated between persons to whom the same set of circumstances applied, and therefore offended Article 14 of the Constitution which provides for equality before the law or the equal protection of law for all persons. Though the Legislature recognised that the awards are invalid, it has afforded protection to persons who have approached Courts and have secured declarations that awards based on the same footing as those which have been legislatively held valid are not current and valid.

The expression "equal protection of the laws" which occurs in the 14th Amendment of the United States Constitution has been explained in several decisions of the Courts of the United States. "Equal protection of the laws" means that all persons and business similarly situated, shall be treated alike. *See* Hall's Constitutional Law, page 136. At page 478 of Mathews book on the Constitution of the United States of America we find a discussion of this phrase. In *Yick Wo* v. *Hopkins*[1], Mathews, J., of the Supreme Court in delivering the opinion of the Court has held that though a law be fair on its face and impartial in appearance, yet if it is administered by public authority with an evil and unequal hand so as practically to make illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. *See also* page 86 of the American system of Government by Ferguson and McHenry, 1st Edn., where the subject of equal protection of the laws is discussed. The learned author says that the test is whether the classification is reasonable and appropriate. If it is, then every one within each group must be treated alike. Willoughby on the Constitution of the United States, Vol. III, Second Edn., p. 1931, discussing the case in *Yick Wo* v. *Hopkins*[1], observes that the Law or the Ordinance, though upon its face discriminating, was held void for the reason that it gave to designated officials, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent not only as to places but as to persons.

In *Truak* v. *Corrigan*[2], Taft, C.J., considered the question about the validity of an Act of State Legislature which prohibited interference by injunctions in disputes between employers and employees concerning the terms or conditions of employment and came to the conclusion that the impugned law resulted in the recognition of one set of actions against ordinary tort-feasors and another set against tort-feasors in labour disputes. It is there held that if employers were denied the right to obtain injunctions while such a right was permitted to the employees, then there was the denial of equal protection of laws to one set of persons placed in similar circumstances. What the prohibition against the denial of equal protection of

1. 118 U.S. 356. 2. 257 U.S. 312.

the laws to all persons situated in similar circumstances connotes is, that all persons subject to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed. See *Hayes* v. *Missour*[1]. Applying these principles to the interpretation of Article 14 of the Constitution, one thing is clear that Madras Act XII of 1949 discriminates between such employers as have got a decision from the High Court in a different manner from those that have not. In other words, though the Act envisages that awards, including the one under consideration, are void and inoperative, still because the persons affected by the award have not availed themselves of the remedy allowed by a writ of *certiorari* they should stand on a different footing from those who have so availed themselves of the remedy. That is, if the Act is considered in relation to employers, then it discriminates favourably with respect to such of them who had recourse to a Court of law and affects unfavourably such of those who did not obtain a quashing order though the awards in both categories, are void and inoperative. Conversly the Act discriminates between employees against whom the award has been set aside and those against whom it has not been though the awards in both the cases are void. If the award is void because no tangible dispute was referred to the arbitrator, it does not become more void by being quashed by proceedings in Court. Therefore all awards passed under similar circumstances some of them declared void by Court, while others are not so declared, stand on the same footing. It is therefore clear that Act XII of 1949 is a discriminatory piece of legislation which deprives some of the persons situated in the same position from the beneficent effects whereas others who are sitauted in the same position are conferred those benefits. On this aspect of the case, our conclusion is that though at the time Act XII of 1949 was parsed, it could not have been held to be invalid on account of the discrimination contained therein, after 26th January, 1950, in view of Article 13 (1) of the Constitution which says that all laws in force in the territory of India immediately before the commencement of this Constitution in so far as they are inconsistent with the provisions of this part shall to the extent of the contravention, be void, it has to be held that the legislation is inconsistent with Article 14, equality before law, and is therefore void.

Under Article 372 of the Constitution read with Article 13, all the law in force in the territory of India immediately before the commencement of the Constitution shall continue in force until altered or repealed or amended by a competent Legislature. This is subject to the provision that such laws shall not be repugnant to the Constitution. Therefore, even if Act XII of 1949 is not void but is valid and operative, still it has to be considered whether in virtue of the provisions contained in section 107 of the Government of India Act re-enacted in a similar form in Article 254 of the Constitution, the Amending Act, *viz.*, Act XII of 1949 can have any validity or not. At the time Act XII of 1949 was passed the Government of India Act, 1935, as adapted by the India (Provisional) Constitutional Order 1947, was in force. Section 107 of that Act related to inconsistency between Dominion laws and Provincial or State laws. What was enacted there was if any provision of a Provincial law is repugnant to any provision of a Dominion law, which the Dominion Legislature is competent to enact or any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then subject to the provisions of the section, the Dominion law, whether passed before or after the Provincial law, or, as the case may be, the existing law shall prevail and the Provincial law to the extent of the repugnancy be void. We find a similar provision in Article 254 as well. We are pressed with the argument that section 5 of Act XII of 1949 is inconsistent with and diametrically opposite to section 10 (1) of the Central Act XIV of 1947. Section 10 (1) postulates the existence or the apprehension of an industrial dispute which can be referred to a tribunal for adjudication. That is, the appropriate Government must have, before it, an existing industrial dispute or should feel that an industrial dispute is apprehended. In such a case it gets jurisdiction to refer the dispute, existing or potential, to a tribunal.

1. 120 U.S. 68.

But section 5 of Act XII of 1949 validates action taken by the tribunal even in cases where no dispute was referred to the tribunal in accordance with the Act. In other words, section 5 envisages and sets the seal of approval on, an award passed by a tribunal without the necessary pre-requisite of a dispute either existing or apprehended so as to form the basis for a reference. It seems to us that if, without any kind of dispute, an appropriate Government refers possible, contingent and future likely disputes to a tribunal and an award is passed on such contingent matters, still such an award will be valid according to section 5 of the Madras Act. It need hardly be said that section 5 of the Madras Act XII of 1949 is inconsistent with section 10 (1) of the Central Act of 1947. The result necessarily follows that by the application of section 107 of the Government of India Act, 1935 and Article 254 of the Constitution the Act which ought to prevail is the earlier Dominian law, *i.e.*, section 10 (1) of Act XIV of 1947 should prevail and it should be deemed as if section 5 of Act XII of 1949 has not been passed at all. The existing provision of law when Act XII of 1949 was passed was section 10 (1) of Act XIV of 1947 and as such it should prevail. Madras Act XII of 1949 in its preamble enunciates that it is expedient to amend the Industrial Disputes Act, 1947, in its application to the Province of Madras for the purposes appearing thereafter and the Act itself is styled "an Act to amend the Industrial Disputes Act, 1947, in its application to the Province of Madras." Such being the case, the effect and operation of the Amending Act on the principal Act has to be considered. Delivering the judgment of the Judicial Committee in *Union of South Africa (Minister of Railways and Harbours)* v. *Simmer and Jack Proprietary Mines*[1], Lord Sumner observes thus at page 596 of the Report :

> " In the opinion of their Lordships, it is not a legitimate interpretation of mere amending provisions to hold that they completely alter the character of the principal law unless clear language is found indicating such an intention. The amending words, wide as they are, do not evince any intention to make so radical a change as would be involved if there were thrust into powers to regulate future operations, a solitary power, etc ".

Then again at the very outset of the judgment, at page 595 the following sentence occurs with regard to the amending Act :

> " The latter amended the former, and is to be read as one with it "

Therefore the principle of law is clear that amending statutes should be read as part of the original statutes and if that is so, the new section 5 of Madras Act XII of 1949, if it is to be read along with section 10 (1) of Act XIV of 1947, would be contradictory to the earlier provision and if a statute contains two such contradictory provisions it is left to the Court to infer, from a reading of the other provisions of the statute, which ought to prevail.

To the decision in *Kalyanam Veerabadrayya, In re*[2], one of us was a party and there at page 680, the scope and effect of an amending Act is considered and it is there laid down that an amending Act is not an independent Act but an Act passed with a view to effect an improvement or to more effectively carry out the purposes for which the original law was passed. Sections 5 and 6 of Madras Act XII of 1949, cannot therefore be considered as valid provisions of legislation because their effect is not to amend an existing Act. It might be to add to the original statute certain provisions but such additions have tended to make the provisions of the existing statute, *viz.* Act XIV of 1947, unworkable.

The learned counsl for the respondent trade union contends that Act XII of 1949 is both an amending as well as a validating Act and that sections 5 and 6 constitute a separate Act so far as the State of Madras alone is concerned and therefore the Act should be read as a composite one. Where legislative fields are concurrent between two Legislatures, the question has often arisen as to whether when an Act passed by the superior Legislature is amended or added to by the inferior Legislature, the additions and amendments together with the original enactment should be deemed to be the statute law prevailing within the area where the subordinate Legislature functions. For example, the Court-Fees Act of 1870 which applied to the whole of India was amended with the concurrence of the Governor-General

1. (1918) A.C. 591 at 596. 2. (1949) 2 M.L.J. 663.

in Council during the time when Government of India Act, 1919, was in force by the different Provinces levying court-fee on different standards and separate methods of computation. In such cases it has been understood that in so far as the area over which the subordinate Legislature has sway the additions or amendments together with the original statute would be considered to be the governing enactment. Understood in that way there is no difficulty in incorporating sections 5 and 6 of Madras Act XII of 1949 into the frame work of Act XIV of 1947 if sections 5 and 6 of the Madras Act are neither repugnant nor contradictory to the provisions of the existing statute *i.e.* Act XIV of 1947. To that extent the contention of the learned counsel for the respondents is acceptable but the difficulty is that here sections 5 and 6 of the Madras Act as we have held already cannot be said to fit into the framework of the original statute as they seem to be repugnant and contradictory to the provisions of Act XIV of 1947.

Another alternative argument put forward by Mr. K. S. Jarayama Aiyar is that Act XII of 1949 is invalid because it is not within the legislative competence of the Province of Madras to legislate for a subject like the industrial disputes. He relies upon the following expression in section 107 (1) of the Government of India Act, 1935 :

" . . . with respect to one of the matters enumerted in the Concurent Legislative List ".

The matters enumerated in the Concurrent List regarding Labour Legislation are entries 27 and 29 in List III, 7th Schedule, which are equivalent to entries 24 and 22 in List III in the 7th schedule to the Indian Constitution. Entry No. 27 in List III of the Government of India Act is as follows :

" Welfare of labour ; conditions of labour ; provident funds ; employer's liability and workmen's compensation ; health insurance, including invalidity pensions ; old age pensions ".

Entry No. 29 relates to trade unions ; industrial and labour disputes. Therefore if Act XII of 1949 is a legislation with respect to one of the matters enumerated in the Concurrent List, then the Provincial Legislature has power to enact the law. But Mr. K.S. Jayaramara Aiyar contends on the authority of the observations of the Privy Council in *Attorney General of Saskatchewan* v. *Attorney General of Canada*[1], where the Privy Council interpreted the words " in relation to," when dealing with provisions of the British North American Act, that Madras Act XII of 1949 cannot be considered to be "with respect to a matter" enumerated in the Concurrent List. He also invited our attention to *Satischandra* v. *Sudhir Krishna*[2], where the words " with respect to " have been defined. The learned Judges observed that the words " with respect to " mean " on the subject of ". Therefore, the question has to be decided as to whether Act XII of 1949 is " on the subject of " the two entries referred to by us above in List III of the Government of India Act of 1935. We see no difficulty whatever in holding that Madras Act XII of 1949 is a legislation " on the subject of " industrial and labour disputes. But it is contended that in pith and substance Act XII of 1949 is intended to validate an invalid statute though it indirectly touches an industrial dispute and as such it cannot be said to be a legislation " on the subject of " industrial disputes. We are unable to accede to this argument. Our conclusion is that the argument of the learned counsel does not lend any support to the plea that the Provincial Legislature, as it then was, had no power to enact the Act in question.

The further argument advanced by the learned Counsel for the petitioner which was discussed at some length in the order of reference to this Bench by Somasundaram, J., deserves a more detailed consideration and that is that the prosecution is not maintainable because the offence complained against the petitioner is the result of *ex post facto* legislation which is void under Article 20 of the Indian Constitution. Mr. Chandrasekharan for the respondent union wants to draw a distinction between what is prohibited in Articles 20 and 21 of the Indian Constitution and what the framers of the American Constitution enjoined upon the Congress and the States not to attempt to legislate. The distinction is put in this way; The Indian Constitution only prohibits a person from being convicted.

1. (1949) 2 M.L.J. 80 at 82 (P.C.). 2. A.I.R. 1942 Cal. 429 at 433.

of an offence which was not an offence at the time it was committed. The emphasis is therefore more on the aspect that nobody shall be convicted, though legislation to that effect can be passed making offences *ex post facto* punishable. It is pointed out that Article 1, section 9, sub-section 3 of the Constitution of the United States of America which reads "no bill of attainder or *ex post facto* law shall be passed" completely prohibits the passing of an *ex post facto* law. According to the learned counsel, the Indian Constitution does not put a restraint upon the passing of the law but the prohibition is against a person being convicted by an *ex post facto* law. It is unnecessary for us, for the purposes of this case, to express any definite opinion as to whether there is in fact any real distinction between the ideas and objects sought to be inculcated in the Constitution of the United States of America and our country. In the view which we have taken that Act XII of 1949 is *ultra vires* the question of *ex post facto* legislation does not arise . We had to consider the question of *ex post facto* legislation in *Velayudam*, In re[1], and there we have held that there is no prohibition so far as such legislation was concerned prior to the 26th January, 1950, whatever might be said as regards such legislation subsequent to the inauguration of the Republic of India. Mr. Jayarama Aiyar invited our attention to the observations contained in a number of decisions on this point: See *Rex* v. *Austin*[2] and *The Queen* v. *Griffith*[3]. If our view had been that sections 5 and 6 of Act XII of 1949 were valid, then we would have held that what the Amending Act did was not to create any new offence but to cure the illegalities that existed before, and as such cannot be called retrospective legislation. The penal provision remained unchanged and that was section 29 of the original Act and what the Amending Act did was to declare that it was not competent to call in question the award on the grounds of its invalidity. It cannot be said that keeping current and valid awards, which would otherwise have been invalid, for one year from 14th June 1949, is an *ex post facto* legislation which violated Article 20 of the Constitution. If the award was valid, then it would remain in force for one year from 14th June, 1950 and the non-implementation of it between those two dates is the violation of a law then in force, *viz.*, section 29 of Act XIV of 1947 and as such is punishable.

The further contention of the learned counsel for the petitioner is that the omission or commission, which makes the non-implementation of the award an offence, was committed when the act was done or the omission was made and on the authority of *London County Council* v. *Cross*[4] and *Beachardas* v. *Emperor*[5], these offences cannot now be made punishable. We fail to see how these authorities are of any relevancy to the facts of the present case. Both the cases dealt with circumstances of quite a different nature and it is unnecessary for us to discuss those two cases in any detail for our present purpose. For the reasons given above we are of opinion that the award on which the charge sheet was filed being without jurisdiction and its enforceability not having been properly justified by Act XII of 1949, it is open to the petitioner to contend that the Magistrate has no jurisdiction to entertain the charge sheet.

But it is urged on behalf of the trade union as well as by the State that this Court should not interfere and quash the charge under its inherent powers and that section 561-A, Criminal Procedure Code is not intended for circumstances like this. It has been held by this Court in *Ramanathan Chettiar* v. *Subramania Aiyar*[6] and *Re. Kuppuswami Aiyar*[7] and other cases that a charge sheet which the Court had no jurisdiction to entertain could be quashed under sections 435 and 439, Criminal Procedure Code and therefore the proper remedy should be an application for revision under those sections. A Full Bench of this Court in *Thiruvengadaswami Naidu* v. *Municipal Health Officer, Karaikudi*[8], has considered the question as to the limits under which an accused person can question the order of the statutory body, the failure to comply with which, has been the foundation of the prose-

1. (1950) 1 M.L.J. 508.
2. (1913) 1 K.B. 551 at 556.
3. (1891) 2 Q.B. 145 at 148.
4. 61 L.J. Magisterial Cases, 160.
5. A.I.R. 1930 Bom. 340 at 341.
6. (1924) 47 M.L.J. 573 : I.L.R. 47 Mad. 722.
7. (1915) 28 M.L.J. 505 : I.L.R. 39 Mad. 561.
8. (1949) 1 M.L.J. 488 (F.B.)

cution. It is there held that if, on the face of it the order that has created the offence is illegal, or if the statutory body made the order without jurisdiction, then the accused can question it when the prosecution is launched. We have already found that the award was made without jurisdiction and therefore it is open to the accused person to contend that the prosecution launched under it is not sustainable. Cases of this Court have held that quesions regarding the jurisdiction have to be taken in the earliest stage and that is what the petitioner has done here. *See* the observations in *Mistry*, In re[1], where one of us has stated that an application for quashing proceedings on the ground of want of jurisdiction ought to be moved at the earliest possible opportunity. Sections 435 and 439, Criminal Procedure Code, ordinarily contemplate the approach to this Court at a stage when the trial Court has done something in continuation of the charge. We are not satisfied that the petitioner has to wait until something is done before this Court is moved.

Consistently with the reasoning advanced above, we conclude that the filing of the charge sheet was based upon an award, which itself was without any jurisdictional foundation, and therefore the learned Magistrate has no justification for proceeding with it. The proceedings are therefore quashed.

Certificate to appeal to the Supreme Court granted to the State under Article 132 of the Constitution.

Basheer Ahmed Sayeed, J.—My learned brother has elaborately dealt with all the points that arise for consideration in this petition in his well-considered judgment and as I entirely agree with him there is no necessity for me to traverse the same grounds. The only point on which I wish to make a few observations is on the main question, *viz.*, as to how far the award, the alleged violation of which has resulted in the initiation of criminal proceedings against the petitioner can be said to be valid and binding on the petitioner.

The learned counsel for the petitioner has relied upon several decisions of this Court reported in *Ramayya Pantulu* v. *Kutty and Rao (Engineer) Ltd*[2], *Kandan Textiles Ltd.* v. *Industrial Tribunal, Madras*[3], *Lakshmanan Chettiar*, In re[4] and the *Calicut Hosieries, Calicut*, In re[5], in support of his contention that the order of reference is without jurisdiction and the award consequently is inoperative and invalid and the non-compliance thereof cannot form the subject-matter of a criminal prosecution against the petitioner. The effect of these decisions has been discussed at length by my learned brother and I need not take time in considering their application to the facts of the present case. But as against these decisions, the learned State Prosecutor and the learned counsel for the South India Cinema Employees Association have invited our attention to the decision or the Federal Court reported in *India Paper Pulp Co.* v. *India Paper Pulp Workers Union*[6], on which they placed great reliance for their contention that the order of reference made by the Government and the award passed thereon are in accordance with section 10 (1) of the Industrial Disputes Act, 1947, and therefore section 29 of the said Act applies to the case and that the prosecution for non-implementation of such an award is therefore justified. But a careful perusal of the said decision would show that, on the facts of the present case, it does not lend any support to the contention of the learned State Prosecutor and the learned counsel for the trade union. In that case, the order of reference issued by the Government of West Bengal clearly sets out that there was an industrial dispute between a particular company, namely, the India Paper Pulp Co., Ltd., Managing Agents, Messrs. Andrew Yule & Co., Ltd., 8 Clive Road, Calcutta, and their discharged workmen whose names were mentioned in the list annexed to the reference, as represented by the India Paper Pulp Workers Union, and that it was expedient that the said dispute should be referred to the tribunal under the Industrial Disputes Act, 1947, and so forth. The order of reference is extracted at page 368 in the report referred to above. A reading of that order makes it abundantly clear that there was in existence an industrial

1. (1949) 2 M.L.J. 44 at 45.
2. (1949) 1 M.L.J. 231.
3. (1949) 2 M.L.J. 789.
4. (1950) 1 M.L.J. 219.
5. (1949) 2 M.L.J. 800.
6. (1950) 1 M.L.J. 270 : (1949) F.L.J. 367.

dispute between a particular firm of employers and its discharged workmen. Apart from mentioning the name of the particular employers, the names of the discharged workmen are also given in the order of reference and it is also stated therein that those discharged workmen are represented by the India Paper Pulp Workers Union. The order also conveys clearly to one's mind that the dispute that existed between the employer and the employees related to the discharge of certain workmen. It is evident therefore from the order of reference in that case that there was existing a definite dispute between a particular employer and a certain specified number of workmen of that firm. Yet, while considering an order of reference of this kind, their Lordships of the Federal Court were constrained to observe thus :

"The order was far from satisfactory and it was not carefully drafted."

Quoting section 10 (1) of Act XIV of 1947, their Lordships have further observed as follows :

"The section does not require that the particular dispute should be mentioned in the order. It is sufficient if the existence of a dispute and the fact that the dispute is referred to the tribunal are clear from the order. To that extent the order does not appear to be defective. Section 19 of the Act however requires a reference of the dispute to the tribunal. The Court has to read the order as a whole and determine whether in effect, the order makes such a reference".

Applying the test laid down in the above observations to the order of reference of the Madras Government now under consideration by us, it will be found that the order of reference does by no means, make it clear that any industrial dispute exists between the petitioner before us and his workmen. On the other hand, it only says :

"The Commissioner of Labour has reported that an industrial dispute has arisen between the workers and the managements of the Cinema Talkies in the Madras City, that the parties to the dispute are unable to arrive at an amicable settlement and that the dispute may be referred for adjudication."

The terms quoted above clearly do not refer to any industrial dispute having arisen between the petitioner before us and his workmen. Even the elaborate notification that has been published in the *Fort St. George Gazette* in pursuance of the above order does not improve matters except that paragraph 2 thereof gives the direction to the tribunal to have a preliminary enquiry to settle issues for adjudication. It is true that according to the decisions of the Federal Court, Section 10 (1) of Act XIV of 1947 does not require that the particular dispute should be mentioned in the order. But that decision does lay down that it would be sufficient, if the existence of a dispute and the fact that the dispute is referred to the Tribunal *are clear from the order*. Can it be said that the order now under consideration or the notification in question is clear on the point of the dispute between the petitioner and his workmen ? Analysing the order of reference of the Madras Government now under consideration it is obvious that there is no mention of the existence of any dispute between the petitioner and his workmen. It will be seen that even the name of the petitioner does not find a place in the order of reference ; nor are the names of the employees of the petitioner's business mentioned in the order, as is found to be the case with the order of the Bengal Government in the case cited above. The order under consideration does not by any means make it clear that any dispute does at all exist between this particular petitioner and his workmen, nor does it make it clear as to what the nature of the dispute is that is sought to be referred to the tribunal. A mere mention in the most general terms that a dispute has arisen between the workers and the managements of the several talkies doing business in the Madras City as a whole without any particular reference to the petitioner and his workmen cannot be said to be an order of the kind contemplated under section 10 of the Industrial Disputes Act, 1947. It is too vague and too general to be made applicable to any particular case with reference to which there must be in existence a definite dispute between an employer and his employees. The scheme of the Act seems to be intended to devise a machinery to settle disputes arisen or apprehended, and it postulates that for a settlement of such disputes, there must be two definite parties and a definite dispute must exist between them,

so as to be dealt with by a tribunal. Any amount of probing into the order of reference now in question, gives us no idea whatsoever as to whether there is any dispute at all between the petitioner before us and his workmen ; nor does it put the reader on notice as to what that dispute relates to. On the other hand as a matter of fact, we have been told at the Bar and it is also corroborated by the details given in the award itself that most of the workmen of this particular petitioner are paid much more than what has been recommended by the award and that their treatment is also more generous than what is contemplated under the award. See pages 74 to 76 and the appendices to the award. There is also reference in the award to the fact that the workmen had passed resolutions expressing their satisfaction with the conditions of service and the treatment accorded to them by the petitioner. As against this a reading of the order of reference that was the subject matter of the Federal Court decision *India Paper Pulp Co.* v. *India Paper Pulp Workers' Union*[1], conveys a clear idea as to a definite dispute, its nature and existence, and the parties between whom the dispute exists. It cannot be denied that these particulars are completely absent in the order of reference and the notification that is now under consideration by us.

In this connection we were however requested to look, along with the order of reference into the letter of the Commissioner of Labour, Madras, C. 8-7611 of 1945, dated 13th May, 1947, which is referred to in the said order of reference and which is claimed to form part and parcel of that order. We have carefully perused the said letter of the Commissioner of Labour dated 13th May, 1947 addressed to the Joint Secretary to Government, Development Department, Madras. We think it may be useful to extract the said letter in its entirety for purposes of discussion. The letter reads as follows :

"The South Indian Cinema Employees Association submitted a memorandum on 8th November, 1946 in which the workers demanded increased wages and dearness allowances, annual bonus of three months' wages, increased leave facilities, provident fund and the adoption of proper procedure in imposing punishments. The representatives of the employers and the employees Association met me on several occasions when the demand of the workers were discussed, and finally on 28th April, 1947, the following suggestions were made by me to the employers.

(i) Minimum wages of Rs. 15 for scavengers, gardeners etc., Rs. 20 for watchmen and Rs. 25 for ticket collectors and door checkers etc.;

(ii) grant of increments to all other class of workers (operators etc.) by direct negotiations between the employers and employees in respect of each theatre ;

(iii) A minimum dearness allowance of Rs. 15 for all classes of workers.

(iv) Grant of ten days' holidays with pay in a year in addition to the weekly holiday.

(v) adoption of proper procedure in taking disciplinary action against workers (*viz.*, framing of charges, taking of explanation in writing, and service of orders in all cases of punishments.)

The Union officials were advised to accept the above terms and to await the enactment of the Shops and Establishments Bill.

The managers of the Minerva Talkies, Prabhat Talkies, Broadway Talkies, Kinema Central, Saraswati Talkies and the Crown Talkies have agreed to accept the suggestions made by me. The managements of the other talkies in the city have not yet reported to me their acceptance of the terms suggested by me.

The representatives of the Union met me on 13th May, 1947 and reported that the Employees association has decided to go on strike any day after 30th May, 1947 if the following demands are not conceded :

"(1) Employees of all categories working in cinemas be given a new grade of salaries with a fair basis minimum as per our memorandum ;

(2) Employees be given a bonus of three months salary at the completion of each year's service ;

(3) Employees be allowed to have the benefit of 15 days casual leave and 90 days privilege leave in the year ;

(4) In lieu of pension, a provident fund be started by every establishment, the employers contributing an equivalent contribution to the fund ;

(5) Employees be given one day's wage for each extra show (other than matinee shows on Saturdays and Sundays).

(6) Employees be relieved of their work on weekly and other holidays by the employer having adequate staff ;

(7) Employers be forbidden to sell cinemas or theatres to any party without taking into consideration the staff maintained by them as part of the selling contract by which the purchaser may keep on the staff by compulsory obligation ;

1. (1950) 1 M.L.J. 270 : (1949) F.L.J. 367.

(8) The service of the employees should be confirmed immediately after three months of service;

(9) The employees be privileged to earn and enjoy the regular increment in fair graded scales of salaries and be also eligible for promotions automatically;

(10) no employee shall be dismissed or discharged from service unless a proper charge is made out by the employer and an enquiry be held thereof at which there shall be an official of the Union present".

As the employers have not accepted even the minimum terms suggested by me and as the employees are restive, I apprehend that they may strike work at any time. I therefore suggest that the above demands made by the workers may be referred to an Industrial Tribunal for adjudication. I have advised the workers to defer further action on their notice, pending the orders of Government.

Sri Diwan Bahadur K. S. Ramaswami Sastri, Retired District and Sessions Judge, (Royapettah High Road, Madras) or Sri N. Balarama Reddi, Retired District and Sessions Judge, (8/11, Conran Smith Road, Cathedral Post) may be appointed as the sole member of the Special Industrial Tribunal to adjudicate on this dispute".

It will be seen from a perusal of this letter of the Labour Commissioner that he sets out in the first instance that the South Indian Cinema Employees Association submitted a memorandum to the Labour Commissioner in which the workers demanded increased wages, dearness allowance, annual bonus, etc. It may be mentioned incidentally that this South India Cinema Employees Association is said to have on its rolls only about 370 and odd members, who are workers in the 24 cinemas having business in the city of Madras and in the other cinemas in the entire State of Madras. It is obvious that it does not represent the entire body of all the workers of the cinemas and it is also not claimed that it represents the majority of the workers in the cinema houses either in the city of Madras or outside the city. The Association appears to be a Provincial Association, as its name indicates and the membership extends to the entire State but there are no figures made available to us about the actual number of cinemas in the entire State and the number of workmen employed. The fact, however, remains that the South Indian Cinema Employees Association which has figured as one of the parties to the reference in question represented only 15 out of the 43 workers of the cinema belonging to the petitioner before us on the date of the reference by the Government. However, on the submission of the said memorandum, the Commissioner would appear to have called for a meeting of the employers on several occasions, when the first demands of the workers were discussed, and finally on the 28th April 1947 as many as five suggestions were made by the managements of the 24 cinema houses in the City and at the same time, the union officials were said to have been advised to accept the above terms and to await the enactment of the Shops and Establishments Bill. In the next place the letter of the Commissioner definitely states that six of the managements of the cinema houses among whom the petitioner before us is also one, agreed to accept the suggestions made by the Commissioner and that the other managements of the Talkies in the city had not reported to him their acceptance of the terms suggested by him. This statement of the Commissioner makes it clear that the dispute, if any, which might have existed between the workmen of the petitioner's cinema and the petitioner himself had been settled by the petitioner's ready and willing acceptance of all the terms suggested by the Commissioner. There was thus no further scope for the existence of any dispute, and therefore, the letter of the Commissioner does not proceed to set out any further dispute between the petitioner and his employees on any points. But the matter was not left there and the Labour Commissioner proceeds next to mention that the representative of the Union met the Commissioner on 13th May, 1947 and reported that the Employees Association had decided to go on strike on any day after 30th May 1947, if the ten demands mentioned by them in their report and enumerated in the Commissioner's letter were not conceded. Immediately thereafter, the Labour Commissioner would appear to have come to the conclusion that very moment, that as the employers had not accepted even the *minimum terms* suggested by him and as the employees were restive, he apprehended that the workmen might strike work at any time. By the phrase "minimum terms" in the commissioner's letter must be meant the terms offered by the Commissioner and referred to in the earlier part of his letter. If this were so, there is a slight inexactitude in the state-

ment of the Commissioner, when he fails to make a distinction between the petitioner and five others who agreed to his terms and the rest of those who did not report such acceptance. Immediately thereafter, *i.e.*, on the same day, *viz.*, 13th May, 1947, and without further ado, he thought it fit that the demands made by the workers should be referred to the Industrial Tribunal for adjudication. It is however obvious that when the Commissioner stated that the employers had not accepted even the minimum terms suggested by him, it could have reference only to those employers other than the petitioner and five other employers referred in the earlier part of the Commissioner's letter. For, the petitioner was not one of those who had not accepted the minimum terms suggested to the Commissioner for the reason that the earlier part of the order had clearly set out that the petitioner was one of the six employers who had agreed to accept the suggestions made by the Commissioner. There is nothing in the letter of the Commissioner which would indicate that these demands made by the South India Cinema Employees Association were referred to the respective owners of the cinema houses in the City of Madras as a body or to any of them individually. In any event, there is nothing to show that any reference of the demands of the South Indian Cinema Employees Association, dated 13th May, 1947, had been made to the petitioner; nor is it contended that these demands have so much as even brought to the notice of the petitioner or, any other of the employers in the City of Madras. In the absence of any such notice of the demands to the petitioner, or the other employers, or any opportunity having been given to the petitioner or the other employers to have their opinion expressed on the demands, or even to discuss the same with the Labour Commissioner and the Employees Association, it is simply inconceivable to hold that there was any dispute or apprehension of a dispute between the petitioner and his employees. For a dispute to arise, the two parties, *viz.*, the petitioner and his workmen, must both come into conflict and a difference must ensue therefrom. The letter of the Commissioner does not indicate that such was the case between the petitioner and his workmen. The letter for the Commissioner, therefore, far from supporting the case of the State Prosecutor that it discloses the existence of a dispute, proves the contrary and demonstrates beyond doubt that there could have been absolutely no difference, and no dispute whatsoever between the petitioner and his workmen represented by the Association. It will be improper to assume that a dispute can come into existence by a one-sided demand or a unilateral action of one of the parties, which demand or action has neither been referred to the other party nor even communicated to that party and in respect of which there was no opportunity, nor any occasion for the other party to express any view or indicate any positive or negative relation thereto. Unless a specific dispute is postulated between a particular employer and his workmen which calls for a settlement by reference to a tribunal it is difficult to imagine how an award of the kind now under consideration which does not relate to any dispute existing or apprehended between the particular employer and his workmen can be said to be an adjudication binding on the particular employer, however wide the scope of the reference or the award may be in its application.

Such being the case, it cannot be said that the order of reference taken as a whole and read along with the letter of the Commissioner, dated 13th May, 1947, addressed to the Joint Secretary to Government indicates clearly the existence of any dispute between the petitioner and his workmen and that it was such a dispute that was being referred to the Industrial Tribunal. On the other hand, it will not be far wrong to say that the order of reference is not merely most unsatisfactory, in that it is couched in vague and general terms without making it clear as to the particular parties and the specific dispute between them, which is referred to the tribunal, but is also ill-conceived in that it does not conform to the requirements of or the spirit underlying the Industrial Disputes Act. In this view, we are constrained to hold that the facts which formed the basis of the decision of the Federal Court in India *Paper Pulp Co., Ltd.* v. *India Paper Pulp Workers Union*[1], are clearly

1. (1950) 1 M.L.J. 270 : (1949) F.L.J. 367.

distinguishable from the facts that arise for consideration in the case before us. As has already been pointed out, when there was no dispute between the petitioner and his employees in existence at all, there can be no question of any reference being made and consequently there was no jurisdiction for the Government to exercise its powers under section 10 of the Industrial Disputes Act. That there was actually no dispute in existence or apprehended as between the petitioner and his employees for being referred to any tribunal, also receives further confirmation from the observations made in paragraph 43 of the award itself. A reading of this paragraph would go to show that the whole case of the so-called existence of any dispute between the petitioner and his employees or its apprehension is entirely given up and this justifies our view that there was no dispute and therefore no jurisdiction whatsoever for the Government to make any reference of the kind in question. The form in which issue 2 has been framed by the Industrial Tribunal also points to the same conclusion, *viz.*, that in fact there was no dispute to be referred to a tribunal so far as this petitioner was concerned. If therefore there was no jurisdiction to make any reference, it follows that the whole reference and the award are both invalid and not binding on the petitioner. It was this apprehension of the situation and of the invalidity of the reference and the award that compelled the Government to move the Legislature to enact an amending or validating Act, *viz.*, Act XII of 1949 the constitutionality of which has been considered very fully by my learned brother and I entirely agree with the reasoning and conclusions he has arrived at that the Madras Amending Act, Act XII of 1949, is *ultra vires* the Legislature in that it offends against Article 14 and other provisions of the Constitution.

K.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AYYAR.

Mathurai Sadhu Seva Samajam by its Secretary N. A. Nannier .. *Appellant in O.S.A. and Petr. in C.M.P.**

v.

The Official Assignee of Madras representing the estate of M. K. Balakrishnier and Sons .. *Respondents.*

Insolvency—Moneys of a registered society deposited with a firm which happened also to be a member of the society—Firm becoming insolvent—Deposit of the society, if in the nature of a trust—Society if can claim priority in insolvency.

Where a society registered under the Societies Registration Act, XXI of 1860, invested certain moneys belonging to it with a firm, which was also a member of the society and the firm later on became insolvent, on the question whether the society can claim priority of payment as the moneys invested by the society with the firm were in the nature of a trust,

Held, as the insolvent firm was neither a member of the governing body nor was it one of the trustees under the Societies Registration Act, it cannot be said that the insolvent firm which at best was an ordinary member was by reason of such membership in the position of a trustee in respect of moneys belonging to the society as such.

On appeal from the order of the Hon'ble Mr. Justice Mack, dated 14th March, 1950 and passed in the exercise of the Insolvency Jurisdiction of the High Court in Application No. 163 of 1950, in I.P. No. 52 of 1949.

D. Ramaswami Aiyangar for *O. K. Ramalingam* for Appellant.

V. C. Viraraghavan for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The Madurai Sadhu Seva Samajam, a Society registered under the Societies Registration Act, XXI of 1860, which is the appellant before us filed an application in the insolvency of M. K. Balakrishnier and Sons

* O. S. A. No. 66 of 1950 and C. M. P. No. 776 of 1951. 11th February, 1951.

claiming a preferential payment of a sum of Rs. 8,056-1-0 being the amount due for principal and interest in respect of a sum of Rs. 7,000 deposited with the insolvent firm on 29th July, 1946. The society was certainly a charitable institution, but the learned Judge held that even assuming that the insolvent firm knew of the objects of the society and that the funds were in the nature of the trust funds, that would not be sufficient to create a deposit on trust which will entitle payment in priority over other creditors. He held that there was nothing to show that the insolvent firm received this deposit or held it on trust for the society. He therefore dismissed the application.

It is not contended that on the facts as placed before him, the learned Judge erred in dismissing the application. But an application has been made to us to admit certain documents as additional evidence and it is contended that if such evidence is admitted, the society would be entitled to the relief for which they prayed in their application. The documents are intended to show that the insolvent firm was a member of the society. The argument is that if the firm was a member of the society, it must be deemed to be in law a trustee in respect of the amounts invested with the firm. Assuming that the insolvent firm was a member of the society, we fail to see how that fact by itself makes the firm a trustee. The society is a corporate body with a separate juristic personality which is distinct and separate from that of its members. The moneys and property belonging to the society are vested either in the trustees, if any, duly appointed under the provisions of the Act, or, in the absence of trustees, in the governing body. It is admitted that the insolvent firm was not a member of the governing body; nor was it one of the trustees under the Act. It cannot therefore be said that the insolvent firm which at best was an ordinary member of the society was by reason of such membership in the position of a trustee in respect of moneys belonging to the society as such. Here was a plain case of an investment of moneys belonging to the society by the society with the insolvent firm which happened to be also a member of the society. In this view, as the appellant is not likely to succeed in establishing his claim, even after admission of the documents sought to be admitted, we think we should not admit them. The application (C.M.P. No. 776 of 1951) is therefore dismissed.

The appeal also fails and is dismissed with costs.

V.S. ——— *Appeal and petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AIYAR, AND MR. JUSTICE BASHEER AHMED SAYEED.

Guruswami Thevar .. *Accused.*

Criminal Procedure Code (V of 1898), section 350 (1)—Applicability—Judgment written by a Sessions Judge who heard the evidence delivered by his successor in office—Validity.

A judgment written by the Sessions Judge who heard the evidence in the case which on the handing over charge of his office to another is pronounced by his successor is a nullity. Section 350 (1) of the Criminal Procedure Code does not apply to sessions trials and there is no corresponding provision which can be invoked by Sessions Judges.

Petan Alli Khan, In re, (1946) 2 M.L.J. 195 : I.L.R. (1947) Mad. 365, followed.

Trial referred by the Court of Session, Ramanathapuram Division at Mathurai for confirmation of the sentence of death passed upon the said prisoner in C.C. No. 100 of 1950, dated 14th December, 1950 and appeal by the said prisoner.

C. Rajaraman for the Accused.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

The Judgment of the Court was delivered by

Balakrishna Aiyar, J.—The Sessions Judge of Ramanathapuram has convicted the appellant of the murder of his concubine and sentenced him to death.

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* Referred Trial No. 1 of 1951. 26th February, 1951.
(Crl. Appeal No. 14 of 1951).

Mr. Rajaraman, the learned advocate for the appellant, has raised this preliminary objection. The evidence in the case was heard by Mr. H. A. Ayyar who also appears to have actually written the judgment in the case. He handed over charge of his office as Sessions Judge on the forenoon of the 14th December, 1950 and the judgment which he wrote was pronounced by his successor in office, Mr. Sankaran Nambiar. This procedure, Mr. Rajaraman contends, is illegal because what Mr. H. A. Ayyar wrote cannot be called a judgment; in law it can only be regarded as an expression of his opinion on the merits of the case. After he ceased to be the Sessions Judge of Ramanathapuram he became *functus officio* in the matter and he had no power to write a judgment in the case. When thereupon Mr. Sankaran Nambiar purported to pronounce judgment he was only reading out the opinion of his predecessor and was not pronouncing the judgment in the case. In a Sessions case, he contended, the judgment must be written and pronounced by the very same officer who heard the evidence in the case. In support of this objection he referred us to the decision in *Patan Alli Khan*, In re[1]. In that case what happened was this. The evidence was heard by Mr. Nainar when he was Sessions Judge, Chittoor. After he handed over charge to Mr. A. S. P. Ayyar, he wrote what purported to be the judgment of the case and it was pronounced by Mr. A. S. P. Aiyar. It was held by a Bench of this Court that the judgment so pronounced was really a nullity. The learned Judges say :

"We must hold that unless the Criminal Procedure Code expressly provides for the pronouncement of the judgment by a Judge other than he who recorded the evidence, a succeeding Judge would have no power to do so . . . . We are therefore driven to conclude that the presiding officer referred to in section 367 (1), Criminal Procedure Code, in both cases means the presiding officer at the trial who is assumed in the section to have written and pronounced the judgment by still holding the same office."

We find that in the decision reported as *Jogesh Chandra Roy* v. *Surendra Mohan Roy Chowdhury*[2], a Bench of the Calcutta High Court took the same view. The headnote of the case reads as follows :

"A Judgment delivered by a Sessions Judge which was written by his predecessor after the latter has ceased to be a Sessions Judge of the District concerned, having under orders of transfer, made over charge previous to that date, is not a judgment as contemplated by the Criminal Procedure Code."

On the other side Mr. V. T. Rangaswami Aiyangar, the learned Public Prosecutor, has drawn our attention to a number of decisions and to those we refer briefly.

The earliest of these is reported in *Sankara Pillai*, In re[3]. In that case the judgment was written by the Magistrate who heard the evidence. But he left the station before it was delivered. His successor in office read out his predecessor's judgment and signed and dated it in open Court. A Bench of this Court held that the course was not illegal being of the view that under section 367, Criminal Procedure Code, it is not necessary that the presiding officer of the Court who wrote the judgment should be the same person as the presiding officer who is required to date, sign and pronounce it. We may point out that this case was considered by the learned Judges of the Calcutta High Court in *Jogesh Chandra Roy* v. *Surendramohan Roy Chowdry*[2] and they distinctly stated that they were not prepared to follow it.

The second case cited by the learned Public Prosecutor is reported in *Chinna Somayya*, In re[4], and is the decision of a single Judge. He took the view that the trial of a criminal case is over as soon as a Magistrate has determined the issue of the guilt or innocence of the accused.

"Mere pronouncement of the judgment is not part of the trial and there is no illegality or irregularity in a succeeding magistrate pronouncing a judgment written by his predecessor."

The third decision referred to was delivered by Govinda Menon, J., in *Surya Rao* v. *Sathiraju*[5]. That was a case under section 145, Criminal Procedure Code

1. (1946) 2 M.L.J. 195 : I.L.R. (1947) Mad. 365.
2. (1931) 35 C.W.N. 838.
3. (1908) 18 M.L.J. 197.
4. A.I.R. 1933 Mad. 251.
5. (1948) 1 M.L.J. 396.

and what the learned Judge decided was that a proceeding under that section of the Code is not a trial, that an order issued by the Magistrate under sub-clause 6 of section 145 is not a judgment and that therefore the provisions of sections 366 and 367, Criminal Procedure Code, were not applicable to it; if at all, the only provision that would apply was section 350, Criminal Procedure Code.

The last of the decisions referred to by the learned Public Prosecutor is reported in *Mohamed Sattar* v. *Beharilal Jain*[1], where a Bench of the Allahabad High Court held that where one Magistrate had heard the entire evidence and arguments and had written a judgment which was pronounced by his successor, there was only an irregularity which is cured by section 537, Criminal Procedure Code.

Now we notice that all the decisions cited by the learned Public Prosecutor relate to instances of judgments written by one Magistrate and pronounced by another Magistrate; they do not refer to judgments of Court of Sessions. So far as trials by Magistrate are concerned, section 350 (1), Criminal Procedure Code explicitly provides:

"Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercise such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself.

Now, as explained by Horwill, J., in the *Patan Alli Khan*, in re,[2] section 350 (1), Criminal Procedure Code does not apply to Sessions trials and there is no corresponding provision which can be invoked by Sessions Judges. The decisions cited by the learned Public Prosecutor are not therefore exactly in point; they involve an extension of the procedural rule enacted in section 350 (1), Criminal Procedure Code which is available only to Magistrates. We consider that the decisions in *Patan Alli Khan* In re[2], is right and must be followed. This means that the judgment pronounced by Mr. Nambiar on behalf of Mr. H. A. Aiyar is a nullity. We therefore set aside the conviction and sentence imposed upon the appellant and direct that he is tried afresh according to law.

V.S. *Conviction set aside. Retrial ordered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE CHANDRA REDDI.

Seeram Appala Raju .. *Appellant**

v.

The Official Receiver, West Godavari .. *Respondent.*

Provincial Insolvency Act (V of 1920), sections 4 and 37—Order on application under section 4 for payment of money against a stranger—Annulment of adjudication—Quondam *insolvent's right to execute order as a decree—Failure to execute—Effect—Limitation—Limitation Act (IX of 1908), Article 182 (5).*

When money is due to a person who has been adjudicated an insolvent and the Official Receiver in whom the estate of that person has become vested files a suit to realise that sum of money, it cannot be said that he is representing any of the creditors of the insolvent in realising that sum of money. After an adjudication has been annulled it is open to the *quondam* insolvent to take such steps regarding his property which he could ordinarily have done unless there had been an order under section 37 (1), clause (2), of the Provincial Insolvency Act, vesting the property in a trustee or in the Official Receiver.

An order for payment of money on an application under section 4 of the Provincial Insolvency Act is tantamount to a decree and if after annulment of adjudication the insolvent failed to apply for execution and three years had elapsed the Official Receiver cannot on the setting aside of the annulment seek to execute such decree.

Appeal against the order of the District Court, West Godavari, Ellore, dated 7th July, 1948, in E. P. No. 8 of 1948, in C. M. P. No. 327 of 1936, in I. P. No. 8 of 1927.

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1. I.L.R. (1948) All. 222.

2. (1946) 2 M.L.J. 195 : I.L.R. (1947) Mad. 365.

*A. A. O. No. 399 of 1948.

2nd January, 1951.

V. Ramaswami Aiyar for *C. V. Narasimha Rao* for Appellant.

V. Suryanarayana for Respondent.

The Judgment of the Court was delivered by

Govinda Menon, J.—The judgment-debtor against whom a decree for a sum of money had been passed in I. P. No. 8 of 1927 is the appellant in this appeal. One Chekka Rangayya was adjudicated an insolvent on 17th November, 1927, and his properties vested in the Official Receiver of West Godavari. This Chekka Rangayya had to realise a certain sum of money from the present appellant and therefore, the Official Receiver filed an application under section 4 of the Provincial Insolvency Act and the Court passed an order directing the appellant to pay a sum of money as due to Chekka Rangayya to the Official Receiver of West Godavari on 9th April, 1941. According to the provisions of the Act, this order is tantamount to a decree which is capable of execution. The decree was for a sum of Rs. 8,120-5-11. Against the order directing the payment of this sum, an appeal was preferred to this Court in C. M. A. No. 545 of 1941 which was dismissed on 4th February, 1943. In the meanwhile, the insolvent had died on 13th November, 1941, and his legal representative had been brought on record on 22nd September, 1942. But this is a matter of minor importance because nothing depends on the question as to whether the legal representative was brought on record in time or not. As the Official Receiver had obtained the decree on 9th April, 1941, which was confirmed on appeal on 4th February, 1943, he applied for executing the same against the appellant on 14th July, 1943, by E. P. No. 59 of 1943. This petition underwent various adjournments and finally it was dismissed with costs on 28th February, 1944.

Thereafter an application for annulling the adjudication had been taken before the Insolvency Court with the result that on 18th November, 1944, the adjudication of Chekka Rangayya had been annulled. The result of this order according to section 37, Provincial Insolvency Act is that the insolvent was relegated to the position which he occupied prior to the date on which the application for adjudication had been made. This order annulling the adjudication was again taken up to this Court and in C. M. A. No. 641 of 1945, this Court set aside the order annulling the adjudication and restored the adjudication to its original state on 3rd September, 1947. The present application E. P. No. 8 of 1948 out of which this appeal arises was filed on 7th February, 1948. The learned District Judge held that the application was not barred because according to him the period of three years which has to be computed from 28th February, 1944, expired during the period when the order annulling the adjudication was in force and therefore the Official Receiver had three years from 3rd September, 1947, to file the application for execution.

Mr. V. Ramaswami Aiyar for the appellant contends that even though there was an order annulling the adjudication on 18th November, 1944, it was open to the insolvent who had been relegated to the position which he occupied prior to the adjudication to have applied for executing the decree and he not having done so within three years of 28th February, 1944, *i.e.*, before 28th February, 1947, the present application is barred under Article 182 (5) of the Limitation Act. On the other hand Mr. V. Suryanarayana for the Official Receiver very strenuously contends that the Official Receiver was *eo nomine* the decree-holder and when by reason of the order annulling the adjudication it became impossible for him to execute the decree there was something in the nature of an impediment or embargo put upon the Official Receiver from executing the decree with the result that when that impediment was removed or the embargo dissolved, it was possible for the Official Receiver to have availed of the provisions of Article 181 of the Limitation Act and apply for execution of the decree. In other words the learned counsel contends that there was an obstacle put upon the Official Receiver from executing the decree by the annulment of the adjudication. In our opinion the argument of the learned counsel for the appellant has to be accepted. *Ex concessis*, after the adjudication was annulled, it is possible for the *quondam* insolvent to have applied

for execution of the decree obtained by the Official Receiver because the decree was for moneys due to him and not to the Official Receiver. Mr. Suryanarayana contends that the capacity in which the Official Receiver obtained the decree is not only as representing the estate of the insolvent but he had another role, *i.e.*, as representing the creditors of the insolvent. We are afraid we cannot accede to that contention. When money is due to a person who has been adjudicated an insolvent and the Official Receiver in whom the estate of that person has become vested files a suit to realise that sum of money, it cannot be said that he is representing any of the creditors of the insolvent in realising that sum of money. Quite a large body of case-law of this Court have held on interpreting section 37, Provincial Insolvency Act, that after an adjudication has been annulled it is open to the *quondam* insolvent to take such steps regarding his property which he could ordinarily have done unless there had been an order under section 37 (1), clause (2) Provincial Insolvency Act, vesting the property in a trustee or in the Official Receiver. There is no such vesting in this case at all. If there had been such a vesting, it would have been all the worse for the Official Receiver, because, then, even the present argument based on an impediment or embargo or an obstacle cannot be put forward by the Official Receiver. In our opinion since the decree was capable of being executed after the adjudication had been annulled and till that order was set aside, failure by the insolvent to apply for execution during that period would disentitle the Official Receiver from seeking to execute the decree after three years from 28th February, 1944.

The learned counsel for the respondent invited our attention to a passage at page 282 of *Chhattar Singh* v. *Kamal Singh*[1], as well as to a judgment of our learned brother, Raghava Rao, J., in *Venkinani Rajagopala Venkataratnam and another* v. *Vegunta Anjaneyalu and others*[2]. The facts of these two cases cannot be said to be in any way approaching the points in controversy in this case. Our learned brother had to construe the meaning of the word "closed" in an application and he was of opinion that in the particular context of the circumstance of that case, the word "closed" should be understood as that for the time being the matter had proceeded out of the ordinary role of pending proceedings. The application to restore should be deemed to be a revivor. We fail to see how this case has any application to the facts of the present case. If our view that during the time when the insolvency stood annulled and before that order was set aside it was possible for the quondam insolvent to have applied for execution of the decree is right, then there is no impediment or any obstacle to execute the decree. The decree was in full force. It can be executed by whomsoever is competent to execute the same. To take an illustration, supposing the Official Receiver, after getting the decree, had assigned it over to a third party who did not put in any application for execution within three years of getting the decree and thereafter re-assigned it in favour of the Official Receiver, can it be said that the Official Receiver can ignore the time during which the decree had been in the ownership of the third party, having been assigned in his favour, when seeking to execute the decree. The answer to it is an emphatic "no." We are therefore of opinion that since the decree could have been executed between 28th February, 1944 and 9th March, 1947, and since no steps were taken towards that end, the Official Receiver's application, E. P. No. 8 of 1948, dated 7th February, 1948, is barred under Article 182 (5), Limitation Act. The appeal is therefore allowed and the E. P. No. 8 of 1948, is dismissed with costs throughout. The costs will come out of the estate.

K.S. *Appeal allowed.*

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1. (1926) LL.R. 49 All. 276 (F.B.) at 282. 2. C. M. A. Nos. 454 and 455 of 1947.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

The Public Prosecutor .. *Appellant**

v.

K. M. Vedantam .. *Respondent.*

Penal Code (XLV of 1860), section 420—Cheating—Ingredients of.

The offence of cheating is made up of 2 ingredients : Deception of any person and fraudulently or dishonestly inducing that person to deliver any property to any person or to consent that any person shall retain any property.

Where the facts are that the accused to the knowledge of the complainant was solvent, and the money was lent to him on promissory notes carrying interest, that the money was wanted badly by the accused as he had to deposit the sum with the Forest Department, but no such deposit was made on account of disputes between the accused and the Department, it cannot be said that the accused had an intention at the time of borrowing of defrauding the complainant nor that the money was lent because of his representation that he wanted the money for paying to the Forest Department. It was at best the occasion for borrowing. On the facts, no case of cheating can be held to be made out.

Appeal under section 417, Criminal Procedure Code, 1898, against the order of the Additional Sessions Judge, Court of Session, Coimbatore, in Criminal Appeal No. 66 of 1949, setting aside the order of the Joint Magistrate, Coonoor, in C. C. No. 115 of 1948.

State Prosecutor (*S. Govind Swaminthan*) for Appellant.

K. Kalyanasundaram for Respondent.

The Court delivered the following

JUDGMENT.—The accused was charged under three counts under section 420, Indian Penal Code, and was convicted by the Court of the Joint First Class Magistrate, Coonoor and sentenced to pay a fine of Rs. 300 for each of the three offences, in default to undergo rigorous imprisonment for three months. In appeal the Additional Sessions Judge of Coimbatore set aside the conviction. The Public Prosecutor preferred the above appeal.

The case of the prosecution may be briefly stated. The accused was the highest bidder for the year 1947-48 at the auction of minor forest produce in Ooty, Seegur and Mudumalai ranges. The amount of his bid was Rs. 10,750 and he paid 25 per cent of the bid amount, that is, Rs. 2,887-8-0 on 25th June, 1947 and 26th June 1947. He represented to P. W. 1 and her father P. W. 3 that he urgently required money for depositing the balance of the bid amount with the Forest Department and that P. W. 1 believing his representations lent him a sum of Rs. 5,500 on three promissory notes dated 8th July 1947, 17th July 1947 and 19th August, 1947, Exhibits P-2, P-3 and P-4 respectively. He also represented that he had 10 tons of sandalwood worth Rs. 13,000 and that he had sold sandalwood worth Rs. 7,000 to one Sarobji and that he had not received the money yet from him. Relying upon those two representations the accused fraudulently, with no intention of repaying the amount, committed the offence of cheating.

The offence of cheating is defined by section 415 of the Indian Penal Code. It reads :—

"Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act of omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat."

Explanation.—A dishonest concealment of facts is a deception within the meaning of this section."

The offence therefore is made up of two ingredients. (1) Deception of any person, (2) (*a*) fraudulently or dishonestly inducing that person to deliver any property to any person or to consent that any person shall retain any property or (2) (*b*) intentionally inducing that person to do or omit to do anything which if he were not

* Crl. Appeal No. 102 of 1950. 30th January, 1951.

so deceived and which act or omission causes or is likely to cause harm to that person in body, mind, reputation or property. For the purpose of this case 2 (*b*) may be ignored as the arguments were advanced to bring in the case within the first part of the definition.

Deceiving generally is to lead into error by causing to believe what is false or to disbelieve what is true. If *A* makes a representation to *B* intending to deceive *B* and *B* acts upon that representation, *B* may be said to be deceived by *A*. If *A* makes that representation which induces *B* to lend money to him who has no intention of repaying it to *A*, the offence of cheating is complete. But, on the other hand, if *B* does not act upon the representation of *A* but lends money because he is satisfied with the financial position of *A* and if *A* has the intention of repaying it, it cannot be said that *A* is guilty of the offence of cheating.

The main witnesses for the prosecution are P. Ws. 1 and 3. P. W. 1 says that the accused wanted money to pay as a deposit to the Forest Department on account of the contract for minor forest produce which he had taken, and believing what he said she paid him the amounts on 8th July, 1947, 17th July, 1947, and 19th August, 1947. She asserts that, but for his assurance that he had to get money from Sorabji and that he had taken a Forest Department contract she would not have paid the accused money because it was reserved for her marriage. P. W. 3, her father, also says that the accused represented to him that he required money to make up one-fourth of the contract amount which he had to deposit and that he had ten tons of sandalwood worth Rs. 13,000 in addition to Rs. 6,000 or Rs. 7,000 worth of sandalwood sold to Sorabji. In the cross-examination this witness who must have acted on behalf of his daughter says that he knew that the accused had about 10 tons of sandalwood and that he also knew that the accused was entitled to get a sum of Rs. 7,000 or Rs. 8,000 from one Sorabji. He admits that he trusted him because of his knowledge of his solvency. P. W. 1 advanced the said amounts on three promissory notes, Exhibits P-2, P-3 and P-4. They carry interest at the rate of 12 per cent. per annum. It is clear from the aforesaid evidence that though the occasion for the borrowing by the accused was the need to deposit the amount with the Forest Department, P. W. 1 advanced the monies on promissory notes for interest as she and her father were satisfied with the financial position of the accused. I cannot therefore hold on the evidence that P. W. 1 was acting upon the representation made by the accused that he wanted money urgently for depositing with the Forest Department. It cannot also be said on the evidence that the accused at the time he borrowed the money had no intention of repaying it or otherwise defrauding P. W. 1. Exhibits P-20 and P-21 show that he was the highest bidder for a sum of Rs. 10,750. Exhibits P-22 and P-23 indicate that the District Forest Officer confirmed the bids and directed the accused to give security deposit and also to furnish additional security. Under Exhibits P-24 and P-25 the District Forest Officer informed him that the Tahsildar did not declare the accused to be solvent for the entire bid amount and therefore asked him to deposit the entire amount before 27th July, 1947. Exhibit P-26 is the letter written by the accused to the Department wherein he requested the Department to allow him to pay the amount in instalments. Further correspondence passed between the accused and the Department owing to disputes in regard to the manner in which the balance should be paid to the Department. It is clear from the correspondence that the accused did not deposit the balance because of the disputes between him and the Department. The correspondence also discloses that while, according to the ordinary rules of the Forest Department, only 25 per cent. of the bid amount had to be deposited, the Department insisted that an additional 1/3 of the amount should be deposited. Finally the accused did not pay the amount. It is clear, therefore, from the correspondence that the non-payment of the balance of the bid amount was mainly due to the disputes between them. The accused wanted money urgently and executed promissory notes in favour of P. W. 1. Though he borrowed the amount for a specific purpose he did not deposit the amount because of supervening circumstances. I cannot therefore hold on the evidence

that at the time when the accused borrowed the amounts he had no intention of paying the amount to the Forest Department or of repaying the amount to P. W. 1.

On the evidence, therefore, the following facts emerge. The accused, to the knowledge of P. Ws. 1 and 3, was solvent. They lent the money to him in promissory notes carrying 12 per cent. interest. He badly wanted the money at that time as he had to deposit the sum with the Forest Department. But he did not deposit the amount on account of disputes between them. He had therefore no intention at the time of borrowing to defraud P. W. 1, nor did P. W. 1 lend the money because of his representation that he wanted the money for paying to the Forest Department. At best that was only the occasion for borrowing. On these facts, it is manifest that the accused did not, by deceiving P. W. 1, fraudulently or dishonestly, induce her to deliver any property to him. I therefore agree with the Additional Sessions Judge that the prosecution did not make out the case against the accused.

In the result, the appeal is dismissed.

V. P. S. ——— *Appeal dismissed.*

[THE SUPREME COURT OF INDIA.]

(Civil Appellate Jurisdiction.)

PRESENT :—S. FAZL ALI, B. K. MUKHERJEA AND N. CHANDRASEKHARA AIYAR, JJ.

Arjan Singh *alias* Puran .. *Appellant**

v.

Kartar Singh and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 41, rule 27—Discretion exercised by appellate Court in admitting additional evidence—Interference if and when justified—Second appeal—Finding of fact based on additional evidence which ought not to have been admitted—If conclusive in second appeal.

The discretion to receive and admit additional evidence is not an arbitrary one, but is a judicial one circumscribed by the limitations specified in Order 41, rule 27 of the Civil Procedure Code. If the additional evidence was allowed to be adduced contrary to the principles governing the reception of such evidence, it would be a case of improper exercise of discretion and the additional evidence so brought on the record will have to be ignored and the case decided as if it was non-existent. Under Order 41, rule 27, it is the appellate Court that must require the evidence to enable it to pronounce judgment. So where there is nothing to show that there was any lacuna or gap which had to be filled up and that the appellate Court felt the need for the omission being supplied so that it could pronounce a judgment, the High Court would be right in holding that the appellate Court was not justified in admitting additional evidence under Order 41, rule 27, Civil Procedure Code.

Though a finding of fact, however erroneous, cannot be challenged in second appeal, yet a finding reached on the basis of additional evidence which ought not to have been admitted and without any consideration whatever of the intrinsic and palpable defects in the nature of the entries in the register of the record of rights themselves which raise serious doubts about their genuineness, cannot be accepted as a finding that is conclusive in second appeal.

On appeal from the judgment and decree, dated the 28th February, 1946, of the High Court of Judicature at Lahore in Regular Second Appeal No. 887 of 1942 (Din Mohammad and Mohammad Shariff, JJ.) arising out of decree, dated the 21st February, 1941, of the Senior Sub-Judge, Jullunder, in Suit No. 180 of 1940.

Ram Lal Anand, Senior Advocate (*Harbans Lal Mittal*, Advocate, with him), for Appellant.

Bakshi Tek Chand, Senior Advocate (*P. S. Safeer*, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

Chandrasekhara Aiyar, J.—The plaintiff, Arjan Singh *alias* Puran, brought a suit in the Court of the Subordinate Judge, Jullunder, against Inder Singh, Kartar Singh and five others, for a declaration that a will executed by the first defendant, Inder Singh, in favour of the second defendant, Kartar Singh, about 14 years ago

* C. A. No. 31 of 1950. 2nd March, 1951.

was null and void as against the plaintiff, who was the first defendant's reversionary heir after his death. The plaint comprised a half share of land measuring 395 kanals in the village of Kadduwal, another half share of land measuring 837 kanals and 11 marals in the village of Pattar Kalan, and four houses in the latter village. In the pedigree attached to the plaint showing the relationship of the parties, the plaintiff claims Sehja Singh as his 4th ancestor. Jodha Singh and Jai Singh are shown as Sehja Singh's sons. Defendant No. 1, Inder Singh, is Jodha Singh's grandson. It is alleged that the parties are Jat agriculturists governed by the customary law in matters of alienation of ancestral property and succession, and that as a sonless proprietor under this law is not competent to make a will in respect of his ancestral property, when there are collaterals up to the 5th degree, and as the entire property mentioned in the plaint was ancestral, the will made by the first defendant in favour of the second defendant who claimed to have been adopted by the first defendant was invalid and ineffectual. Plaintiff was born on 22nd July, 1919, and was a minor when the will was made, and so the suit was within time.

The suit was contested mainly by the second defendant, Kartar Singh, who set up his adoption, and pleaded that the properties were not at all ancestral as regards the plaintiff. Defendants 3 to 7 remained *ex parte*.

At the trial, it was admitted that the land situated in Kadduwal was not proved to be ancestral. The Subordinate Judge held that even the land in Pattar Kalan was not shown to be ancestral by the evidence adduced on the side of plaintiff, as it was found that the common ancestor, Sehja Singh, had not only two sons called Jodha Singh and Jai Singh, but a third son named Pohlo, and that from the mere fact that the two sons enjoyed the land in equal shares, no presumption could arise that the property was ancestral and descended by inheritance from the common ancestor, when nothing was known about the share of the third son. He recorded findings in favour of the plaintiff on the issues as to adoption and limitation, but he also held that the plaintiff had no *locus standi* to contest the validity of the adoption as the period of limitation had expired long before he was born. In the result, the suit was dismissed.

The plaintiff preferred an appeal to the Court of the District Judge. He filed an application under Order 41, rule 27 and section 151, Civil Procedure Code, for leave to adduce additional evidence. The document he wanted to be taken on record and considered, and of which it was alleged that he was not aware at the trial, was a *kami-beshi* statement relating to Mauza Pattar Kalan, which contained a note that the third son, Pohlo, gave up his interest in the ancestral property in favour of his brothers. A copy of the statement was filed along with the appeal memorandum. The application was naturally opposed on behalf of the contesting defendants who urged that the plaintiff appellant had ample opportunity to produce all his evidence in the lower Court to prove that the property was ancestral and that the entry on which reliance was now sought to be placed appeared on the face of it to be a forged one. The District Judge posted the application to be heard along with the appeal itself. On the 17th March, 1942, that is, even before he heard the appeal, the District Judge allowed the application. Referring to the two entries found in the *naqsha kami beshi* prepared in 1849-50 and the *muntakhib asami-war* prepared in 1852 which stated that Pohlo had relinquished his ancestral share, he observed :

"These two entries taken together, if found genuine, would enable the Court to arrive at a just conclusion. It is, therefore, in the interest of justice that the additional evidence should be let in. I have taken action under Order 41, rule 27 (1) (*b*) of the Civil Procedure Code. This additional evidence would supply material to remove the defect pointed out in the judgment of the Court below, why two of the sons of Sehja Singh came to own equal shares of land of Pattar Kalan in the presence of their 3rd brother."

He permitted the parties to call evidence relating to the two documents. Two witnesses were examined on the side of the appellant. Munshi Prithi Nath is the clerk in the D.C.'s Office, Jullunder City, and he brought the record of rights

for the village Pattar Kalan prepared at the time of the settlement of 1849-50. Munshi Niaz Ahmad is the office Qanungo in the Jullunder Tahsil and he brought the *muntakhib asami-war* of the record of rights preserved at the Tahsil Office. Both of them gave evidence about the relevant entries found in the registers.

The District Judge reversed the decision of the Subordinate Judge and decreed the plaintiff's suit on the strength of this additional evidence. He held that the entries relied on for the appellant were genuine and not forged and that as Pohlo had relinquished his share, the land in Mauza Pattar Kalan was ancestral *qua* the plaintiff. He further found that the suit was not barred and was within time under Article 120 of the Indian Limitation Act, but that the adoption set up by the second defendant was not true. As the custom of the district did not permit a proprietor to will away any portion of his property, whether ancestral or self-acquired, the plaintiff had, in the opinion of the District Judge, a right to contest the will. On the basis of these findings, he decreed the plaintiff's suit in its entirety, including the lands in the village of Kadduwal which were conceded to be non-ancestral and also an area of 4 bighas and 16 biswas of land in Pattar Kalan which, according to the record of rights, was not in the possession of Jodha Singh and Jai Singh, but with third parties.

Kartar Singh, the second defendant, took the matter on second appeal to the High Court. The learned Judges of the High Court held that there was nothing to show that the land in Pattar Kalan was ancestral and that the District Judge was not justified in admitting additional evidence in the shape of the *naqsha kami beshi* and the *muntakhib asami-war* records. They further pointed out that even a superficial observation of the original documents led one irresistibly to the conclusion that the entry regarding Pohlo giving up his share was a subsequent interpolation. They came to the conclusion, therefore, that the entire land situated in Pattar Kalan was also non-ancestral and that the suit should have been dismissed *in toto*, inasmuch as under section 7 of Act II of 1920, no person is empowered to contest any alienation of non-ancestral immoveable property on the ground that such alienation is contrary to custom. In view of this finding, no other question arose in the case for decision. Leave was, however, granted to appeal to His Majesty-in-Council and this is how this appeal is now before us.

It was strenuously argued by the learned Counsel for the appellant that it was not open to the High Court to interfere with the discretion exercised by the District Judge in allowing additional evidence to be adduced and that even assuming that there was an erroneous finding of fact, it must stand final as a second appeal can be entertained only on the specific grounds mentioned in section 100 of the Civil Procedure Code. There is, however, a fallacy underlying this argument. The discretion to receive and admit additional evidence is not an arbitrary one, but is a judicial one circumscribed by the limitations specified in Order 41, rule 27 of the Civil Procedure Code. If the additional evidence was allowed to be adduced contrary to the principles governing the reception of such evidence, it would be a case of improper exercise of discretion, and the additional evidence, so brought on the record will have to be ignored and the case decided as if it was non-existent. Under Order 41, rule 27, it is the appellate Court that must require the evidence to enable it to pronounce judgment. As laid down by the Privy Council in the well-known case of *Nessowji Issur* v. *G. I. P. Railway Co.*[1] :

> "The legitimate occasion for the application of the present rule is when, on examining the evidence *as it stands*, some inherent lacuna or defect becomes apparent, not where a discovery is made, outside the Court, of fresh evidence and the application is made to import it;"

and they reiterated this view in stronger terms even in the later case of *Parsotim* v. *Lal Mohar*[2]. The true test, therefore, is whether the appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced.

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1. (1907) 17 M.L.J. 347 : L.R. 34 I.A. 115 : I.L.R. 31 Bom. 381 (P.C.).
2. (1931) 61 M.L.J. 489 : L.R. 58 I.A. 254 : I.L.R. 10 Pat. 654 (P.C.).

In the present case, there is nothing to show that there was any lacuna or gap which had to be filled up and that the appellate Court felt the need for the omission being supplied so that it could pronounce a judgment; to put it the other way round, it does not appear, and it was not stated that the District Judge felt himself unable to come to a decision without copies of the settlement registers that were sought to be put in before him for the first time. On the other hand, the District Judge made up his mind to admit the certified copies of the *naqsha kami beshi* and *muntakhib asami-war* registers even before he heard the appeal. The order allowing the appellant to call the additional evidence is dated 17th March, 1942. The appeal was heard on 24th April, 1942. There was thus no examination of the evidence on the record and a decision reached that the evidence as it stood disclosed a lacuna which the Court required to be filled up for pronouncing its judgment. In the circumstances, the learned Judges of the High Court were right in holding that the District Judge was not justified in admitting this evidence under Order 41, rule 27.

Even conceding that the reception of additional evidence was proper, the District Judge has failed to consider the inherent infirmities of the entries in the settlement registers relied on for the appellant and the several criticisms that could justly be levelled against them for showing that they were spurious. He took the entries to be genuine. The only reason assigned by the learned Judge for treating the entries to be genuine and not forged appears to be that the records had all along remained in proper custody. As against this rather perfunctory remark, we must set the following observations of the learned Judges of the High Court:

"Even a superficial observation of the original documents leads one irresistibly to the conclusion that this entry was a subsequent interpolation. In *naqsha kami bishi* there was already a remark in that column and the remark relied upon which has very awkwardly been inserted there is with a different pen and in a different ink. It is even impossible to read it clearly. Further, although there are 2 or 3 other places where the names of Jodha and Jai Singh appear, no such remark has been made aginst them. It may also be observed that though a corresponding remark appears in the column of *sharah lagan* in *muntakhib asami-war* where it is evidently out of place in the copy retained in the Tahsil Office, there is no such remark in the copy which is preserved at the Sadar Office. Even otherwise it does not stand to reason why a remark to this effect should have been made in this column. The way in which these entries were said to have been traced also throws a lot of suspicion on their genuineness."

We find ourselves in entire agreement with these observations of the learned Judges. It is no doubt true that a finding of fact, however erroneous, cannot be challenged in a second appeal, but a finding reached on the basis of additional evidence which ought not to have been admitted and without any consideration whatever of the intrinsic and palpable defects in the nature of the entries themselves which raise serious doubts about their genuineness, cannot be accepted as a finding that is conclusive in second appeal.

If the additional evidence is left out of account, the appellant has practically no legs to stand on. There is nothing to show that the common ancestor Sehja Singh was possessed of the Mauza Pattar Kalan properties which are found subsequently entered in the name of two sons in equal shares, with nothing said about the share of the third son Pohlo. As a matter of fact, the pedigree table shows that there was a fourth son called Hamira. If the property had been entered in the registers in the name of all the sons in equal shares, there might be some ground, however feeble, for presuming that the property was ancestral as alleged by the plaintiff. There is nothing to show that the common ancestor owned the land and that his sons got it from him by inheritance in equal shares.

The District Judge was obviously wrong when he decreed the plaintiff's suit even with reference to the lands in Kadduwal conceded to be non-ancestral and the land in Khasra No. 2408 measuring 4 bighas and 16 biswas, which was not in the possession of the two sons Jodha Singh and Jai Singh. He was equally wrong in holding that the customary law which governed the parties did not permit the owner to will away any portion of the property, whether ancestral or self-

acquired ; this is contrary to section 7 of Punjab Act II of 1920, which is in these terms :

"Notwithstanding anything to the contrary contained in section 5, Punjab Laws Act, 1872, no person shall contest any alienation of non-ancestral immoveable property or any appointment of an heir to such property on the ground that such alienation or appointment is contrary to custom."

No other point arises in this appeal which fails and is dismissed with costs in all the Courts.

Agent for Appellant : *Ganpat Rai.*

Agent for Respondents : *S. P. Varma.*

G.R./V.S. *Appeal dismissed.*

[THE SUPREME COURT OF INDIA.]

(Civil Appellate Jurisdiction.)

PRESENT :—S. FAZL ALI, MEHRCHAND MAHAJAN, B. K. MUKHERJEA AND N. CHANDRASEKHARA AIYAR, JJ.

V. Ramaswami Aiyangar and others .. *Appellants**

v.

T. N. V. Kailasa Thevar .. *Respondent.*

Mortgage decree—All mortgagors, judgment-debtors agriculturists—Application by all except one to scale down the decree-amount—Decree scaled down only against those who applied but not against the defendant who did not apply—Payments towards the decree by judgment-debtors against whom the decree was scaled down—Difference between scaled down amount and the payments so made deposited by the defendant who had not applied for scaling down—Application by him for entering up satisfaction and exonerating the mortgaged properties—Relief if can be given on the basis of mortgage decree being one and indivisible.

In a suit by the mortgagee, the mortgage was held binding on all the defendants and while scaling down was not ordered with reference to the first defendant (though he was an agriculturist) as he made no application for scaling down of the decree when the Act came into force, scaling down was ordered so far as the other defendants were concerned, as they had made the necessary applications. In the decree passed there was no specification of the different interests in the hypotheca of the several defendants. Thereafter applications were made by the first defendant for amendment of the decree under section 19 of the Madras Agriculturists Relief Act. It was dismissed as also his application for permitting him to file an application to have the decree scaled down as against him also. A revised final decree was passed as no payment under the preliminary decree was made, 'that the mortgaged property in the aforesaid preliminary decree mentioned or a sufficient part thereof be sold'. The other defendants made certain payments towards the decree, when it was put into execution. Then the first defendant deposited an amount equal to the difference between the amount of the scaled down debt against the other defendants and the payments made by them and prayed that the deposit should be accepted and full satisfaction might be recorded exonerating the mortgaged properties and also the defendant himself from any further liability in respect of the decretal debt. He contended that the mortgage debt was one and indivisible and that even though the first defendant's application for relief under the Madras Agriculturists Relief Act was expressly rejected and he was held liable for the entire amount of the mortgage debt, he would still be entitled to avail himself of the benefit of the scaling down of the decree in favour of the defendants 2 to 7. This contention though negatived by the District Judge was accepted on appeal by the High Court. In an appeal to the Supreme Court against the judgment of the High Court,

Held, the general law undoubtedly is that a mortgage decree is one and indivisible and exceptions to this rule are admitted in special circumstances where the integrity of the mortgage has been disrupted at the instance of the mortgagee himself ; for example when there is a severance of the interests of the mortgagors with the consent of the mortgagee or a portion of the equity of redemption is vested in the latter. It is to be noted, however, that the Madras Agriculturists Relief Act is a special statute which aims at giving relief not to debtors in general but only to a specified class of debtors, *viz.*, those who are agriculturists as defined in the Act. To this extent it trenches upon the general law. There is nothing wrong in law in scaling down a mortgage decree in favour of one of the judgment-debtors, while as regards the others the decree is kept intact. The Judges of the High Court appear to have overlooked the fact that they were sitting only as an executing Court and their duty was to give effect to the terms of the decree that was already passed and beyond which they could not go. It is true they were to interpret the decree, but under the guise of interpretation they could not make a new decree for the parties. The High Court's approach to the case has not been a proper one and the conclusion it had reached cannot be supported in law.

Kailasa Thevar v. *Ramaswami Ayyangar*, (1948) 2 M.L.J. 28, reversed.

* Civil Appeal No. 32 of 1950. 5th March, 1951.

On appeal from the Judgment and Order, dated the 12th December, 1947, of the High Court of Judicature at Madras (Happell and Govindarajachari, JJ.)[1] A.A.O. No. 328 of 1947, arising out of the decretal order, dated the 5th July, 1947, of the District Judge of East Tanjore at Negapatam, in E. A. No. 78 of 1947, in O. S. No. 30 of 1934.

R. Kesava Aiyangar, Senior Advocate (*T. K. Sundararaman*, Advocate, with him), for Appellants.

S. Ramachandra Aiyar, Advocate, for Respondent.

The Judgment of the Court was delivered by

Mukherjea, J.—This appeal is on behalf of the decree-holders in a mortgage suit and it is directed against a judgment and order of a Division Bench of the Madras High Court, dated January 5, 1948[1], by which the learned Judges reversed, on appeal, an order of the District Judge of East Tanjore made in a proceeding under section 47 and Order 21, rule 2 of the Civil Procedure Code.

The material facts are not in controversy and may be briefly stated as follows. The appellants before us are the representatives of three original plaintiffs who, as mortgagees, instituted a suit (being O. S. No. 30 of 1934) in the Court of the District Judge, East Tanjore, for enforcement of a mortgage, against the present respondent, who was defendant No. 1 in the suit, and six other persons. The mortgage bond, upon which the suit was brought, was executed by defendant No. 1 for himself and his minor undivided brother, the defendant No. 2, and also as authorised agent on behalf of defendants 3 to 7 who were interested in a joint family business. The suit was contested by all the defendants except defendant No. 1, against whom it proceeded *ex parte*, and there was a preliminary decree passed on May 15, 1937, by which a sum of Rs. 1,08,098 was directed to be paid by defendant No. 1 and defendants 3 to 7, in default of which the plaintiffs were declared entitled to apply for a final decree for sale of the mortgaged properties, and the suit was dismissed against defendant No. 2. Against this decree, two appeals were taken to the Madras High Court, one by defendants 3 to 7—being Appeal No. 48 of 1938—who contended that the mortgage was not binding on them or on their shares in the joint family property; and the other by the plaintiffs—being Appeal No. 248 of 1938—who challenged the propriety of the judgment of the trial Judge in so far as it dismissed their claim against defendant No. 2. During the pendency of these appeals, the Madras Agriculturists Relief Act (Act IV of 1938) came into force and applications were made by defendants 2 to 7 to the High Court, praying that in the event of a decree being passed against them, the decretal debt might be scaled down in accordance with the provisions of the Act. The defendant No. 1, who did not appear at any stage of the proceeding, did not make any such application. The High Court forwarded these applications to the lower Court for enquiry into the matter and for return, with its finding on the question as to whether the applicants were agriculturists, and if so, to what extent the decretal dues should be scaled down. The District Judge, after making enquiries, submitted a finding that the applicants were agriculturists and that the debt, if scaled down, would amount to Rs. 49,255 with interest thereupon at 6 per cent. per annum from 1st of October, 1937, exclusive of costs. On receipt of this finding, the appeals were set down for final hearing and by their judgment dated March 25, 1942, the learned Judges of the High Court accepted the finding of the Court below and held that defendants 2 to 7 were entitled to have the debts scaled down; but as no application had been made on behalf of defendant No. 1, he was held entitled to no relief under the Act. A decree was drawn up in accordance with the judgment. The amount due by defendants 2 to 7 was stated to be Rs. 49,255 with interest thereon at 6 per cent. per annum; while, so far as defendant No. 1 was concerned, the decree of the trial judge was affirmed subject to a slight modification regarding the rate of interest. The defendant No. 1 thereupon filed an

1. (1948) 2 M.L.J. 28.

application in the Court of the District Judge, East Tanjore, claiming relief under the Agriculturists Relief Act alleging that he too was an agriculturist and hence entitled to the benefits of the Act. The application was dismissed on February 25, 1943, on the ground that as the decree had already been passed by the High Court definitely negativing his claim to any relief under the Agriculturists Relief Act, such application was not entertainable by the lower Court. The next step taken by the defendant No. 1 was to file an application in the High Court itself, praying for setting aside the *ex parte* decree which excluded him from the benefits of Act IV of 1938. This application was rejected by the High Court on December 13, 1943.

As no payment was made in accordance with the preliminary decree passed by the High Court, a final decree in terms of the same was passed by the District Judge on September 25, 1943. Proceedings for execution of this final decree were started on August 16, 1944, in E. P. No. 2 of 1945 of the Court of the District Judge, East Tanjore. Two lots of the mortgaged properties were put up to sale and purchased by the decree-holders for a total sum of Rs. 12,005 on July 15, 1946. The sale was confirmed on August 17, 1946, and part satisfaction of the decree was entered for that amount. Apparently, certain terms of settlement were thereafter offered by the judgment-debtors. The estate of the decree-holders was in the hands of the Receivers and from the Receivers' report dated January 10, 1947, it appears that the Receivers agreed with the sanction of the Court, to receive Rs. 24,000 only from or on behalf of defendant No. 2 and release him and his share of the mortgaged property from the decretal charge. Likewise, the Receivers were agreeable to receive Rs. 48,000 from defendants 3 to 7 and to release them and their properties from the decretal debt. With regard to defendant No. 1, the proposal, which seems to have been accepted by the Receivers, was that the amount payable by him under the decree was to be settled at Rs. 37,500 and one Yacob Nadar would pay this amount on his behalf on consideration of the decree against defendant No. 1 being assigned to him by the Receivers excluding the rights of the latter to execute the decree against defendants 2 to 7 as scaled down by the High Court.

The records of the Execution case show that on January 20, 1947, a sum of Rs. 24,000 was paid on behalf of defendant No. 2; and his properties, namely, lots 2 and 6 were exonerated from the decree. On January 27, 1947, a sum of Rs. 30,000 was paid by defendants 3 to 7 and on February 17, following, they paid a further sum of Rs. 18,610-12-0. These three amounts aggregated to Rs. 72,610-12-0. Nothing was done towards the payment of the sum of Rs. 37,500 by defendant No. 1 or by Yacob Nadar, but on March 6, 1947, the defendant No. 1 deposited in Court a sum of Rs. 3,215 and put in a petition under section 47 and Order 21, rule 2, Civil Procedure Code, praying that as the amount thus deposited together with the payments already made completely wiped off the amount due under the decree as scaled down by the High Court in favour of defendants 2 to 7, full satisfaction of the decree might be recorded exonerating the mortgaged properties and also the defendant No. 1 himself from any further liability in respect of the decretal debt.

The position taken up by defendant No. 1, in substance, was that the mortgage debt was one and indivisible and even though different amounts were mentioned as payable by two groups of defendants in the decree, the decree-holders were bound under the terms of the decree to release the entire mortgaged property even on payment of the amount directed to be paid by defendants 2 to 7. In other words, even though the defendant No. 1's application for relief under the Madras Agriculturists Relief Act was expressly rejected and he was held liable for the entire amount of the mortgage debt, he would still be entitled to avail himself of the benefit of the scaling down of the decree in favour of defendants 2 to 7. This contention was negatived by the District Judge, but was accepted by the High Court on appeal, who allowed the application of defendant No. 1 and directed that the Court below should enter up full satisfaction of the mortgage

decree. It is against this judgment that the decree-holders have come up on appeal to this Court.

The learned Judges of the High Court observed at the outset that in the working of the Madras Agriculturists' Relief Act alongside the provisions of the Transfer of Property Act several curious and novel situations had arisen for which it was not possible always to find logical solutions. They then proceeded to discuss the various decisions of the Madras High Court which had a bearing on this point and the conclusion which they reached may be summed up in their words as follows :

"It is no doubt somewhat odd that when a person is declared liable to pay a larger amount he should on payment or tender of a smaller amount get his property exonerated from liability but this is inherent in and arises out of the proposition established by the decisions already dealt with, namely, that by the application of the principle of unity and indivisibility of a mortgage decree a non-agriculturist can indirectly get relief which he cannot directly get."

It seems to us that the High Court's approach to the case has not been a proper one and the conclusion it has reached cannot be supported in law.

The learned Judges appear to have overlooked the fact that they were sitting only as an executing Court and their duty was to give effect to the terms of the decree that was already passed and beyond which they could not go. It is true that they were to interpret the decree, but under the guise of interpretation they could not make a new decree for the parties.

As said above, the mortgage decree was scaled down by the High Court in favour of defendants 2 to 7 only and the amended decree directs that the said defendants do pay into Court the sum of Rs. 49,255 with certain interest and costs on payment of which the plaintiff was to bring into Court all the documents in his power or possession relating to the mortgage and reconvey or retransfer the property if so required. So far as defendant No. 1 is concerned, the decree states in clear and express terms that he is to pay the sum of Rs. 1,05,000 and odd and it is on payment of this sum only that redemption would be allowed of the mortgaged property. If the decision of the High Court is correct, this direction in the decree would be manifestly unmeaning and without any effect. What is said, however, on behalf of the respondent is, that he is not claiming any benefit in violation of this clause. By virtue of the decree against defendants 2 to 7 being satisfied, the entire mortgaged property would, by force of the very decree, be freed from the debt and if the respondent gets any benefit thereby, such benefit would be merely incidental or consequential in its nature. The High Court agreed in substance with this contention and based its decision entirely upon the view that by operation of the principle of indivisibility of the mortgage decree, a non-agriculturist debtor, whose debt has not been scaled down under the provisions of the Agriculturists' Relief Act may indirectly get the benefit of the relief which has been granted to his agriculturist co-debtor under the provisions of the Act.

The general law undoubtedly is that a mortgage decree is one and indivisible and exceptions to this rule are admitted in special circumstances where the integrity of the mortgage has been disrupted at the instance of the mortgagee himself; *e.g.*, when there is severance of the interests of the mortgagors with the consent of the mortgagee or a portion of the equity of redemption is vested in the latter. It is to be noted, however, that the Madras Agriculturists' Relief Act is a special statute which aims at giving relief not to debtors in general but only to a specified class of debtors, *viz.*, those who are agriculturists as defined in the Act. To this extent it trenches upon the general law and section 7 of the Act expressly provides that

"notwithstanding any law, custom, contract or decree of Court to the contrary, all debts payable by an agriculturist at the commencement of this Act shall be scaled down in accordance with the provisions of this chapter."

Thus in case of a mortgage debt when the loan has been advanced to more than one person, if one of the debtors happens to be an agriculturist while others are

not, the agriculturist debtor would certainly be entitled to have his debts scale down under the provisions of the Act in spite of the provision of general law whic prevents a mortgagor from denying the liability of the interest which he owns i the mortgaged property to satisfy the entire mortgage debt. There is, therefor nothing wrong in law in scaling down a mortgage decree in favour of one of th judgment-debtors, while as regards others the decree is kept intact. The Madra High Court expressly adopted this view in *Ramier* v. *Srinivasiah*[1], which is one c the decisions referred to in the judgment appealed from. The fact that in tha case it was a puisne mortgagee and not a mortgagor whose application for relie under section 19 of the Madras Agriculturists' Relief Act was allowed, does no make any difference in principle. The puisne mortgagee was made a party defen dant in the suit instituted by the first mortgagee to recover his dues and as th puisne mortgagee was liable to pay the debt due to the first mortgagee, he wa held to be a debtor and hence entitled to claim the benefit of section 19 of th Agriculturists' Relief Act. It may be mentioned here that section 14 of the Madra Agriculturists' Relief Act which provides for separation of a debt incurred by Hindu family, some members of which are agriculturists while others are not affords a clear indication that the splitting up of a debt in such circumstances i quite in accordance with the scheme of the Act.

The catena of cases upon which the learned Judges of the High Court relie in support of their decision seems to proceed on a different principle altogethe and whether that principle is right or wrong, it has, in our opinion, no applicatio to a case like the present. In this class of cases, the mortgagors were agriculturist and hence entitled to have their debts scaled down under the Agriculturists'. Relie Act but there were purchasers of the mortgaged property who were not agricul turists and the question arose whether a purchaser could get the benefit of th debt scaled down in favour of the original debtors. This question was answere in the affirmative. The reason for taking this view was thus given by the learne Judges in *Arunachalam Pillai* v. *Seetharam*[2], where the purchase of the equity o redemption was at an execution sale :

"When the 12th respondent purchased the properties in Court auction, he took them subjec to the burden of the appellant's mortgage and if the burden is by reason of the provisions of section referred to above reduced without payment, the purchase proves to that extent an advantageou one, and there is nothing in the Act to deprive him of the fruits of his lucky purchase, even thoug he is not an agriculturist. He gets the benefit of the scaling down not because the provisions of th Act apply to him for obviously they do not, but because such benefit is a necessary incident of hi purchase under the general law and the Act does not deprive him of it."

A somewhat different reason was assigned in *Pachigola* v. *Karatam*[3], which however was a case where a portion of the equity of redemption was transferred to a purchaser by a private sale. It was held that the Court by allowing the mortgagor to redeem the mortgage sale was not conferring on the purchaser a non-agriculturist the benefit of the Act, as he would have to refund to his vendor the purchase money reserved with him which as a result of the scaling down he would not have to pay to the mortgagee. In both these cases the question was raised in the proceeding for scaling down of the decree under the provisions of the Agriculturists' Relief Act itself and not at the execution stage. There is however the case of *Subramanian* v. *Ramchandra*[4], where the question arose in course of execution proceedings and a purchaser of a portion of the equity of redemption was held to be entitled to the benefit of the scaled down decree in favour of the mortgagors although his own application for relief under the Act was refused. It is not necessary for purposes of this case to express any opinion as to the correctness or otherwise of these decisions. It is enough to say that the *ratio decidendi* in all these cases is not applicable to the case before us. In the present case there is no purchaser of the mortgaged property and consequently there is no question of the purchaser who is not an agriculturist himself being entitled to the benefit

1. (1940) 2 M.L.J. 872.
2. (1941) 1 M.L.J. 561.
3. (1942) 1 M.L.J. 506.
4. (1946) 2 M.L.J. 429.

of a decree which has been scaled down in favour of the agriculturist mortgagor. Here the judgment-debtors are the mortgagors themselves and according to the plain provisions of the Agriculturists' Relief Act there could not be any objection to a decree for reduced amount being passed against an agriculturist debtor while the same relief is not given to his co-debtors who do not fulfil that description.

Some exception could undoubtedly be taken to the form and wording of the decree that has been passed in the present case. The decree, in our opinion, should not only have stated the amount payable by defendant No. 1 and that by defendants 2 to 7 separately but should have expressly directed that on payment of the amount directed to be paid by defendants 2 to 7 their interest alone in the mortgaged property would not be liable to be sold. The further direction should have been that in case they did not pay this amount, the whole of the mortgaged property including their interest would be sold for the entirety of the mortgage debt for which defendant No. 1 was made liable. It is true that the decree contains no such clear directions but reading the decree as a whole and having regard to the actual decision in the case, this must be taken to be its plain implications. The subsequent agreement between the parties arrived at in course of the execution proceedings by which the decree-holders agreed to release the interest of defendant No. 2 and that of defendants 3 to 7 separately on payment of certain specified amounts by them proceed clearly on the assumption that the mortgage debt and the security have been split up, and in our opinion it is not possible for the defendant No. 1 to contend that the mortgage debt remained indivisible. Our conclusion is that the view taken by the District Judge was right and should not have been disturbed.

The result is that the appeal is allowed, the order of the High Court is set aside and that of the District Judge restored. We make no order as to costs of this appeal.

Agent for Appellants : *M. S. K. Sastri.*

Agent for Respondent : *M. S. K. Aiyangar.*

G.R./V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE SOMASUNDARAM.

G. Chandrasekhara Reddi .. *Petitioner**

v.

Commissioner of Income-tax, Madras and another .. *Respondents.*

Income-tax Act (XI of 1922), section 61 (3)—Order disqualifying an auditor who had been removed from the Register of Accountants for one year on being found guilty of misconduct—"Thenceforward be disqualified"—Meaning—Order how far final—Section 61 (3)—Validity—If unreasonable restraint on right to carry on a profession conferred by Article 19 (1) (g) of the Constitution.

Section 61 (3) of the Income-tax Act does not by itself prevent the income-tax authorities including the Central Board of Revenue) from permitting a person against whom they had passed an order under that provision to appear before the authorities on behalf of assessees at a later date, provided, of course, there was nothing in the original order which precluded them from doing so. An order in terms of the language in section 61 (3) without mentioning the period of disqualification would not be such an order as to preclude reconsideration on a subsequent date. The word "thenceforward" fixes only one limit, namely, the limit from which the order begins to have effect. By itself it does not necessarily fix the other limit. The word cannot mean "thenceforward and forever."

An order under section 61 (3) does not prevent a person who has been disqualified from carrying on his profession, namely, that of auditor or accountant. Such order only prevents him from representing assessees before a particular department of the Government. Section 61 (3) of the Income-tax Act is in the nature of a reasonable restriction on the exercise of the right under Article 19 (1) (g) of the Constitution of India, 1950, in the interests of the general public and the section is therefore valid.

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* C. M. P. No. 11070 of 1950. 16th February, 1951.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the record from (1) the Commissioner of Income-tax, Madras and (2) the Central Board c Revenue, New Delhi, in respect of the petitioner's right as Accountant to represen appear and attend on behalf of the assessees under section 61 (1) of the India Income-tax Act and in respect of the disqualification of the petitioner unde section 61 (3) of the Indian Income-tax Act, 1922, and to quash the order of th Commissioner of Income-tax, Madras, dated 14th September, 1950, and also th order of the Central Board of Revenue, New Delhi, dated 1st November, 1950 o in the alternative to fix a time-limit after which the petitioner may be allowed t represent appear and attend on behalf of assessees, under section 61 (1) of th Indian Income-tax Act, 1922 and to direct payment of costs to the petitioner.

S. Krishnamachariar for Petitioner.

C. S. Rama Rao Sahib for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The applicant is a Chartered Accountant and has beer practising as an auditor from 1923. He is a fellow-member of the Institute o Chartered Accountants from 22nd August, 1950. He has been appearing on behalf o assessees before the Income-tax authorities in connection with assessment proceed ings under the Act. Under section 61 (1) of the Indian Income-tax Act, he wa found guilty of misconduct as an auditor in connection with income-tax proceed ings before the Income-tax Officer, Kurnool. Thereupon, the Central Governmen declared him not to be a fit and proper person to remain enrolled on the Registe of Accountants and in exercise of the powers conferred by clause (*d*) of sub-rule (1 of rule 14 of the Auditor's Certificate Rules, 1932, the Government removed hi name temporarily for a period of one year from the said Register by a notificatior dated 24th June, 1949. On 8th July, 1949, the Commissioner of Income-tax issue a notice to the petitioner why action should not be taken against him under th provisions of sub-section (3) of section 61 of the Act and he should not be dis qualified to represent an assessee. The petitioner did not appear before the Com missioner in pursuance of the notice and on 21st July, 1949, the Commissioner o Income-tax passed an order under section 61 (3) directing that the petitioner shal "henceforward be disqualified to represent an assessee under sub-section (1) c section 61 of the Act."

Proviso (*b*) to section 61 (3) of the Act gives a right of appeal to a person agains whom a direction is made under that sub-section to the Central Board of Revenue The petitioner, however, did not prefer any such appeal. On 6th July, 1950 the Institute of Chartered Accountants of India notified that the Council of th Institute was pleased to restore the petitioner to the Register of Members witl effect from the 24th June, 1950. Thereupon the petitioner addressed a lette to the Commissioner of Income-tax informing him of the restoration and requestin that he may be permitted to represent assessees under section 61 of the Income tax Act. The Commissioner replied on 14th September, 1950, regretting hi inability to interfere with his predecessor's order, dated 21st July, 1949. Th petitioner went up to the Central Board of Revenue in appeal and the Board or 1st November, 1950, communicated their decision that the Board saw no reasor to interfere with an order which not having been appealed against had becom absolute. The petitioner seeks a writ of *certiorari* to quash this order of the Centra Board.

Section 61 (3) runs thus :

"No person who has been dismissed from Government Service after the 1st day of April, 193 shall be qualified to represent an assessee under sub-section (1) ; and if any lawyer or registere accountant is found guilty of misconduct in connection with any income-tax proceedings by th authority empowered to take disciplinary action against members of the profession to which h belongs, or if any other person is found guilty of such misconduct by the Commissioner of Income tax, the Commissioner of Income-tax may direct that he shall be thenceforward disqualified t represent an assessee under sub-section (1) :

Provided that—

(*a*) no such direction shall be made in respect of any person unless he is given a reasonable opportunity of being heard,

(*b*) any person against whom such direction is made, may, within one month of the making of the direction, appeal to the Central Board of Revenue to have the direction cancelled, and

(*c*) no such direction shall take effect until one month from the making thereof, or, where an appeal is preferred, until the disposal of the appeal."

The first question, and in fact the only question, which has impressed us as of some substance raised by the learned counsel for the petitioner is whether an order under section 61 (3) in terms thereof, namely, an order that a particular person shall be henceforth disqualified to represent an assessee under sub-section (1), assuming no appeal in time has been filed under proviso (*b*), has the result of operating as an order permanently disqualifying that person from representing an assessee under sub-section (1). The Commissioner evidently, and the Central Board of Revenue certainly, appeared to have taken this view of the provision. The Central Board clearly and unambiguously says that the original order of the Commissioner not having been appealed against has become absolute.

Now the word "thenceforward" *prima facie* fixes only one limit, namely, the limit from which the order begins to have effect. By itself it does not necessarily fix the other limit. 'Thenceforward' in our opinion cannot be read as "thenceforward and for ever." In *Rex* v. *Llewellyn*[1], the justices acting under section 13 of the Coal Mines Regulation Act, 1887, made an order in respect of a person employed as a checkweigher in a mine in the following terms:

"From henceforth he shall cease to perform the duties of checkweigher on behalf of the persons employed in the said mine as aforesaid."

It was contended that the effect of "this order" was to disqualify the man for ever from acting as checkweigher. This contention was overruled. The following observations of Darling, J., are apposite to the present case:

"The word 'henceforth' means from the date of the order, and does not mean 'henceforth and for ever'."

We therefore think that the Commissioner of Income-tax and the Central Board of Revenue did not approach the request of the petitioner from a proper standpoint. At the same time, we must remark that the petitioner was not without blame in the matter. His letter to which we have referred obviously proceeds on the implied assertion that once the period of temporary removal from the register of Accountants had elapsed he automatically became entitled to represent assessees under section 61 (1). Even before us the learned counsel for the petitioner again contended that the original order of the Commissioner of Income-tax should be read as if the period of disqualification under section 61 (3) of the Income-tax Act was also a period of one year. In this we cannot agree with him. It is true that the punishment meted out to the petitioner under the Chartered Accountants' Rules was suspension for one year. But it does not follow that necessarily the Commissioner of Income-tax should also limit the duration of his order under section 61 (3) to the same period.

We are of the view that section 61 (3) does not by itself prevent the Income-tax authorities (including the Central Board of Revenue) from permitting a person against whom they had passed an order under that provision to appear before the authorities on behalf of assessees, at a later date, provided, of course, there was nothing in the original order itself which precluded them from so doing. We have also pointed out above that an order in terms of the language in section 61 (3) without mentioning the period of disqualification would not be such an order as to preclude reconsideration on a subsequent date.

In this view we think the most satisfactory course for the petitioner would be to approach the Commissioner of Income-tax for a reconsideration of his prior order on sufficient grounds. We can only say that such a consideration by the Commissioner will not be precluded by this provision.

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1. 96 L. J. 32.

Having regard to the expression of this opinion by us it is not necessary to deal at great length with the several points raised by the learned counsel for the petitioner, impugning even the validity of section 61 (3) of the Act. His contention was that this sub-section offends against the fundamental right declared under Article 19 (1) (*g*) of the Constitution; and it is, therefore, void. He tried to develop the contention from various aspects. First he said that section 61 (3) of the Income-tax Act completely destroys the right conferred by Article 19 (1) (*g*). This is obviously not correct. The order of the Commissioner under section 61 (3) does not prevent the petitioner from carrying on his profession, namely, that of auditor or accountant. That order only prevents him from representing assessees before a particular department of Government. The question, therefore, to be considered is whether section 61 (3) of the Income-tax Act is in the nature of a reasonable restriction on the exercise of the right under Article 19 (1) (*g*) in the interests of the general public. We have no hesitation in holding that it is a reasonable restriction. It is in the interests of the general public that persons who have been found guilty of misconduct in connection with income-tax proceedings should not be allowed to represent the assessees before the income-tax authorities. It is a salutary provision which saves the public from undesirable persons and also the State from being misled or defrauded.

The learned counsel next contended that there was something contrary to the principles of natural justice in empowering the Commissioner of Income-tax to pass an order under section 61 (3) of the Act; and, therefore, the provision contravened the spirit of Article 19 (1) (*g*) of the Constitution. The Commissioner was described as a party in income-tax proceedings and, therefore, it would be unfair to empower one of the parties to the proceedings to disqualify the person to represent the opposite party. In our opinion, there is a certain amount of mixing up in this argument. Assuming for argument that in the case of a particular assessment it can be said that the assessee and the Commissioner of Income-tax are ranged opposite to each other, the powers conferred on the Commissioner under section 61 (3) are conferred on him not as a party in any one proceeding but as one of the highest officers in the heirarchy of the income-tax department who, in the opinion of the Legislature could be entrusted with the proper conduct of proceedings before the authorities.

If this is borne in mind, the next argument of the learned counsel also falls to the ground that the Commissioner of Income-tax is given power to disqualify persons appearing before the Appellate Tribunal which is superior in certain matters to the Commissioner himself.

It was also contended that it was unreasonable that the Commissioner of Income-tax should have power to inflict a punishment more excessive than punishment imposed on the petitioner and persons like the petitioner by an authority empowered to take disciplinary action against them. We, however, do not think that there is anything inherently unreasonable in this. Punishment is one thing and the effect of the misconduct for which the punishment has been inflicted is quite a different thing. For a criminal offence the sentence may be only simple imprisonment for a few months. But if the offence involves moral turpitude it may result in his not being qualified for election to public bodies. We think it would be really unreasonable to say that the person who has been sentenced by a Criminal Court should be disqualified for other purposes only till he serves his sentence and that the moment he has undergone the punishment, he must be deemed to be qualified in every other way.

We must confess that we are unable to follow the argument of the learned counsel that there is something in section 61 (3) of the Act which is inconsistent with Article 14 of the Constitution. The well-known decision of *Yick Wo* v. *Hopkins*[1] and the equally well-known English case in *Board of Education* v. *Rice*[2], were referred to. No doubt, there are observations in these cases which lay down that there should not be an

1. 118 U. S. 356. 2. (1911) A.C. 179.

unreasonable discrimination in the application of a law but we do not see any discrimination contemplated by section 61 (3) of the Income-tax Act.

In the result, with the observations which we have already made at the beginning as regards the construction of section 61 (3) of the Indian Income-tax Act, the application is dismissed.

There will be no order as to costs.

K. S. ——— *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BASHEER AHMED SAYEED.

G. Venkatareddi .. *Petitioner**

v.

P. Nagireddi .. *Respondent.*

Promissory note—Suit on—Form of consideration relied on different from that recited in the promissory note—Burden of proof—Plaintiff's responsibility.

In a case where the plaintiff does not want to rely upon the original recital in the promissory note for the nature or the quantum of the consideration but wants to set up a different form of consideration for the promissory note, he ought to prove the consideration, and the burden therefore is initially on him rather than on the defendant who denies consideration.

The fact that the defendant in any event will deny consideration whether it be in cash or in some other form, by itself would not take away the defendant's right to put the plaintiff on his responsibility to prove consideration to start with.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Munsiff Court, Prodattur, dated 24th March, 1950, in I. A. No. 136 of 1950, in O. S. No. 211 of 1949.

S. V. Venugopalachari for Petitioner.

C. Rangaswami Aiyangar for Respondent.

The Court delivered the following

JUDGMENT.—In this petition the point raised is as to whether the learned District Munsiff was correct in throwing the burden of proof on the defendant when he framed the issue in the following manner : " Whether the suit note is not supported by consideration ? " The defendant sought by way of an application to have this issue recast in the following manner : " Whether the defendant executed the suit note for any lease amount due? "

The learned District Munsiff has relied upon the decisions reported in *Balkisandas* v. *Rambakas*[1] and *Premraj* v. *Nathmal*[2]. There it has been held that a mere admission that the consideration was not the one recited in the negotiable instrument would not shift the burden on to the plaintiff when the defendant denies consideration. These two decisions are of single Judges and so far as this Court is concerned, as laid down by the decision in *Palaniappa Chettiar* v. *Rajagopal Pandarathar*[3], the rule has been that when the plaintiff contends that the consideration is different from the one that is recited in the negotiable instrument the burden of proving want of consideration does not rest with the defendant but proof of consideration shifts on to the plaintiff. In the present case the recital in the promissory note is to the effect that cash consideration was paid. But in the plaint the plaintiff has pleaded that the consideration was some lease amount that was due from the defendant. The plaintiff has *practically* shifted the ground, and he is not relying upon the recital in the promissory note for the nature or the quantum of consideration. In such cases I feel that the decision in *Palaniappa Chettiar* v. *Rajagopal Pandarathar*[3] should prevail ; otherwise it will cause serious injustice.

* C. R. P. No. 599 of 1950. 8th January, 1952.

1. A.I.R. 1930 Nag. 187.
2. I.L.R. (1936) Nag. 142.
3. (1928) M.W.N. 425.

to the defendant, if he is called upon to open the case and prove want of consideration.

Mr. Rangaswami Aiyangar appearing for the respondent has not been able to place before me any decision which is contra to the one relied upon by the learned counsel for the petitioner. His main point seems to be that since the defendant has applied to the Court nearly seven months after the issue had been framed, there is no equity in his favour in having come to this Court for revision of the order refusing to recast the issue. I should say I am not very much impressed with this argument.

The next point raised by learned counsel for the respondent is that a matter like this ought not to be considered and decided upon in revision, but the defendant should be allowed to go through the entire trial and that he should take up the point on appeal when the decision goes against him and particularly when it was always open to him to take up the point that the burden of proof was wrongly cast upon him. I do not think that is in the interests of justice or fairness to the parties that the matter should be allowed to go through like this, when it can be attended to and rectified even at the earliest possible stage. In this view, I am not impressed with this argument of the learned counsel either.

On a consideration of the facts of the case I am inclined to hold that in a case like this where the plaintiff does not want to rely upon the original recital in the promissory note but wants to set up a different form of consideration for the suit pronote, he ought to prove the consideration, and the burden therefore is initially on him rather than on the defendant who denies consideration. No doubt the defendant, in any event, will deny consideration, whether it be in cash or in some other form; but that itself would not take away his right to put the plaintiff on his responsibility to prove the consideration to start with.

In this view I think there is substance in this petition, which is allowed with costs.

K.C. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

The District Magistrate of Chittoor .. *Referring Officer**

v.

K. Subbanna .. *Respondent (Accused).*

Penal Code (XLV of 1860), section 366—"Against her will"—Meaning—Kidnapped minor girl's consent to her marriage—Effect—Criminal trial—Framing charge—Duty of Magistrate.

A kidnapped minor girl's consent to her marriage with the accused is no consent at all even for purposes of section 366 of the Penal Code and a prosecution will lie in such circumstances.

The view in *Bhagwati Prasad* v. *King-Emperor*, A.I.R. 1929 All. 709; *Sultan* v. *The King-Emperor*, A.I.R. 1930 All. 1 (2); *Emperor* v. *Ayubkhan Mirzullan*, (1943) 46 Bom.L.R. 203, preferred to; *Tepriwalla* v. *King-Emperor*, (1931) 36 C.W.N. 49 and *Bishnath Prasad* v. *King-Emperor*, (1946) 48 Cr.L.J. 542.

Magistrates must stick to the law and not strike out the well-known and recognised clauses in printed forms of charges approved by the High Court and frame new and unauthorised methods of charges regarding offences which they are not "competent to try" and send the case up to their superior Magistrates to try, after recording the accused's plea also. That is clearly illegal, and not merely irregular under section 537, Criminal Procedure Code. Where the facts are not sufficient to sustain a charge under section 366 of the Penal Code it is not open to the Sub-Magistrate to frame a charge under section 363 and send the case to a superior Magistrate.

Case referred by the District Magistrate of Chittoor in his letter C. R. P. No. 17 of 1950 of 12th July, 1950, submitting for the orders of the High Court the records in P. C. No. 4 of 1950 on the file of the Court of the Stationary Sub-Magistrate of Madanapalle.

* Crl. M. P. No. 1524 of 1950. 21st March, 1951.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) on behalf of the State.

Accused not represented.

The Court made the following

ORDER.—This petition has been taken on file on a reference by the District Magistrate, Chittoor, for quashing the charge under section 363, Indian Penal Code, framed by the Stationary Sub-Magistrate, Madanapalle, against one Subbanna for having kidnapped one Venkatalakshmamma, a girl aged 16 years on 4th December, 1949.

The facts were briefly these. The Sub-Inspector of Police, Thambanapalle, filed a charge sheet in the Court of the Stationary Sub-Magistrate, Madanapalle, against accused Subbanna under section 366, Indian Penal Code, for kidnapping Venkatalakshmamma, a fatherless minor girl of 16, from the guardianship of her mother, P. W. 2 on 4th December, 1949, with intent that she might be compelled to marry him against her will. That case was taken on file by the Stationary Sub-Magistrate, Madanapalle, as P. R. C. No. 4 of 1950. As the girl had stated to P. W. 10, the Sub-Inspector of Police that she loved the accused and was having sexual intercourse with him even before her marriage in the fields and elsewhere, and had willingly eloped with him and had indeed induced him to take her away and marry her as she did not like to marry a Bangalore man fixed up for her by her mother and intensely disliked by her, the Assistant Public Prosecutor probably relying on the rulings in *Fulchand Tepriwalla* v. *King Emperor*[1] and *Bishnath Prasad* v. *King-Emperor*[2] applied to the Sub-Magistrate by a memo dated 23rd March, 1950, to send the case to the Sub-Divisional Magistrate, Madanapalle, for trial under section 363, Indian Penal Code as he was not pressing the charge under sections 366, Indian Penal Code. So without examining the prosecution witnesses, the Sub-Magistrate sent the case to the Sub-Divisional Magistrate Madanapalle, for taking it on file under section 363, Indian Penal Code, and disposing of the case. He simply endorsed on the case file thus :

"Submitted to the Sub-Divisional Magistrate, as requested by A. P. P. II."

The Sub-Divisional Magistrate, Madanapalle, sent the case back to the Sub-Magistrate stating that, when the charge sheet and complaint disclosed an offence under section 366, Indian Penal Code, the Assistant Public Prosecutor could not say that he was giving up the offence under section 366, Indian Penal Code at his will and pleasure and that it was the duty of the Court to hear the witnesses and determine what offence was committed. I may here remark that the Assistant Public Prosecutor had not applied to the Stationary Sub-Magistrate, under section 494, Criminal Procedure Code for permission to withdraw from the prosecution of the offence under section 366, Indian Penal Code and the Court had not given its consent to any such withdrawal and discharged the accused regarding the offence under section 366, Indian Penal Code. So the Sub-Divisional Magistrate's action in returning the case to the Sub-Magistrate, cannot be said to be unjustified. The Sub-Magistrate, after receiving back the case, enquired into it as a P. R. case and finally came to the conclusion that only an offence under section 363, Indian Penal Code would stand, as the marriage was not by compulsion or against the will of the girl but with her full consent, and, indeed, demand. So, he framed a charge only under section 363, Indian Penal Code against the accused, but, unfortunately, fell into an illegality by not framing a charge as in a committal Court, and also by recording the accusd's plea after the charge was framed. The charge runs :

"I, Stationary Sub-Magistrate, Madanapallee, hereby charge you as follows :

That you, on or about 4-12-1949, kidnapped Venkatalakshmamma, a minor girl, under 18 years, from the lawful guardianship of her mother Sidhamma and thereby committed an offence under section 363, Indian Penal Code and within *the cognisance of the First Class Magistrate, Madanapallee.* I hereby direct that you be tried by the said Court on the said charge. "

1. 36 C.W.N. 49 : A.I.R. 1932 Cal. 442. 2. (1946) 48 Cr.L.J. 542.

It will be noticed that this kind of charge was not within the powers of the Sub-Magistrate as he could not under the law frame a charge relating to a first class offence (which he was not "competent to try" under section 254, Criminal Procedure Code—the principle of the Privy Council ruling in *Yusofali Mulla Noorbhai* v. *The King*[1] that the Court should be one "competent to hear and determine the case" will apply) and record the accused's plea of "not guilty" and direct the First Class Magistrate to try the case. He could only frame charges for offences within his cognizance or within the cognizance of the Court of Session and not for offences within the cognizance of the First Class Magistrate, Madanapalle, indeed even the printed form of the charge sheet would have warned him about this illegality. But he corrected the form and committed the error! Nor did he proceed under section 346, Criminal Procedure Code and stay the proceedings and submit the case with a brief report to the Sub-Divisional Magistrate, Madanapallee as that section requires. Naturally, the Sub-Divisional Magistrate, Madanapalle moved the District Magistrate, Chittoor, to move this Court to quash the illegal charge and to direct the committal of the case by the Sub-Magistrate, Madanapalle to the Sessions Court, Chittoor, under section 366, Indian Penal Code or to direct the case to be tried by the Sub-Divisional Magistrate, taking it on file only under section 363, Indian Penal Code. He urged that in any case, the charge framed by the Sub-Magistrate had to be quashed by this Court as it was illegal and not merely irregular and curable under section 537, Criminal Procedure Code. The District Magistrate agreed with him and made this reference.

I have perused the records and heard the learned Public Prosecutor. The accused is absent though served. It is clear to me that, under the law and applying the principle of the Privy Council ruling in *Yusofali Mulla Noorbhai* v. *The King*[1], the charge framed by the Sub-Magistrate is illegal as urged by the Sub-Divisional Magistrate, the District Magistrate and the learned Public Prosecutor, and not merely irregular and curable under section 537, Criminal Procedure Code. Magistrates must stick to the law and not strike out the well-known and recognised clauses in printed forms of charges approved by this Court and frame new and unauthorised methods of charges regarding offences which they are not "competent to try" and send the cases up to the superior magistrates to try, after recording the accused's plea also. That is clearly illegal, and not merely irregular under section 537, Criminal Procedure Code. So I quash the charge under section 363, Indian Penal Code framed by the Sub-Magistrate, Madanapalle.

The next question is whether the case is a fit one to be directed to be committed by the Sub-Magistrate, Madanapalle to the Court of Session, Chittoor for an offence under section 366, Indian Penal Code or whether it is to be simply directed to be tried by the Sub-Divisional Magistrate, Madanapalle for an offence under section 363, Indian Penal Code. There is a conflict between the other High Courts regarding the validity of a *minor girl's consent* to marriage with the person who kidnaps her when considering a charge against him under section 366, Indian Penal Code. The Calcutta High Court in *Fulchand Tepriwalla* v. *King-Emperor*[2] and the Oudh Chief Court in *Bishnath Prasad* v. *King Emperor*[3] have taken the view that the clause "against her will" in section 366, Indian Penal Code means only the minor's own will and not the will of the lawful guardian whereas the Allahabad High Court in *Bhagwati Prasad* v. *King Emperor*[4] and *Sultan* v. *The King Emperor*[5] and the Bombay High Court in *Emperor* v. *Ayubkhan Mirsultan and others*[6] have held that minor's consent is *no consent* at all even for purposes of section 366, Indian Penal Code and that a prosecution for an offence under section 366, Indian Penal Code will lie in such circumstances. There is no Madras case on this point. *Prima facie*, I am inclined to agree with the view of the Bombay and Allahabad High Courts, as the principle of section 366, (as of section 363 itself) is to uphold the lawful autho-

1. (1949) 2 M.L.J. 461.
2. 36 C.W.N. 49 : A.I.R. 1932 Cal. 442.
3. (1946) 48 Cr.L.J. 542.
4. A.I.R. 1929 All. 709.
5. A.I.R. 1930 All. 19 (2).
6. (1943) 46 Bom.L.R. 203.

rity of the parents or guardians over their minor wards and throw a ring of protection over the girls themselves, and to penalise sexual commerce on the part of persons who corrupt or attempt to corrupt the morals of the minor girls by taking improper advantage of their youth and inexperience, and as under section 376, Indian Penal Code the consent of a girl under sixteen is expressly enacted to be irrelevant and immaterial and ignored. I offer no final opinion now on this point, but it is obvious that the point will have to be considered and decided in this State one way or the other, and, so, it is better that the accused be directed to be committed to the Court of Sessions, Chittoor, for an offence under section 366, Indian Penal Code which will permit of a conviction under section 363, Indian Penal Code if it will not stand and the lesser offence will. Of course, I say nothing also as to whether an offence under section 363 also will be finally made out. That is all for the trial Court. In the end, I direct the Sub-Magistrate, Madanapalle to commit the case to the Court of Sessions, Chittoor, for an offence under section 366, Indian Penal Code, after framing such a charge against the accused.

K.S. ——— *Reference accepted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE PANCHAPAKESA AYYAR.

K. K. Rm. Muthayee Achi (died) and another .. *Appellants**

v.

A. K. Rm. S. Rm. Subbiah Chettiar and another .. *Respondents.*

Promissory note—Suit on promissory note executed after looking into accounts—Court if should decide on the basis of a settlement of accounts and give findings on item by item—Mother executing promissory note for the debts of her deceased son—Barred-debt forming part of consideration—Executant not shown to have had knowledge that a part of the debt was barred—If affects executant's liability on the note—Contract Act (IX of 1872), section 25.

Where a person agrees to execute a promissory note for the entire amount found due on looking into the accounts and the amount due under the accounts is agreed to without any dispute by both parties, both of whose accounts have been looked into and a promissory note for the amount due plus a sum advanced on that date is executed, the transaction is really not one of settlement of accounts but of ascertainment of the money due and in such a case the Court is not bound to discuss the amounts due item by item and it would be enough if it passes a decree when it finds that the accounts were looked into and that the amount was correctly ascertained.

The fact that a mother executing a promissory note for the debts of her deceased son was not conscious when she executed the promissory note that a particular sum out of the consideration thereunder represented a debt which was time-barred, and did not promise to pay that debt knowing it to be a time-barred debt, will not make any difference to her liability under the note.

Apparao v. *Suryaprakasa Rao*, (1899) 9 M.L.J. 330 : I.L.R. 23 Mad. 94 and *Ganapathi Mudaly* v. *Muniswami Moodaly*, (1909) I.L.R. 33 Mad. 159, followed.

Ramaswami v. *Kuppuswami*, (1910) 20 M.L.J. 656, not followed.

Appeal against the decree of the Court of the Subordinate Judge, Devakottai in O. S. No. 65 of 1945.

R. Gopalaswami Aiyangar for Appellants.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Respondents.

The Judgment of the Court was delivered by

Panchapakesa Aiyar, J..—This is an apeal against the judgment and decree of the Subordinate Judge of Devakottai in O. S. No. 65 of 1945. That was a suit for recovering Rs. 13,013-14-11, the balance of principal, after giving credit to Rs. 930-8-0 paid on 14th November, 1944, and Rs. 556-13-4, the interest due on the promissory note, Exhibit P-1, executed by the defendant on 8th November, 1944 for Rs. 13,710, the amount found due on taking of accounts on 8th November, 1944, in respect of the dealings between the plaintiff, Subbayya Chettiar, and the defendant's deceased son, Ramanathan Chettiar, and for Rs. 1,000 paid in cash on the date of the promissory note. The defence was that there was no settlement of accounts or taking of accounts on 8th November, 1944, that Rs. 1,000 in cash

* Appeal No. 180 of 1947. 12th January, 1951.

was not paid on that day, that the defendant did not execute Exhibit P-1 with the knowledge that it was a promissory note, and that her signature was obtained to Exhibit P-1 on the fraudulent representation that it was a document for taking a boy in adoption for her deceased son, Ramanathan Chettiar. It was also alleged that the defendant's grandson, Ramanathan, was threatened by the plaintiff and his friends and *pangalis* with an adoption to the deceased, Ramanathan thereby depriving him and his brother, Shanmugam, of their expected reversion to the estate of the defendant's son, Ramanathan, and that the defendant's grandson, Ramanathan, therefore, obliged the plaintiff in bringing into existence the promissory note, Exhibit P-1, and getting it signed by the defendant, Muthayee Achi, the mother of the deceased Ramanathan. The learned Subordinate Judge, after discussing the entire evidence, found that the suit promissory note was true and was executed by the defendant, Muthayee Achi, with full knowledge of its contents. He found also that the accounts were looked into and settled on 8th November, 1944, before the execution of the promissory note, Exhibit P-1, as urged by the defendant, and that the suit promissory note was fully supported by consideration. He also held that the defendant's contention that the endorsement of payment of Rs. 930-8-0 on Exhibit P-1 was not true, valid or binding on the defendant, was not sustainable, and that this payment and endorsement were true and that limitation would not operate even if this payment did not exist. In the result, he granted the plaintiff a decree as prayed for, but only as against the assets of the deceased Ramanatha in the hands of the defendant, as the evidence let in by the plaintiff himself showed that all the consideration under Exhibit P-1 represented only the debts of the deceased Ramantha, and so, should be recovered only from his assets in the hands of of the defendant. The defendant died pending the appeal, and one of her grandsons, Shanmugham, has been brought on record as her legal representative, the other grandson, Ramanthan Chetti, being added as the 2nd respondent, the 1st respondent being the plaintiff.

We have perused the entire records and heard the learned counsel on both sides. Mr. R. Gopalaswami Aiyangar, the learned counsel for the appellant, raised three main contentions. The first was that the lower Court was wrong in brushing aside the question of the truth or otherwise of the settlement of accounts on 8th November, 1944, in all its details simply because a promissory note, Exhibit P-1, was executed, and the suit was based on it, and that it should have gone into the whole matter on the basis of a settlement of accounts and given its findings item by item. We cannot agree. All the witnesses on the side of the plaintiff said that the parties wanted to look into the accounts and settle them soon after Ramanathan's death, and so brought the accounts on both sides and looked into them in the presence of seven or eight respectable people including P. Ws. 1 to 4 and some of the D. Ws. like D. W. 1. The plaintiff was admittedly a rich man worth 7 or 8 lakhs of rupees, and was a close friend of the deceased, Ramanathan, for 10 years before his death, and had, admittedly, many dealings with the deceased Ramanathan. There was no question of any fraud by him or black-mail by him from the defendant or from her grandsons, Ramanatha and Shanmugham, by holding out the threat of supporting an adoption against the grandsons, and inducing the defendant to sign in Exhibit P-1 by making her believe that it was only an authority or consent to take a boy in adoption. P. Ws. 1 to 4 were all persons of some standing, and none of them were shaken in cross-examination. All of them swore that the accouns of both parties were looked into before the final figure due by the deceased Ramanatha to the plaintiff was arrived at in the presence of the seven or eight big men assembled there. The seven or eight big men were assembled in order to settle the amount due, the interest and the instalments. The defendant asked her grandsons and the big men to look into the accounts and to tell her what amount was really due to the plaintiff. After looking into the accounts, both sides, according to the evidence of P. Ws. 1 to 4, which was not contradicted by the D. Ws. materially, arrived at the figure due to the plaintiff from the deceased Ramanatha. Both sides differed only about the rate of interest and the instalments. The plaintiff stood out for a higher rate of interest; but, on the advice of the big men, he agreed

to take 6 per cent simple interest per annum. He also agreed finally, on the advice of the big men, to take Rs. 930-8-0 within a week, and Rs. 3,000 before the end of *Thai* (13th February, 1945) and the balance conveniently, proportionately with the other creditors. It was also agreed that in case Rs. 930-8-0 and Rs. 3,000 were not paid within the time fixed the plaintiff was free to proceed to recover the entire balance due to him under Exhibit P-1 without reference to the instalments fixed. It is admitted that the Rs. 3,000 was not paid before the end of *Thai*, that is, before 13th February, 1945, and this suit was filed on 1st August, 1945, for recovering the entire balance, only after that date had elapsed. We see therefore no point in this argument. When a person agrees to execute a promissory note for the entire amount found due on looking into the accounts and the amount due under the accounts is agreed to without any dispute by both parties, both of whose accounts have been looked into, and a promissory note for the amount due plus Rs. 1,000 advanced on that date is executed, the transaction is really not one of settlement of accounts, but of ascertainment of the money due, by looking into the accounts, before executing a promissory note for that amount. So, the lower Court naturally did not discuss the amounts due under the accounts item by item, but found that both the accounts were looked into and the amounts correctly ascertained without the least dispute on either side and that Rs. 1,000 was also paid in cash to the defendant for being paid, in sums of Rs. 500 each, to two other creditors.

The next contention of Mr. R. Gopalaswami Aiyangar was that even though the lower Court held that the defendant executed the promissory note, Exhibit P. 1, with a full knowledge of its contents and that she had not executed it as an authority or consent for an adoption, still it was not proved that the defendant was aware, when she executed Exhibit P-1, that Rs. 4,000 out of the consideration covered by it, namely, the first three items in Exhibit P-2 (*a*), was at that time barred by limitation and that, therefore, inclusion of this Rs. 4,000 in this promissory note without such consciousness of the debt being barred to that extent or intention to promise to pay such barred debt, would mean that the debt to this extent at least should have been disallowed by the lower Court as not supported by consideration. *Prima facie*, and if the matter had not been covered by decisions, we might have been inclined to agree that there is considerable force in this argument, and that section 25 (3) of the Indian Contract Act, could reasonably be interpreted in the way Mr. R. Gopalaswami Aiyangar wanted. That was also the view taken by Miller J. in *Ramaswami* v. *Kuppuswami*[1]. He says.

"There is nothing to show that the debtor recognised that the debt was irrecoverable and still promised to pay it, and the promise to which section 25 refers seems to me to be a promise to pay despite the consciousness that the debt is barred."

But, unfortunately for the appellant, two Benches of this court have held to the contrary. In *Apparao* v. *Suryaprakasarao*[2], Boddam and Moore, JJ., have held as follows :

"The section does not require that the document should contain a promise to pay a sum of money in consideration of a debt which is barred nor that it should show that the promisor knew that it was barred—for the words used in the section show that it is the debt and not a sum of money in consideration of the barred debt that the promisor should refer to, and there is nothing whatever in the section to indicate that the promisor should do more than promise to pay a debt of which the creditor might have enforced payment but for the law of limitation of suits. The words are not 'promise to pay a sum of money in consideration of a debt', nor does the section refer to the knowledge of the promisor. Every man is supposed to know the law and in this case the promisor has mentioned the years for which the rent was in arrear and must be supposed to have known the law of limitations, so that, even if that were a necessity in this case, the promisor must be taken to have known that the debt referred to was barred to some extent at all events".

In *Ganapathi Moodely* v. *Munisami Moodely*[3], a Bench of this Court, consisting of Benson, Offg. C.J. and Sankaran Nair, J., has held that a promise to pay under section 25 of the Indian Contract Act will be enforced if the real consideration is shown to be a barred debt, though no reference is made in the document to such debt, and no knowledge of the debtor that the debt is barred proved before the

1. (1910) 20 M.L.J. 656.
2. (1899) 9 M.L.J. 330: I.L.R. 23 Mad. 94.
3. (1909) I.L.R. 33 Mad. 159.

promise is made. There are also decisions of the Calcutta and Bombay High Courts to the same effect, and it is unnecessary to refer to them as we are bound by the two Bench decisions of this Court referred to above, which have taken a contrary view from that of Miller, J. in *Ramasami* v. *Kuppuswami*[1]. We must, therefore, hold that the fact that the defendant was not conscious when she executed Exhibit P-1 that Rs. 4,000 out of the consideration thereunder represented a debt which was time-barred, and did not promise to pay that debt knowing it to be a time-barred debt, will not make any difference to her liability. Mr. R. Gopalaswami Aiyangar then relied on the *obiter* in *Apparao* v. *Suryaprakasa Rao*[2] and said that the defendant should at least have named the year of those time-barred debts to show that she must have been conscious when she promised to pay those debts that they were barred by limitation as every person is supposed to know the law. We cannot agree. It is too subtle a distinction to apply to a case, like this, concerning country rustics. When the defendant asked the big men to ascertain the entire liability of her deceased son, Ramanatha to the plaintiff, by looking into the accounts, so that she might execute a promissory note for the entire liability so ascertained and the Rs. 1,000 intended to be borrowed in cash that day, without stating that only debts which were not barred by time should be included within the scope of looking into the accounts, she naturally promised to pay every bit of *true debt* included in the accounts and the promissory note even though it might be time-barred. The evidence in this case, fortunately, shows that the debt of Rs. 4,000 objected to by Mr. R. Gopalaswami Aiyangar must have been *true*, though *time-barred*. It is no use saying that the defendant, who is a woman not able to look into the accounts, delegated the function of looking into the accounts to others and that they did not specifically warn her that there were time-barred debts of Rs. 4,000 due by Ramanatha and that she had a right not to promise to pay those debts. The whole question of these time-barred debts to the extent of Rs. 4,000 has only been raised before us, and not in the lower Court.

[The rest of the judgment is not necessary for the purpose of the report. The appeal was finally dismissed.]

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Muhammad Mustapa Rowther .. *Petitioner* *

v.

State .. *Respondent.*

Madras Prohibition Act (X of 1937), section 5—Applicability—Denatured spirit containing sugar, and lemon juice seized from accused—Sufficiency to convict accused for an attempt to "renature" the spirit to render it fit for human consumption.

In a case where the certificate of the analyst showed that the denatured spirit seized from the possession of the accused contained sugar and lemon juice and that an attempt had been made to "renature" it, an offence under section 5 of the Madras Prohibition Act is proved. To "renature" means to restore to its original nature, that is the nature of spirits fit for human consumption, as against "denature" which means to render spirits fit for human consumption unfit for such consumption. Sugar and lime juice are such well-known articles of human consumption that they must have been put into the denatured spirit by the accused only in an attempt to renature the denatured spirit and make it fit for human consumption. An attempt to render them fit for human consumption will do, however unsuccessful, for a conviction under section 5 of the Madras Prohibition Act.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional first Class Magistrate of Pattukkottai, dated 12th November, 1949 in C.A. No. 35 of 1949 (C.C. No. 365 of 1949 on the file of the Court of the Stationary Sub-Magistrate, Arantangi).

G. Gopalaswami for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

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1. (1910) 20 M.L.J. 656.
2. (1889) 9 M.L.J. 339 : I.L.R. 23 Mad. 94.

* Cr. R. C. No. 116 of 1950. 22nd February, 1951.

The Court made the following

ORDER.—Mr. Gopalaswami, for the petitioner, urged that there was no proper proof that the denatured spirit had been rendered or attempted to be rendered fit for human consumption and so section 5 would not apply. The learned Public Prosecutor rightly urged that as the certificate of the analyst showed that the denatured spirit seized from the possession of the petitioner contained sugar and lemon juice and that an attempt had been made to renature it, the offence was proved. It is obvious that sugar and lemon juice do not develop by themselves in denatured spirits and that some one must have put them in and that the petitioner who was in exclusive possession of the denatured spirits must have been that one. To "renature" means to restore to its original nature, that is the nature of spirits fit for human consumption, as against "denature" which means to render spirits fit for human consumption unfit for such consumption. Sugar and lime juice are such well known articles of human consumption that they must have been put into this denatured spirit by this petitioner only in an attempt to renature the denatured spirit and make it fit for human consumption. That is why the petitioner denied putting them in and suggested that some unknown person might have put them in after seizure. We need not bother about the vexed question whether the denatured spirits became fit for human consumption by the addition of sugar and lime juice, as an attempt to render them fit for human consumption will do, however, unsuccessful, for a conviction under section 5, just as an attempt at pick pocketing will stand though the pocket attempted to be picked was empty and the attempt was therefore futile.

In the end I confirm the petitioner's conviction, but reduce the sentence in the peculiar circumstances to a fine of Rs. 25 (twenty-five) or in default rigorous imprisonment for a week. The excess fine if paid will be refunded.

K.S. ——— *Sentence reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Chava Seetha Ramayya .. *Appellant* *

v.

Kadiyala Pattayya .. *Respondent.*

Civil Procedure Code (V of 1908), Order 21, rules 2 and 4—Decree for demolishing of wall and delivery of land—Uncertified adjustment—If can be pleaded in bar of execution and recognised—Awarding of costs in the decree—If affects question.

On the question whether under Order 21, rule 2, Civil Procedure Code, a decree for the dismantling of a wall, and the delivery of a plot on which the wall stands, to the decree-holder, can be adjusted after the decree is passed, and the adjustment pleaded in bar of execution, though such an adjustment has not been certified by Court, and whether in such a case the mere award of a sum of money as costs in the decree would prevent such an arrangement being gone into or would enable the judgment-debtor to escape execution for the costs till the arrangement is gone into.

Held: that in the circumstances of the case, the uncertified adjustment can be pleaded and recognised and the mere award of costs would not make it a portion of the complex decree proper, and that there was no reason why the decree-holder should not proceed with the execution for costs.

Appeal against the order of the Court of the Subordinate Judge, Vijayawada, dated 28th October, 1947 in A.S. No. 135 of 1947 preferred against the order of the Court of the Additional District Munsif, Vijayawada, in C.M.P. No. 376 of 1947 in O.S. No. 736 of 1944.

N. Rajeswara Rao for Appellant.

P. Ramakrishna for Respondent.

The Court delivered the following

JUDGMENT.—This Civil Miscellaneous Appeal raises an interesting question of law, namely, whether, under Order XXI, rule 2, Civil Procedure Code, a decree

* A. A. O. No. 250 of 1948. 1st December, 1950.

for the dismantling of a wall, and the delivery of a plot on which the wall stands, to the decree-holder, can be adjusted after the decree is passed, and the adjustment pleaded *in bar of execution*, though such an adjustment has not been certified to the Court, and whether in such a case the mere award of a sum of money as costs in the decree would prevent such an arrangement being gone into or would enable the judgment-debtor to escape execution for the costs also till the arrangement is gone into. The facts are briefly these :—

The appellant here, Seetharamayya, got a decree for possession of a small strip of land from the respondent, Pattayya, in O.S. No. 736 of 1944, and the defendant was asked to give delivery after dismantling the wall standing on that strip of land, and directed to construct a wall on his own land beyond that strip if he liked. The judgment-debtor did not dismantle the wall and deliver the strip of land. So execution was taken up by the decree-holder. The judgment-debtor obstructed when the amin went with the warrant, according to the decree-holder ; but, according to the judgment-debtor what happened was that on sighting the amin, the judgment-debtor got four panchayatdars from different villages together and they effected an amicable settlement between him and the decree-holder, under which the judgment-debtor agreed to pay Rs. 150 towards the costs of the suit to the decree-holder, and Rs. 150 for the strip of land on which the wall stood, and the decree-holder agreed to execute a sale deed in respect of that strip of land in favour of the judgment-debtor, and actually wrote out a sale deed, and kept it with him without registering it. The appellant denies that there was any such agreement, as alleged by the judgment-debtor, and says what happened was this. The judgment-debtor, having obstructed peaceful delivery, it was necessary to obtain police aid. Meanwhile, the decree-holder's wife fell sick, and the decree-holder had to attend to her urgently instead of applying to the Court at once for police aid for the demolition of this wall and the recovery of the strip of land. According to him, he filed C.M.P. No. 376 of 1947 as soon as his wife was well, and wanted execution to be proceeded with with police aid. The judgment-debtor pleaded this arrangement before the Additional District Munsif, Vijayawada, who heard C.M.P. No. 376 of 1947. The learned District Munsif held that the adjustment pleaded had not been certified within the prescribed time. He also observed, very cryptically and without any discussion, that there were no merits in the counter, and allowed the execution petition to proceed. The judgment-debtor appealed to the Sub-Court, Vijayawada. The learned Subordinate Judge held that, under the ruling in *Narayanaswami* v. *Rangaswami*[1], an arrangement like this not certified by Court, could not be pleaded regarding decrees where money is payable but could be pleaded in other decrees and should be gone into and a decision given, as, under the Privy Council decision in *Oudh Commercial Bank, Ltd., Fyzabad* v. *Thakurain Bind Basni Kuar*[2], the parties were at liberty to contract as they liked regarding the terms of a decree, and such adjustments could be gone into under section 47, Civil Procedure Code. So, he set aside the order of the District Munsif and directed a full enquiry into the alleged arrangement and adjustment set up by the judgment-debtor, allowing both sides to let in all relevant oral and documentary evidence they liked to adduce, and directing the appeal costs to abide the result of the remanded Execution Petition. The decree-holder has filed this Civil Miscellaneous Appeal against that order of remand.

I have perused the entire records, and heard the learned counsel on both sides. Mr. Rajeswara Rao, for the appellant, has raised three main contentions. The first is that the learned Subordinate Judge himself, having relied on the ruling in *Narayanaswami* v. *Rangaswami*[1] and having held that an adjustment not certified by Court regarding a decree where money is payable under the decree cannot be gone into, erred in directing an enquiry into this arrangement regarding a decree where there was a substantial sum of money, namely, Rs. 145 payable under the decree as costs. I cannot agree. It seems to me that the ruling relied on

1. (1926) 50 M.L.J. 547 : I.L.R. 49 Mad. 716. 2. (1939) 1 M.L.J. 652 (P.C.).

by Mr. Rajeswara Rao for this position will not help him. No doubt, he is quite right in relying on the position that where the decree proper provides for payment of *money*, as well as other reliefs, an adjustment of such a complex decree could not be recognised, unless certified to the Court within the time allowed under Order 21, rule 2, Civil Procedure Code. In other words, supposing there is a decree for recovery of possession of immoveable properties and for a sum of money as mesne profits, or arrears of rent, or damages, the ruling in *Narayanaswami* v. *Rangaswami*[1] will certainly preclude an enquiry into an arrangement not certified to Court within the prescribed time under Order 21, rule 2, Civil Procedure Code. But it seems to be quite unsustainable to contend that costs, which are a feature of almost every decree whether in cases of immoveable property or pure money decrees or even guardianship petitions, matrimonial petitions, etc., can be held to be a portion of the complex *decree proper*, as contemplated in the ruling relied on by him. One simple test will be this. Can any one sue another for *costs alone* before the suit is decided, though it is true that in every plaint one of the reliefs usually claimed is costs; so I take it that the ruling relied on by him will apply only to cases where money is claimed as a relief in the suit and not merely costs allowed in the decree as an adjunct to such reliefs. It is significant to note that our Court has not taken as wide a view regarding Order 21, rule 2, like the Bombay, Calcutta, Nagpur and Patna High Courts, and applied it to every kind of decree, and has specifically restricted its application to complex decrees containing a decree for money *as part of the decree* and, of course, also to the costs portion of other decrees where costs are allowed. If Mr. Rajeswara Rao's contention were accepted the decision in *Narayanaswami* v. *Rangaswami*[1] (which follows a long catena of decisions as in *Sankaran* v. *Ramara*[2], *Abdul* v. *Bathula*[3] and *Ramakrishna* v. *Balakrishna*[4]) will be creating a distinction without a difference which I am loath to believe is what the learned Judges intended. So, though in the Privy Council ruling in *Oudh Commercial Bank, Ltd., Fyzabad* v. *Thakarain Bind Basni Kuar*[5] it was held generally (*see* page 662) that an uncertified adjustment could not be recognised, I overrule this contention in the circumstances of this case.

There is greater point in his next contention, namely, in execution, that, even so, costs, once decreed, become money payable under a decree and, therefore, under Order XXI, rules 2 and 4, payment or adjustment of money payable even as regards costs in a decree shall not be recognised by any Court executing a decree unless it has been certified within the time prescribed, as it is "money payable under a decree of any kind". He said that Order 21, rules 2 and 4, applied to a partial discharge also. The learned counsel for the opposite side has no satisfactory reply to this contention, and I accept it as correct. The ruling in *Ammaniamma* v. *Mudappa*[6], by a Bench of this Court, makes it clear. In that view, the lower Court's order would have to be modified by giving the decree-holder full liberty to proceed with the execution petition as regards *costs*, leaving the other matter, namely, the alleged arrangement regarding the plot of land and the wall, to be gone into by the learned District Munsiff at the remanded hearing. Though the judgment-debtor contended that he agreed to pay Rs. 150 to the decree-holder for costs, that was not an adjustment proper, since Rs. 145 had been awarded as costs in the decree itself, and the balance of Rs. 5 represented only the interest payable. The learned counsel for the judgment-debtor said that his client was always ready to pay the costs. Mr. Rajeswara Rao's contention that once costs are awarded, a money decree would become part of the complex decree does not appeal to me. Then there will be very few decrees which will ever be covered by adjustments or arrangements, as, in almost every decree, regarding immoveable property, etc., there will be an order of costs. But that need not stand in the way of my recognising the force of this contention and allowing execution to proceed for costs.

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1. (1926) 50 M.L.J. 547 : I.L.R. 49 Mad. 716.
2. (1898) 8 M.L.J. 173 : I.L.R. 22 Mad. 182.
3. (1914) 23 I.C. 530.
4. (1919) I.L.R. 43 Mad. 476.
5. (1939) 1 M.L.J. 652 : L.R. 66 I.A. 84 : I.L.R. 14 Luck. 192 (P.C.).
6. (1944) 2 M.L.J. 336.

The third contention of Mr. Rajeswara Rao, was that the arrangement set up by the judgment-debtor regarding the land and the wall was too ludicrous and incredible to deserve any remand for consideration. I cannot agree. This is not the stage where we can go into the alleged incredible nature of an arrangement. No evidence has been let in, and it will be improper for any Court to hold an arrangement to be incredible before considering the evidence regarding it. Even a lunatic can be pronounced to be so by a Court only after hearing him.

In the result, the judgment and decree of the lower appellate Court is modified by allowing the execution petition to proceed regarding costs alone, and is confirmed regarding the remand to the District Munsif for an enquiry into the arrangement set up about the strip of land and wall. In the circumstances, I direct the respondent to pay half the advocate's fees of the appellant in this Civil Miscellaneous Appeal and his full printing charges and bear his own costs himself.

K.C. *Order modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

Polavarapu Venkateswarlu, minor by guardian and mother Hanumamma .. *Petitioner**

v.

Polavarapu Subbayya .. *Respondent.*

Civil Procedure Code (V of 1908), section 151—Scope of the inherent powers—Power of Court to direct parties to submit to a blood test by expert in suit where a question of legitimacy is raised.

Section 151, Civil Procedure Code, has been introduced into the Statute Book to give effect to the inherent powers of Courts. Such powers can only be exercised *ex debito justitiæ* and not on the mere invocation of parties or on the mere volition of Courts. There is no procedure either in the Civil Procedure Code or the Evidence Act which provides for a blood test being made of a minor and his mother when the father is disputing the legitimacy of the minor. If parties are unwilling to submit to such a test the Court has no power to direct them to submit themselves to such a test.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Bapatla, dated 25th July, 1950, in I.A. No. 933 of 1950, in O.S. No. 123 of 1949.

K. Krishnamurthi for Petitioner.

V. Subrahmanyam and *M. Ramakrishna* for Respondent.

The Court delivered the following

JUDGMENT.—The application out of which this Civil Revision Petition arises is one under section 151, Civil Procedure Code. The controversy between the parties to the original suit in which the application was filed is as to the legitimacy of the plaintiff which the defendant, the alleged father, is disputing. The suit is one for partition.

The defendant applied under section 151, Civil Procedure Code, for a direction from the Court to the plaintiff and his mother, his next friend, to appear in person before the Court in order to enable a medical expert to take samples of their blood. The learned Judge below has ordered the application in these terms :

"After hearing both the parties, it appears to me that it is necessary that the plaintiff should be first examined by the medical expert and he should give his opinion to the Court whether it is safe to take some blood from him. For appearance of expert, plaintiff, his mother and the first defendant on 5th August, 1950."

After this order the defendant served a notice on the pleader for the plaintiff in these terms :

"You are required to please state whether your client is prepared to give blood of her son, that is, the plaintiff, and her own, if the expert says that there is test to recognise the paternity of a disputed child and that there is no danger for the child if the blood is taken from the child. You are required by this Honourable Court to file a memo. also giving the above particulars."

*C. R. P. No. 1205 of 1950. 11th January, 1951.

In answer to this notice the plaintiff's pleader replied as follows :

"The High Court has ordered stay of all proceedings in pursuance of the order of the Court directing the plaintiff and his next friend to be in Court for examination. This question therefore cannot arise at this stage."

Mr. Krishnamurthi in revision against the order of the Court on the defendant's application aforesaid contends that there is no warrant in law for an application of this kind ; he also says that there is no provision of law which compels his clients to offer any blood of theirs for the kind of test sought to be taken out by the defendant.

I am clear that in both these contentions the learned counsel is correct. Section 151, Civil Procedure Code, has been introduced into the Statute book to give effect to the inherent powers of Courts as expounded by Woodroffe, J., in *Hukum Chand Boid* v. *Kamalan and Singh*[1]. Such powers can only be exercised *ex debito justitiæ* and not on the mere invocation of parties or on the mere volition of Courts. There is no procedure either in the Civil Procedure Code or in the Indian Evidence Act which provides for a test of the kind sought to be taken by the defendant in the present case. It is said by Mr. Ramakrishna for the respondent before me that in England this sort of test is resorted to by Courts where the question of non-access in connection with an issue of legitimacy arises for consideration. My attention has been drawn by learned counsel to page 69 of Taylor's Principles and Practice of Medical Jurisprudence, Volume 2, where it is stated thus :

"In *Wilson* v. *Wilson*, Lancet 1942 I. 570, evidence was given that the husband's group was OM, that the wife's was BM, and that the child's was ABN. The Court held that the husband was not the father of the child, and granted a decree for nullity."

It is also pointed out by learned counsel that in the text books on Medical Jurisprudence and Toxicology by Rai Bahadur Jaisingh P. Modi, (8th edition), at page 94, reference is made to a case decided by a Criminal Court at Mercara in June, 1941, in which the paternity and maternity of the child being under dispute, the Court resorted to the results of the blood grouping test.

That may be. But I am not in any event satisfied that if the parties are unwilling to offer their blood for a test of this kind this Court can force them to do so. Mr. Krishnamurthi says that his clients are not prepared to offer their blood for such a test.

In these circumstances there was no power in the Court below to make the order it did. The order is accordingly set aside. The Revision Petition succeeds and the respondent will pay the costs of the petitioner here and in the Court below.

V.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VISWANATHA SASTRI.

Saraswathi Raithi and others .. *Appellants* *

v.

Duggamma Shedthi and others .. *Respondents.*

Aliyasanthana and Marumakkathayam Law—Maintenance of junior members of the family—Nature of the right—Quantum of maintenance—Determination—Principles—Legitimate expenses which can be incurred by ejamen or karnavan.

Though it was thought at one time that a junior member of a tarwad had a right to be maintained only in the family house and had no right to separate maintenance if he or she resided elsewhere, to-day a junior member who leaves the tarwad house to live separately with her husband and children is entitled to separate maintenance, and a male who lives separately from the tarwad in order to pursue his vocation or for other reasonable cause, is likewise entitled. Formerly a right to maintenance meant only a right to sufficient food, raiment and a small quantity of oil. To-day the right includes a right to "menchilavu" or extra expenditure necessary for leading a comfortable life consistently with the status, dignity and the means of the family and the needs of its members under the conditions of modern life.

1. (1905) I.L.R. 33 Cal. 927 at 931 and 932.

* Appeal Nol 294 of 1947. 22nd November, 1950.

The imparting of school or collegiate education to the junior members of the family must now be held to be a legitimate purpose for which the karnavan or ejaman is entitled to spend the funds of the tarwad so long as the expenditure is reasonable and consistent with the income of the tarwad and the needs of the other members of the family. If there is no facility for imparting education in or near the tarwad house and there are several boys and girls that have to be educated in schools and colleges, there is nothing improper in the ejaman or karnavan setting up a separate establishment in a city where educational facilities are available and providing for the residence and mess of the students who pursue their studies. The fact that the husbands of the ladies or the children of the male members of the tarwad used to come and stay at intervals in such an establishment would not result in the karnavan becoming liable to account in respect of expenses incurred by him for their food and clothing. Nor would the karnavan be accountable for the expenses incurred by him in receiving and maintaining guests or near relations of the family.

Though a junior member of a tarwad is co-proprietor of the tarwad properties with the karnavan and other members, the karnavan has very large powers of administration of the tarwad properties and its funds and the junior members cannot claim that the whole of the net income of the tarwad should be distributed among the several members or accounted for as if they were tenants-in-common. A junior member is not entitled to claim an aliquot share of the net income of the tarwad properties and a karnavan is not accountable if he gives some members more than what he gives to others, so long as he gives to each what under the circumstances, would be a reasonable allowance for his or her maintenance.

Appeal against the decree of the Court of the Subordinate Judge, South Kanara, in O.S. No. 102 of 1945.

K. Y. Adiga, K. P. Adiga and *S. Ramayya Naick* for Appellants.

A. Narayana Pai, K. S. Shetty and *K. Srinivasa Rao* for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiffs, here appellants, claim maintenance at a rate higher than that decreed to them by the trial Court. The parties are members of an Aliyasanthana family of which the first defendant is the ejamanthi. Plaintiffs 2 to 7 are the children of the first plaintiff and the first plaintiff and defendants 2 to 8 are the daughters and sons of the first defendant. There were 28 members of the branch of the first defendant on the date of suit, and the properties out of which maintenance is now claimed by the plaintiffs were allotted to the branch of the first defendant under an award, Exhibit D-39, dated 12th February, 1932. Though the suit was laid for the recovery of Rs. 10,000 as arrears of maintenance for the period from 1st May, 1934, till 25th October, 1945, the Court below granted a decree only for Rs. 2,668-6-0, for the period from July, 1941 to 25th October, 1945. On appeal an additional sum of Rs. 2,681-4-0 is claimed as maintenance for this period, the claim for the earlier years having been given up. Mr. Adiga for the appellants contends that the Court below has grossly under-estimated the available income of the family and has not applied the correct legal principles in determining the rate at which maintenance should be paid to the different plaintiffs.

The following is common ground :—The family house is at Kotadadi and the income of the family consists of rents, both cash and kind, received from its landed properties. The first defendant's husband, Subbayya Shetti of Marakada, was himself an affluent member of his family with a considerable income of his own, which he spent on himself and his children. He died in February, 1944. He purchased a town-house in Mangalore for the occupation of himself and his family. In 1934 the first defendant set up an establishment at Mangalore referred to in the evidence and in this judgment as the Mangalore bidar, intended mainly for the education of the children of her prolific family. Supplies of rice, straw, firewood, cocoanuts, vegetables, jaggery and fuel were sent from Kotadadi to Mangalore whenever necessary, and a mess was run at the Mangalore bidar. Day to day cash expenses incurred in the purchase of groceries and the like were also met, sometimes out of the family funds and sometimes from contributions made by or on behalf of the members of the family. The youngsters of the family who were receiving education at Mangalore were housed and fed at the Mangalore bidar, and their parents, whenever they happened to go to Mangalore, stayed with them. There was a residential family house and an establishment maintained at Kotadadi for the members of the family. Accounts of the receipts and disburse-

ments of the family were kept by or on behalf of the first defendant, but these accounts are not now available, the sons of the first defendant charging one another with the responsibility for their non-production. The first defendant being an old lady depended on one or other of her sons for the management of the properties, is not wholly to blame for the non-production of the accounts. There is, however, available a rough account of receipts and expenses maintained by the 8th defendant for the period beginning from January, 1944. On 22nd October, 1941, the plaintiffs, through their advocate, gave notice to the first defendant claiming arrears as well as future maintenance separately for themselves. The first plaintiff's husband, Ramanna Rai, has been in Government service, and the first plaintiff and some of their children were staying with him wherever he happened to be employed and also in the Mangalore bidar for various periods of time. During the period from July, 1941, till April 1944, there was a working arrangement under which the members of the family who lived at the Mangalore bidar agreed to share the expenses, though some of them paid and the others did not pay regularly. The first plaintiff's husband paid the charges incurred for the upkeep of his wife and children whenever they or any of them stayed in the Mangalore bidar during this period. This arrangement, however, ceased to be in force after April, 1944.

All the plaintiffs lived in the Mangalore bidar from July to December, 1942. From January, 1943, till the end of March, 1944, plaintiffs 2 and 3, and from April, 1944 till April, 1945, plaintiffs 2 to 6 lived in the Mangalore bidar. None of the plaintiffs lived there after April, 1945. The bulk of the family income consists of the rice rents received from tenants. Since the price of rice varies from time to time its conversion value also varies, and the maintenance awardable to the members of the family after deduction of the common family expenses, would also vary from year to year. The learned Judge has granted a decree at varying rates for the different periods for which maintenance was awarded.

Mr. Adiga for the appellants argues that in arriving at the net income of the family from which maintenance was payable to the plaintiffs, the learned Judge erred in deducting the expenses of the Mangalore bidar and that the only legitimate deductions that could be made were the expenses of the family and its establishment at the family house at Kotadadi. He contends that not only the children of female members of the family but also the wives and children of the male members were fed at the Mangalore bidar when they happened to go there, and that the expenses incurred on this account should not be deducted in arriving at the net income of the family available for distribution to the plaintiffs. He further maintains that the learned Judge erred in treating all members of the family alike, including majors and minors, and those who contributed to the Mangalore bidar and those who did not, and in giving the plaintiffs only a *pro rata* maintenance by dividing the net income of the family by the number of the members for the time being. No objection was taken to the other deductions like Viniyagas, Ejamanthi's expenses, building repairs, etc., allowed by the Court below from the gross receipts before arriving at the net income of the family available for distribution as maintenance to the members of the family, but objection was taken to the computation of the total income of the family made by the learned Judge.

I have been referred by learned counsel to some decisions of this Court dealing with the rights of junior members in an Aliyasanthana or Marumakkathayam family. Marumakkathayam or Aliyasanthana Law as administered to-day by the Courts, though resting on ancient usage, has largely been moulded by judicial decisions. So far as this branch of the law is concerned, Courts have not been inelastic, unyielding or unwilling to respond to social and economic changes and the needs of a progressive society. The old customary law did not recognise the union of man and wife as a valid or binding marriage, but regarded it as a state of concubinage into which the woman entered of her choice and was at liberty to change when she pleased. But to-day such unions are as permanent and sacred as the matrimonial ties recognised in other systems of law, and this Court has held that the

reasonable expenses of the marriage of a member of a Marumakkathayam or Aliyasanthana family have to be provided for by the tarwad if it has the means to do so. It was thought at one time that a junior member of a tarwad had a right to be maintained only in the family house and had no right to separate maintenance if he or she resided elsewhere. This resulted not only in the over-crowding of tarwad houses but also in retarding the growth of family ties and affection between the spouses and in acting as a clog upon the enterprise and initiative of the junior members of the tarwad. It had long ago become a recognised practice in the West Coast for a woman to live with her husband and her children. To-day a junior member who leaves the tarwad house to live separately with her husband and children is entitled to separate maintenance, and a male who lives separately from the tarwad in order to pursue his vocation or for other reasonable cause, is likewise entitled. Formerly a right to maintenance meant only a right to sufficient food, raiment and a small quantity of oil. To-day the right includes a right to "menchilavu" or extra expenditure necessary for leading a comfortable life consistently with the status, dignity and the means of the family and the needs of its members under the conditions of modern life.

In 1898, in *Krishnan* v. *Govinda Menon*[1], this Court, while recognising the obligation of a karnavan to educate the junior members of the tarwad, declared that it was not incumbent on him to

> "give the junior members education through the medium of the English language or on western lines"

and declined to order the karnavan to pay the school fees and other expenses incurred in imparting English education to the junior members on western lines. In 1907 this Court held in *Neelakanta Thiruvambi* v. *Ananthanarayana Aiyar*[2], that in the case of a well-to-do family the imparting of education in English to the junior members of the family was a necessary and proper purpose for which the funds of the tarwad could be spent and the properties of the tarwad could be made liable. Having regard to the high percentage of literacy in Kerala and Canara and to the very large number of people from this part of the country employed in public services both in India and outside, and also in the pursuit of other avocations, the imparting of school or collegiate education to the junior members of the family must now be held to be a legitimate purpose for which the karnavan or ejman is entitled to spend the funds of the tarwad so long as the expenditure is reasonable and consistent with the income of the tarwad and the needs of the other members of the family. If there is no facility for imparting education in or near the tarwad house and there are several boys and girls that have to be educated in schools or colleges, there is nothing improper in the ejman or karnavan setting up a separate establishment in a city where educational facilities are available and providing for the residence and mess of the students who pursue their studies. Judge-made law must be stable, but yet it cannot stand still ignoring the progress of society and the march of events. I hold the maintenance of the Mangalore bidar for the education of boys and girls of the Kotadadi family was a proper and necessary purpose for which the ejmanthi, the first defendant, was entitled to spend a reasonable portion of the income of the family properties. Some of the plaintiffs themselves have taken advantage of this establishment at Mangalore and I cannot accept Mr. Adiga's contention that the expenses of the Mangalore bidar should be left out of consideration in fixing a rate of maintenance for the junior members of the family. The fact that the husbands of the ladies or the children of the male members of the tarwad came and stayed at intervals at the Mangalore bidar, does not result in the karnavan becoming liable to account in respect of the expenses incurred by him for their food and lodging. I have no reason to think that people in the West Coast insist on such a sordid accounting by their karnavan. Nor does the law compel me to order the karnavan to account for the expenses incurred by him in receiving and maintaining guests or near relations of the family.

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1. (1898) 8 M.L.J. 294.
2. (1907) 19 M.L.J. 590.

With regard to the right of a junior member of an Aliyasanthana or Marumakkathayam family to maintenance, Mr. Adiga stressed the point that their right is not analogous to the right of the widow of an undivided coparcener in a Mitakshara family, but is of the same quality as the right of the male coparcener himself. It has no doubt been held in several decisions of this Court that a junior member of a tarwad is a co-proprietor of the tarwad properties with the karnavan and other members and that the right to maintenance is the mode in which this right of ownership is effectively exercised by the junior member. At the same time, it has also been recognised that the karnavan has very large powers of administration of the tarwad properties and its funds, and the junior members cannot claim that the whole of the net income of the tarwad should be distributed among the several members or accounted for as if they were tenants-in-common. The Mitakshara rule of stirpital division does not apply. Each individual member can claim maintenance for himself or herself and as a rule maintenance is awarded *per capita*. But a junior member is not entitled to claim an aliquot share of the net income of the tarwad properties and a karnavan is not accountable if he gives some members more than what he gives to others, so long as he gives to each what, under the circumstances, would be a reasonable, allowance for his or her subsistence. *Ekanat Thayu Kunji Ama* v. *Ekanat Shungunni Valia Kymal*[1]. The needs and requirements of the different members of the family may vary according to their age, health and other circumstances. The karnavan has to incur expenses in connection with payment of revenue on the lands, repairs to buildings, renewal of kanoms, births and deaths, performance of the customary chartities, reception of guests and relatives, maintenance of the establishment, and similar items. A prudent karnavan might set apart a portion of the income of the tarwad in order to meet these charges year by year. It is by taking into account these several factors that the rate of maintenance awardable to each member of the family can be settled. In my opinion, the learned Judge has not misapplied any of the well-settled principles of law in fixing the rate of maintenance for the plaintiffs.

I shall now proceed to consider the income from the tarwad properties during the period now in question and the amount that could be awarded as maintenance to the plaintiffs.

[After dealing with the evidence His Lordship concluded.]

Having given the matter my careful consideration, I am of the opinion that the ascertainment of the net income of the family and the outgoings of the family by the learned Subordinate Judge proceeds on a reasonable basis so far as the period now in suit is concerned. I must make it clear that I am not dealing with the rate of maintenance that may be awardable for the period subsequent to October, 1945, on the basis of the annual income of that period and that my decision is confined only to the amount that should be allowed for the period prior to the suit and has been arrived at on the somewhat inconclusive materials placed before the Court in this case.

There is, however, one slight omission in the Judgment of the learned Subordinate Judge. The 7th plaintiff, who was not in the Mangalore bidar from the end of March, 1944, till April, 1945, should have been awarded 14 muras of rice for that period or their value of Rs. 140 in addition to what has been granted by the learned Subordinate Judge, and I grant a decree accordingly. Subject to this slight modification, the appeal will stand dismissed with costs.

V. S. *Appeal dismissed.*

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1. (1882) I.L.R. 5 Mad. 71.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

N. P. Sethuram Naidu .. *Petitioner.**

Criminal trial—Evidence—Testimony of accomplices, informers and decoys—Rule as to necessity of corroboration.

The undoubted rule of Court which has now ripened almost into a rule of law is that, in the absence of sufficient corroboration by untainted evidence, the evidence of accomplices, informers and decoys should not form the basis of a conviction in a criminal case.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order passed by the Sessions Court, Coimbatore division, in C. A. No. 29 of 1948, dated 4th August, 1948 (C. C. No. 288 of 1947, Court of the Joint Magistrate, Coonoor).

K. S. Jayarama Ayyar for *V. V. Radhakrishnan* for Petitioner.

N. T. Raghunathan for the Public Prosecutor for the Crown.

The Court made the following

ORDER.—The petitioner in this case is one Sethuram Naidu who was the first accused in C. C. No. 288 of 1947, on the file of the Joint Magistrate, Coonoor. The second accused in that case was one Madana Gopalan, the petitioner's younger brother. Both of them had been put up under section 4 (1) (*a*) and (*i*), read with section 7, of the Prohibition Act, and were convicted by the Joint Magistrate of Coonoor. The petitioner was sentenced to undergo rigorous imprisonment for three months for each of the offences, and the sentences were directed to run concurrently. He was also asked to pay a fine of Rs. 500 for each offence in addition to the sentence of imprisonment. His brother, the second accused, was fined Rs. 500 for each offence, as he was only aged 20 and a sentence of imprisonment was considered to be not called for.

On appeal, the Additional Sessions Judge, Coimbatore, set aside the convictions and sentences of the second accused on both the Courts, giving him the benefit of the doubt as he held that there was no corroboration regarding him, of the evidence of P. W. 1, an accomplice, though he considered P. W. 1's evidence to be true. He confirmed the conviction of this petitioner for the offence under section 4 (1) (*a*) (*i*), and the sentence passed thereunder with some slight modification regarding the default imprisonment as he considered that there was sufficient corroboration, regarding him, of the evidence of P. W. 1, the accomplice.

The facts, according to the prosecution, are briefly these. The petitioner is the proprietor of the National Radio Shop, Ootacamund, and lives in a house called Mayfield. The second accused, his younger brother, lives with him. At 8-30 A.M. on 28th October, 1947, P. W. 5, the Circle Inspector of Police, Ootacamund, learnt from an informant (possibly Basha Sait, an enemy of the petitioner) that the petitioner was stocking White Horse whisky and offering it for sale at Rs. 50 a bottle. As prohibition had begun to be enforced in Ootacamund from 1st October, 1947, P. W. 5 gave the informant Rs. 100 in marked five rupee and ten rupee currency notes keeping a note of the numbers on a slip of paper (Exhibit P-4) and asked him to go and purchase two bottles of White Horse whisky from the petitioner. At 9-30 A.M., P. W. 5 and two Sergeants went to the Ootacamund Cafe (some five minutes' walk from P. W. 1's shop) and waited there. P. W. 1, who is addicted to drink for years and years and was a friend of the petitioner and was indebted to him for Rs. 6,000 on promissory notes, and another Rs. 150 on a hand loan, took the money from the informant and gave it to the petitioner in his radio shop and asked him for two bottles of whisky "for a friend" (Bhasha Sait whose name was not mentioned to the petitioner). The petitioner then rang up his brother, the second accused, who went to the shop, from his house "Mayfield", and was asked by the petitioner to give P. W. 1 two quarter bottles of White Horse whisky.

* Cr. R. C. No. 949 of 1948. 23rd November, 1949.
(Cr. R. P. No. 894 of 1948).

Then the accused, who has been acquitted by the lower appellate Court, is said to have taken P. W. 1 to "Mayfield". P. W. 1 was made to wait there in the bed room of the petitioner. After ten minutes, the second accused took and gave him two bottles of White Horse whisky in cardboard boxes, M.Os. 1 and 2. The boxes were damp, evidently because they had been buried underground, as drunkards are said to appreciate wine and whisky buried underground as being of superior quality. P.W. 1 was alleged to have gone with the two bottles later on, to the petitioner's shop. The petitioner was then said to have asked him, "have you got the bottles", and P. W. 1 was said to have replied, "yes". Then P. W. 1 went and sat in a car belonging to Basha Sait, who must have sent him, in consultation with P. W. 5, for purchasing the whisky in order to entrap his enemy, the petitioner, outside the Ootacamund Cafe. P. W. 5 and his sergeants, who were waiting there for P. W. 1, went out and demanded of P. W. 1 what he had with him. He replied that he had two whisky bottles, and took them out of his trouser pockets and handed them over to P. W. 5. P. W. 5 then searched "Mayfield" but could not recover anything incriminating. He searched "Ardene Lodge", a neighbouring house belonging to another man, and recovered a bottle of White Horse whisky of the same type as these two bottles and said to have been buried there by P.W. 1.

It is obvious that in the circumstances the main thing to consider is as Mr. K. S. Jayarama Aiyar for the petitioner has urged, whether the evidence of P. W. 1 which was undoubtedly that of an accomplice, had been sufficiently corroborated by untainted evidence to warrant the conviction of the petitioner. The prosecution relied upon two pieces of corroboration, namely, the recovery of the two bottles of whisky from P. W. 1 some ten minutes after their alleged sale to him, and the recovery by P. W. 5 of the marked notes given by P. W. 5 to the informant, from the petitioner who, however, said that they had been given to him by P. W. 1 towards the hand loan of Rs. 150 due to him and not for two bottles of whisky. P. W. 1, admittedly, owed the petitioner a hand loan of Rs. 150 in addition to the promissory note loans aggregating to Rs. 6,000. Both these pieces of corroboration suffer from grave infirmities and defects, as urged by Mr. K. S. Jayarama Aiyar.

The recovery of the marked notes from the petitioner is of little avail, because the petitioner might have received them from P. W. 1 towards his hand loan, as urged by him, without knowing anything about the secret understanding between P. W. 1 and the informant and P. W. 5 and not even noting that the notes given to him by P. W. 1 were marked notes. Of course, it is curious that only Rs. 100 were returned, and not the full Rs. 150, but such a part payment is not impossible.

As regards the recovery of the two whisky bottles from P. W. 1, that too will not be a strong piece of corroboration of P. W. 1's tainted evidence in this case, as P. W. 1 is not a man who can be implicitly believed as he was admittedly betraying a friend (the petitioner) who had according to him "helped him very much in difficulties", and was even pretending that he was not a decoy of P. W. 5 and Basha, and had not only his own grievance against the petitioner regarding the loans but had also become a tool of Basha, an enemy of the petitioner. What is more, according to P. W. 2, it was P. W. 1 who made him bury a similar whisky bottle in the compound of a bungalow called "Ardene Lodge", belonging to Sowcar Chinnia Goudar, a neighbour, on the very morning of this alleged sale. Now it is obvious that if P. W. 1, a confirmed drink addict, had a very similar bottle of whisky of his own, shortly after the introduction of prohibition in Ooty, to be given to P. W. 2 for burying secretly in another man's bungalow, he might have had these two bottles also on his own, and his evidence that these two bottles were sold to him by the petitioner and the second accused cannot be taken at its face value, much less as conclusive proof of the truth of that statement. Unfortunately in this case P. W. 5 and his sergeants did not lie in hiding and catch the second accused in the act of handing over the two bottles to P. W. 1 or hear the petitioner ask the 2nd accused to go and deliver the bottles to P. W. 1, or hear him ask P. W. 1, later

on, at the shop, if he had received the two bottles. The story of P. W. 1 that he went to the shop after receiving the bottles from the 2nd accused, at Mayfield, sounded pointless, and as meant only for implicating the petitioner fully in this case. The evidence of accomplices, informers, approvers, and decoys ought to be scrutinised very carefully and accepted only when fully corroborated. There is no satisfactory evidence to prove the handing of the two bottles to P. W. 1 by the 2nd accused, and the lower Court seems to have erroneously thought that the petitioner handed over the bottles to P. W. 1. The second accused has been acquitted. There is no corroboration of P. W. 1's evidence that the petitioner asked accused 2 to go to the house and give the bottles, or of the petitioner's asking P. W. 1, at the shop after he had got delivery of the two bottles from the second accused at the house, "Have you got the bottles now", and P. W. 1's replying "yes". Nor was any whisky bottle recovered from "Mayfield" though if the petitioner was a regular trafficker in such bottles, as alleged by the prosecution, it might be reasonable to find some more bottles there.

The evidence of P. W. 5 and others in the case is not directly to the point; and everything depends on the evidence of P. W. 1 and the corroborative evidence referred to above. It follows that, in the circumstances, the petitioner deserves to be given the benefit of the doubt and acquitted, though there is a lot of suspicion against him (as also against accused 2, who was acquitted), as P. W. 1's evidence has not been sufficiently corroborated by untainted evidence. The undoubted rule of Court, which has now ripened almost into a rule of law, is that, in the absence of sufficient corroboration by untainted evidence, the evidence of accomplices, informers, and decoys should not form the basis of a conviction in a criminal case.

I, therefore, acquit the petitioner, by giving him the benefit of the doubt, and cancel his bail bond, and direct the fine, if paid, to be refunded to him.

V. S. *Petition allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE BASHEER AHMED SAYEED.

Vasudeva Rao .. *Appellant**

v.

C. K. Rangai Gounder Managing Trustee of Sri Koniyamman Devasthanam and others .. *Respondents.*

Madras Hindu Religious Endowments Act (V of 1944), section 34—Effect—Property dedicated for performance of kattalais, ubayams and utsavams in various temples making the Hindu Religious Endowments Committee dharmakartha—Suit for possession filed (before dissolution of committees by the operation of Act V of 1944) by trustee of one of the temples with the sanction of Endowments Board—Non-maintainability—Right of Endowments Committees to hold property.

On 25th October, 1918, *R* executed a will which provided *inter alia* "My wife *P* shall, after my lifetime, enjoy the undermentioned property till her lifetime without effecting any alienation whatsoever. She shall, after deducting the amount utilised for the expenses of her maintenance from out of the income thereof, spend according to her pleasure a sum of not less than Rs. 70 every year from out of the balance left over and conduct Skanda Shasti and Soorasamhara festival of Subramania Swami Temple, Coimbatore . . . . . After her lifetime the Hindu Religious Endowments Committee, Coimbatore taluk, shall take possession of the undermentioned property and shall from out of the balance left over after deducting from the income thereof the expenses of repairs and municipal tax in respect of the building, erect a mantapam in front of my house and conduct mantapa kattalai during Radhotsavam of Koniamman temple." There were also other items of festivals and ubayams to be performed in other temples. The widow *P* died in July 1943 and her sister's son was in possession. *X* who was appointed as the managing trustee of the Koniamman devasthanam by the Hindu Religious Endowments Board filed on 15th January, 1944, a suit for a declaration of plaintiff's title and right to management as well as for recovery of possession of the suit house.

Held, (1) an appropriation of property for a specific religious or charitable purpose is all that is necessary for a valid dedication. On the death of *P* the testator intended that the Hindu Religious Endowments Committee of Coimbatore taluk as the dharmakartha for the charities should take

* Appeal No. 92 of 1946. 18th August, 1950.

possession of the house and utilise portions of the income for the specific objects mentioned in the will. As there was no surplus income to be enjoyed by the legatees or heirs of the testator the only inference that is possible is that the entire property is dedicated as a trust.

(ii) Sections 5 and 7 of Act XX of 1863 read with the preamble to Regulation VII of 1817 and clause XV of the Regulation contemplate that the committee can receive and hold property, and therefore the constitution of the temple committee to manage as dharmakartha cannot be questioned. The Devasthanam Committees which were in existence when Madras Act I of 1925 (which repealed Act XX of 1863 and Regulation VII of 1817 in so far as they apply to Hindu Religious Endowments in the Province of Madras) came into force should be deemed to have been duly constituted under the provisions of the Madras Hindu Religious Endowments Act. Madras Act I of 1925 was repealed by Madras Act II of 1927, section 83 of which corresponds to section 79 of Madras Act I of 1925. Madras Act II of 1927 was further amended by Madras Act V of 1944, which by section 34 omitted section 83 of Madras Act II of 1927. The result is that all committees constituted under Madras Act I of 1925 or under Act II of 1927 have got dissolved and did not have any legal existence after 7th March, 1944, when Madras Act V of 1944 came into force. Accordingly as the committee could function as a trustee and was in existence on the 15th January, 1944, when the plaint was filed, none of its powers could have been exercised by the trustee of the Koniamman temple after getting sanction of the Hindu Religious Endowments Board. The plaintiff had no *locus standi* and had no authority to come to Court for the purpose of the reliefs asked for in the plaint.

Appeal against the decree of the Court of the Subordinate Judge of Coimbatore dated 3rd September, 1945 and made in O. S. No. 37 of 1944.

S. Ramachandra Aiyar for Appellant.

K. S. Desikan and *M. R. Narayanaswami* for Respondents.

The Judgment of the Court was delivered by

Govinda Menon, J.—The suit out of which this appeal arises was for a declaration of the plaintiff's title and right of management as well as for recovery of possession, of the suit house together with past and future rent or damages by way of use and occupation. The Subordinate Judge of Coimbatore has held that the plaintiff is entitled to the property claimed by him with all the rights of management of the said property; but the relief for possession was disallowed. There is a further direction that the plaintiff is entitled to collect the rents from such of the defendants as are occupying portions of the suit house and utilise the funds for the ceremonies stipulated in the will of Ranoji Rao. There were directions regarding the deposit of rent by the second to the fourth defendants along with the order to pay future rent at the same rate. Other minor reliefs were awarded to the plaintiff which it is not necessary to mention in detail. The first defendant has appealed against that decision of the learned Subordinate Judge and the second defendant has filed a memorandum of cross-objections against that portion of the decree which went against his contentions.

The basis of the plaintiff's title is that he has been appointed as the managing trustee of Sri Koniamman Devasthanam by the Hindu Religious Endowments Board and as such he is entitled to ask for the reliefs claimed by him in the plaint. The first defendant is said to be the nearest heir of Ranoji Rao who was originally the owner of the property. On the 25th October, 1918, Ranoji Rao executed a will by which he made certain bequests and the question for consideration is whether that will created a trust so far as the bequests are concerned. It is common ground that Ranoji Rao's wife Parvathi Bai who was a legatee of some of the items died only in July, 1943. The plaintiff states that the widow Parvathi Bai was in possession and enjoyment of the suit house according to the provisions of the will and died in July, 1943. Before her death she had leased out portions of the house to defendants 2 to 4 separately. The first defendant is the son of Parvathi Bai's sister and as stated in the plaint he got into possession of the properties after the death of Parvathi Bai and is managing the same. Though the plaintiff, as the managing trustee of Sri Koniamman Temple to which the property has been dedicated in the will, demanded from the first defendant such possession as he was entitled to have, he sent a reply repudiating the will and containing false allegations. Therefore the plaintiff prayed that as the trustee of Sri Koniamman Devasthanam he is obliged to file a suit for declaration of title and recovery of possession

of the suit house. The Hindu Religious Endowments Board has granted him sanction to file the suit by its order dated 21st October, 1943.

The first defendant's plea as set forth in the written statement is that the plaintiff has no cause of action and that there was no dedication or creation of a trust by Ranoji Rao and consequently on his death and on the death of his widow Parvathi Bai, the property must, in law, be held to have passed to the heirs of Ranoji Rao. Therefore, neither the Koniamman Devasthanam nor the Hindu Religious Endowments Committee nor any trustee, has any manner of right to the suit property and as such the plaintiff's claim for possession was unsustainable. The alternative case set up by the first defendant was that even on the footing that the properties have been allotted for religious and charitable trusts, Parvathi Bai was the sole person entitled to the management thereof and in the absence of any provision for the management of the charities made by the founder, after Parvathi Bai's lifetime, the right of management passes on to the heirs of the founder, especially as before the death of Parvathi Bai, the Taluk Devasthanam Committee named in the will has ceased to exist. Therefore in any event there has been an intestacy in respect of the suit property and the major portion of the income. In any view of the case it was contended that as there has been an intestacy in respect of the suit property and the major portion of the income barring the sums directed to be spent for specified purposes, the property should, in law, be deemed to have passed to the heirs of Ranoji Rao subject to a charge for the performance of specific charities. Defendants 2 to 4 who were tenants of the suit property were willing to pay the rent into Court and they further said that during the lifetime of Parvathi Bai they had paid all the rent to her.

On these pleadings the learned Subordinate Judge framed five issues of which the most important one for consideration was whether the dedication is true and valid and whether the suit by the plaintiff is maintainable. Though in the trial Court the question of the genuineness of the will was raised by the contesting defendants and the Judge gave a finding that it was the last will and testament of late Ranoji Rao, that contention has not been seriously raised in this Court. What we have therefore to decide is whether there was a valid dedication of the property in favour of the trust, and secondly even if there is a valid dedication, whether the plaintiff is entitled to bring this suit. The relevant portions of the will are as follows:

"My wife Parvathi Bai Ammal shall, after my lifetime, enjoy the undermentioned property till her lifetime without effecting any alienation whatsoever. If she were to effect any such alienation, it shall not be valid. She shall, after deducting the amount utilised for the expenses of her maintenance from out of the income thereof, spend according to her pleasure a sum of not less than Rs. 70 (Rupees seventy) every year from out of the balance left over and conduct Skanda Shashti and Soorasamhara festival for Sri Subramaniaswami at Coimbatore Fort. My gold and silver jewels as well as other movable properties shall belong only to my wife. After her lifetime, the Hindu Religious Endowments Committee, Coimbatore taluk, and the Dharmakarthas (trustees) of the above Devasthanam shall take possession of the undermentioned property and shall from out of the balance left over after deducting from the income thereof the expenses of repairs and municipal tax in respect of the building, erect a mantapam in front of my house and conduct mandapa kattalai every year for the Amman for ten days during the time of Radhotsavam (car festival) in the month of Masi (February-March) in Sri Koniamman temple, offer neivethya prasadam and deeparadhana at a cost of not less than Rs. 30 (Rupees thirty) on the tenth day darshan and distribute the prasadam to the people. Further, on the day of Vinayaka Chathurthi in the month of Avani of every year, Sri Vinayakar deity in Sri Subramaniaswami temple at Fort shall be taken round in procession from the temple by spending a sum of not less than Rs. 15 (Rupees fifteen). Abhishekam and archana shall be conducted in my name and in the name of my wife for Sri Sangameswaraswami during the time of festival at a cost of Rs. 15 (Rupees fifteen). Further repairs, etc., shall be effected to the aforesaid temple. And during the time of festival in the month of Panguni (March-April) and the festival on the day of Arudra Darshanam in Sri Nataraja Devasthanam at Perur, abhishekam and archana shall be conducted every year in my name and in the name of my wife Parvathi Bai Ammal at a cost of not less than Rs. 40 (Rupees forty) for each festival. The Hindu Religious Endowments Committee and the Dharmakarthas shall, in co-operation, duly perform all the above acts without fail, maintain proper account and submit every year without fail the abstract of the balance sheet in respect of the account of each year to the District Court or the Subordinate Court of Coimbatore."

In the translation furnished it is conceded that there is some slight mistake and that is that the will does not make any distinction between the Hindu Religious

Endowments Committee and the Dharmakartha of the Devasthanam. What the will contemplates is that the Hindu Religious Endowments Committee shall be the Dharmakartha so far as the performance of the various charities is concerned. The exact Tamil expression is as follows :

"மேற்படியார் ஜீவ தசைக்குப் பிறகு இதனடியில் கண்ட சொத்தை கோயம் புத்தூர் தாலுக்கா தேவஸ்தான கமிட்டியாரும் மேற்படி தேவஸ்தான தர்மகர்த்தர்கள் வசதிப்படித்திக்கொண்டு அதன் வரும்படியில் கட்டிடத்தில் நிவேச், etc , etc."

The correct interpretation of this sentence is that the testator does not make any distinction between the Hindu Religious Endowments Committee and the Dharmakartha. What the testator contemplates is the conferment of the right of dharmakartha or trustee of these charities on the Hindu Religious Endowments Committee. Therefore his intention was that after the death of his wife, the Hindu Religious Endowments Committee of Coimbatore Taluk shall function as the Dharmakartha of the Devasthanam for the performance of the charities, *viz.*, the erection of a mantapam in front of the house and conducting the mantapam kattalai every year for the Amman for ten days during the radhotsavam in the month of Masi in the Sri Koniamman temple and offering neivethya prasadam and deeparadhana at a cost of not less than Rs. 30. The dharmakartha was to take in procession the Sri Vinayakar deity in Sri Subramaniaswami temple at Fort in the month of Avani on the Vinayakachathurthi day. The trustee has to conduct the abhishekams and archanas in the names of the testator and his wife at a cost of Rs. 15 in the Sri Sangameswaraswami temple ; and lastly, during the festival in the month of Panguni and on the Arudra Darshanam day in the Sri Nataraja Devasthanam in Perur, the trustee has to conduct abhishekams and archanas in his name and in his wife's name. It is conceded that the Koniamman temple trustee, the Subramaniaswami temple trustee, the Sangameswaraswami temple trustee and the Nataraja Devasthanam trustee at Perur are all different individuals. Therefore what we have to find is whether, for the purpose of these religious ceremonies in each of these temples, the Hindu Religious Devasthanam Committee of Coimbatore is made the trustee. It cannot for a moment be contended that Parvathi Bai had any absolute right in the property. The question whether the Devasthanam Committee becomes the dharmakartha for the performance of these religious ceremonies will arise only after Parvathi Bai's death. On a careful reading of the above provisions in the will, we have no doubt whatever that what the testator contemplated was the creation of a trust in favour of the various temples as specified in the will and the utilisation of the income for those expenses. Whatever might be said with regard to the spending of the amount during the lifetime of Parvathi Bai, after her lifetime the person mentioned in the will has to take up the management and administer the trust.

The chief contention of the learned counsel for the appellant is that the will does not transfer ownership to any of the religious institutions in respect of which directions have been given by the testator providing for the performance of the specified kattalais or ceremonies. What we have to see is whether there has been any transfer of ownership in favour of the trustee. We do not read the aforesaid provisions of the will as amounting to a dedication of the income for certain purposes, and the right in the corpus remaining with the testator's widow and after her lifetime vesting in the heirs at law. The appellant's contention is that it is only intended as a charge for the performance of the various ubayams. For this purpose our attention was invited to a passage in page 922 of Mayne's Hindu Law, 10th edition as well as to decisions in *Sree Sree Ishwaree Thakurani* v. *Braja Nath De*[1], *Ramappa Naidu* v. *Lakshmanan Chettiar*[2], *Thiruvengadamudayanaiya* v. *Narasimhaswamiaiya*[3] and *Jainambukanni Ammal* v. *Ruthrapathi Pillai*[4]. On the other hand the learned counsel for the respondents relied upon the earlier passage in page 922 of Mayne's

1. (1937) 2 M.L.J. 527 : L.R. 64 I.A. 203 : I.L.R. (1937) 2 Cal. 447 (P.C.).
2. (1927) 54 M.L.J. 272.
3. (1941) 1 M.L.J. 488.
4. (1946) 1 M.L.J. 181.

Hindu Law and contended that the appropriation of the income for the specific purpose was tantamount to dedication of the property to the trust. What is mentioned in the document, reading it as a whole, is that a legal agency, *viz.*, the Hindu Religious Endowments Committee, was constituted to take charge of the property and perform the ceremonies mentioned in the various temples and such agency as takes possession should be the trustee and as such the Hindu Religious Endowments Committee shall be the trustee and the dharmakartha. It is further contended that a vested right is created in favour of the Committee. At page 922 in paragraph 791 of Mayne's Hindu Law it is stated that in order to create a valid dedication, a trust is not required and that an appropriation of property for a specific religious or charitable purpose is all that is necessary for a valid dedication. In our opinion that is what has been done in the present case. There is a direction that the income of the property should be appropriated for specific religious and charitable purposes and as such there has been a valid dedication. The learned author cites a number of cases, *viz.*, *Ram Dhan* v. *Prayag Narain*[1], *Nagappa Chettiar* v. *O. R. M. O. M. S. P. Firm*[2], which was confirmed by the Privy Council in *O. RM. O. M. SP. (Firm)* v. *Nagappa Chettiar*[3] and other cases. It is unnecessary for us to discuss any of these cases because, in our opinion, what has been done is not the earmarking of the income for a specific purpose but there has been a complete direction to appropriate the property for specific religious purposes. The argument of Mr. S. Ramachandra Ayyar for the appellant that we should read this document as a partial dedication, where a charge is created on the property, or there is a trust to receive, and apply for, a portion of the income for religious purposes is, in our opinion, unsound. What is decided here is that the property is given out and out for the performance of the religious purposes and the testator does not retain any proprietary rights in the property in favour of any of his heirs at law. The observations of their Lordships of the Judicial Committee in *Sree Sree Ishwari Bhubaneswari Thakurani* v. *Braja Nath De*[4], do not in any way help the appellant's contention. Their Lordships there observe :

> "The effect of a valid deed of dedication is to place the property comprised in the endowment *extra commercium* and beyond the reach of creditors. The dedication is not invalidated by reason of the fact that members of the settlor's family are nominated as shebait and given reasonable remuneration out of the endowment and also rights of residence in the dedicated property."

Their Lordships further draw the distinction between absolute and partial dedication and on the facts of that case they agreed with the lower Court that the deed in question effectively dedicated the properties to the service of the idol. We do not think that the learned advocate for the appellant can gain any support for his contention from the observations of their Lordships. The facts of the case in *Ramappa Naidu* v. *Lakshmanan Chettiar*[5], are absolutely different. It was found there that the charities which were detailed in the will would not consume any considerable portion of the income even if they were conducted on a lavish scale and that a very large amount of the income was left intact for the enjoyment of the family ; nor was it satisfactorily shown that all other properties were given to the son of the testator by the will at all. On these facts, the learned Judges Madhavan Nair and Curgenven, JJ., were of opinion that the properties covered by the will were not absolutely dedicated to the trust but were only charged with carrying out the trust as the dominating purpose and the intention of the testator, in executing the will, was to provide for the members of his family, and the maintenance and conduct of the charity was only of subsidiary importance. The facts of the present case are absolutely different from what the learned Judges had to consider therein. Similarly if we look at the facts of the case in *Thiruvengadamudayanaiya* v. *Narasimhaiwamiaiya*[6], it will be seen that the surplus income from the property, after expending a portion of the same for certain charitable purposes, was far greater than what was required to comply with the directions of the testa-

1. (1921) I.L.R. 43 All. 503.
2. I.L.R. (1939) Mad. 121.
3. (1941) 1 M.L.J. 393 : L.R. 67 I.A. 448 : I.L.R. (1941) Mad. 175 (P.C.).
4. (1937) 2 M.L.J. 527 : L.R. 64 I.A. 203 : I.L.R. (1937) 2 Cal. 447 at 455 (P.C.).
5. (1927) 54 M.L.J. 272.
6. (1941) 1 M.L.J. 488.

trix with regard to the religious and charitable purposes and under those circumstances the proper inference was that the property was merely charged to charitable uses and that the residuary legatee took the property subject to the charge. It is difficult to see how the decision in *Jainambukanni Ammal* v. *Ruthrapathy Pillai*[1], can be of any assistance to the appellant. What the learned judges held was that on reading the settlement deed as a whole, there was no gift of the surplus income to the sons or the members of the family in general and that the charity itself is the true beneficiary and that the testator's son-in-law should be considered to be a trustee of the charity and the only obligation of the trustee, for the time being, was to utilise the surplus income, if any, for the maintenance of the three specified relatives after whose death or effacement otherwise, there will be no obligation on the trustee to utilise any part of the income from the property for any object other than the charitable object mentioned in the document. There are observations in the judgment which tend to show that the proper construction was that there was a dedication of the property to charity. As observed by Rajamannar, J., as he then was, in that case after quoting the decision of the Judicial Committee in *Har Narayan* v. *Suja Koniwari*[2], in such cases the only rule which appears to be established is that there cannot be any fixed and absolute rule to construe the effect of any particular document.

We do not think that any of the cases cited by the appellant's counsel is against the interpretation which we are inclined to put upon the will. We have no doubt whatever that on the death of Parvathi Bai the testator intended that the Hindu Religious Endowments Committee of Coimbatore taluk, as the dharmakartha for these charities, should take over possession of the house and utilise portions of the income for the specific objects mentioned in the will. The reason why it was found necessary to appoint the Hindu Religious Endowments Committee as the dharmakartha was that the religious ceremonies were to be conducted in, or with respect to, institutions of which the trustees were different individuals and not one and the same. It is also important to note that the entire income has to be utilised for the various religious ceremonies. The document does not show that any surplus is to be had after meeting the expenses and as such, even according to the decisions cited by the appellant's learned counsel to which we have referred, when there is no surplus income to be enjoyed by the legatees or the heirs of the testator, the only inference that is possible is that the entire property is dedicated as a trust.

It is next contended by the appellant that even if the intention of the testator was that after the death of his widow Parvathi Bai the Hindu Religious Endowments Committee of Coimbatore shall be the dharmakartha and perform these religious kattalais in the various institutions mentioned therein, the Taluk Endowments Committee, as constituted, was not a body competent to hold any property on behalf of the trust and such being the case the trustee designated under the will was incapable of holding property and therefore the trust failed on the death of Parvathi Bai. For this contention, our attention was invited to various provisions of Act XX or 1863, *viz.*, an Act to enable the Government to divest itself of the management of Religious Endowments. We were invited to consider the scope and effect of sections 3, 4, 7, 11, 12 and 13. Section 3 contemplates that the local government should make provision respecting temples and mosques with regard to their management because Regulation VII of 1817, so far as Madras Province was concerned, related to the appointment of managers, trustees and superintendents. Section 5 provided the procedure in case of disputes as to right of succession to vacated trusteeship and to apply to the Civil Court to appoint a manager of such mosque, temple or religious institution and the manager so appointed shall exercise all the powers under the Act which the trustee, manager, or superintendent under Regulation VII of 1817 had. We may, in this connection, refer to section 4 of the Act which contemplates transfer of property to independent trustees, etc.,

1. (1946) 1 M.L.J. 181 : 2 91 (P.C.).
2. (1921) L.R. 48 I.A. 143 : I.L.R. 43 All.

belonging to their trusts, etc., remaining in charge of Revenue Board or others. It contemplates transfer to a trustee if there is one and if not to the Committee. Section 11 prohibits any member of a Committee from acting as the trustee or manager or superintendent of a mosque or temple; and section 12 lays down that on the appointment of a Committee, the Board and local agents shall transfer properties to the Committee. Section 13 provides for keeping of accounts of receipts and disbursements. According to Regulation VII of 1817 which was repealed by Act XX of 1863, the Board of Revenue was the supervisory body but when Act XX came into existence and a Committee was constituted, the supervisory power was given to the Committee. The learned counsel for the appellant contends that according to clause VII, Regulation VII of 1817, which enacted that to enable the Board of Revenue to better carry into effect the duties entrusted to them by this regulation, local agents shall be appointed in each zillah, subject to the authority, control and orders of that Board it might have been possible for a local agent to hold property but not to the Board and when this regulation was repealed by Act XX of 1863, the Committee that was constituted could not take upon itself the trusteeship of any religious endowment. We do not think that there is any absolute prohibition so far as the functioning as trustee by the Committee is concerned. Sections 5 to 7 of Act XX of 1863 by implication allow the committee to hold the property. Section 12 speaks of the management of the affairs. We may also refer to the preamble in Regulation VII of 1817, *viz.*, the collection of rents and profits and clause XV of the Regulation which provided that the Board had the right to appropriate the income, which meant that it had the power of management as mentioned in clause XII. On a careful consideration of the various provisions of Regulation VII of 1817 and Act XX of 1863, we are not satisfied that the contention of the learned counsel that the Hindu Religious Endowments Committee cannot hold the property as trustee, is sound. No doubt section 11 of Act XX of 1863 states that no member of a committee shall act as trustee, manager, etc., of a temple, mosque or religious establishment for the management of which such committee shall have been appointed. The literal meaning of this section is that any person who happens to be a member of a Committee which was a collective body cannot function as a trustee of an institution over which the Committee as such has got superintendence. But in *Panduranga* v. *Nagappa*[1], Muttuswami Ayyar and Parker, JJ., have held that the plaintiffs there, who were members of a temple committee appointed under Act XX of 1863, were not entitled to claim possession of the temple and its properties from the hereditary trustee even if it were found to be subject to their jurisdiction because the learned Judges say that it is provided by section 11 of Act XX of 1863, that no member of a committee shall be capable of being, or shall act as, the trustee of a temple for the management of which such committee shall have been appointed. The learned Judges have interpreted the prohibition to possession of the temple and its properties as trustee, to the collective body of the Temple Committee and not only to the individuals. In *Ramanatha Chettiar* v. *Swaminatha Aiyar*[2], the learned Judges, Benson and Sadasiva Ayyar, JJ., have considered the powers of a Committee appointed under the Hindu Religious Endowments Act and at page 281 they refer to *Panduranga* v. *Nagappa*[1]. In the opinion of the learned Judges if the Committee members usurp the powers of a temple trustee, such usurpation cannot prevent the trustee from claiming and taking back the powers at any time; the usurping committee members are trustees *de son tort* and as such are liable for the trust monies to the *cestui que trust*. One thing is deducible from this decision and it is that if the members of a Committee begin to function as trustee, they are liable to be proceeded against as trustees. In the well-known *Srirangam case*[3], the powers of a Temple Committee are discussed and considered by Wallis, C.J. and Seshagiri Ayyar, J. Seshagiri Ayyar, J., at page 717 considered this aspect of the case and held that the intention of the Legislature was not to give larger powers to the committee than were possessed by the Revenue Board under Regulation VII of

1. (1889) I.L.R. 12 Mad. 366 at 367 and 368.
2. (1912) 23 M.L.J. 278.
3. (1915) 30 M.L.J. 29 : I.L.R. 39 Mad. 700.

1817. Here also reference has been made to a number of cases. In none of these cases has the question been considered or decided as to whether the Committee as such can accept and hold property on behalf of the trust. As we have already remarked sections 5 and 7 of Act XX of 1863 read with the preamble to Regulation VII and clause XV of the Regulation contemplate that the Committee can receive and hold property. We are therefore of opinion that the dedication of the property and the constitution of the Temple Committee to manage as dharmakartha cannot be questioned.

The further point arising from this conclusion is whether, assuming that the Committee can accept the trusteeship as an obligation and function as such on the death of Parvathi Bai in 1943, the rights and obligations did not devolve upon the Hindu Religious Endowments Board and as such the plaintiff could not have been invested with any powers to file the suit by the Hindu Religious Endowments Board. The earliest of the Hindu Religious Endowments Act was Act I of 1925 which was repealed and re-enacted as consolidated Act by the Madras Act II of 1927. Section 4 of Act I of 1925 which corresponds to section 8 of the Act II of 1927 repealed the Hindu Religious Endowments Act of 1863 and the Madras Endowment and Escheats Regulations of 1817, Regulation VII of 1817, in so far as they apply to Hindu Religious Endowments in the Province of Madras. Section 6 of Madras Act II of 1927 repealed Madras Act I of 1925. Section 79 of Madras Act I of 1925 which corresponds to section 83 of Madras Act II of 1927, laid down that every Committee established under the Religious Endowments Act, 1863, which was in existence at the commencement of Act I of 1925, shall be deemed to have been duly constituted under the provisions of that Act. Such being the case the Devasthanam Committees which were in existence when Madras Act I of 1925 came into force should be deemed to have been constituted under the provisions of the Madras Hindu Religious Endowments Act. The result is it cannot be construed that those Committees were continued in existence but that such Committees were newly constituted after the notional dissolution of the existing Committees, especially since the words of the section are " shall be deemed to have been duly constituted under the provisions of this Act." There can therefore be no devolution or perpetuation of the old Committee under section 79 of Act I of 1925 but only the creation and the continuation of new Committees under this Act. Section 5, sub-section (2) of Madras Act I of 1925 corresponding to section 9, sub-section (2) of Act II of 1927 states that the " Committee " means " a Committee as constituted under section 16 of Act I of 1925," corresponding to section 20 of Act II of 1927. Section 16 of Madras Act I of 1925 which is *ad idem* with section 20 of Act II of 1927 empowers the local government by notification, to direct the constitution of a Committee for any temple or temples or for any class of temples, and varying the strength or the jurisdiction of any such Committee. There are provisos to that section which we need not refer at present. Under section 32 of Madras Act II of 1927, every Committee shall, by such name as the Local Government may determine, be a body corporate and shall have perpetual succession and a common seal and shall, by the said name, sue and be sued, so that Temple Committees are corporations as constituted under the Act. The Hindu Religious Endowments Act II of 1927 was further amended by Madras Act V of 1944 which by section 34 omitted section 83 of Madras Act II of 1927, which, as we have said, corresponded to section 79 of Madras Act I of 1925. The result of this is that all the Committees constituted either under Madras Act I of 1925 or under Act II of 1927 have got dissolved and did not have any legal existence after the coming into operation of Madras Act V of 1944 which received the assent of the Governor on the 7th March, 1944 and was published in *Fort St. George Gazette*, on the same day. Therefore, on and after the 7th March, 1944, in the Province of Madras, there could have been no Temple Committee constituted or created by any Hindu Religious Endowments Act.

Granting therefore that on the death of Parvathi Bai in 1943, the Coimbatore Taluk Devasthanam Committee began to function as the trustee of the various endowments charged with the duties of conducting the religious ceremonies in

the temples, this Committee became dissolved and was *functus officio* by the enactment of section 34 of Madras Act V of 1944. There are provisions in Madras Act V of 1944 by which the Hindu Religious Endowments Board itself could, in certain cases, assign the duties of the Committee to various officers. But it has to be borne in mind here that the Committee ceased to exist on the 7th March, 1944, whereas in the present case the suit was filed by the plaintiff on 15th January, 1944, when the Committee was in existence. In *Lakshmana Ayyar* v. *R. S. Nayudu*[1], this Court held that under section 79 (1) of Madras Act I of 1925, any Committee established under the Act of 1863 in existence at the commencement of the Act of 1925, is to be regarded by law as if it were one constituted under section 16 of the latter Act and the Local Government has, by virtue of section 16, power to vary or abolish such a Committee. It was further held that even if the Local Government has no power to vary or abolish the Committee under the Act of 1925 still, under Act II of 1927, under section 20 (1) such powers have become vested in the Government. This decision was cited in support of the contention that the Committee could have filed a suit so far as the trust in question is concerned. In our opinion there is nothing that can be gathered from this judgment which can be of any help for the decision of the present case. As we have remarked, if the Committee could function as a trustee, it was a body that was in existence on the 15th January, 1944, when the plaint was filed and therefore none of its powers could have been exercised by the trustee of the Koniamman temple after getting the sanction of the Hindu Religious Endowments Board. Such being the case, the plaintiff in this case, when he filed the suit, had no *locus standi* and had no authority to come to Court for the purpose of the reliefs asked for in the plaint. In this view it seems to us that the suit was filed by an unauthorised person who had no power to do so when he initiated the proceedings.

The appellant further contended, relying on paragraph 811 at page 945 of the tenth edition of Mayne of Hindu Law and *Bhaba Tarini Debi* v. *Asha Lata Debi*[2], that trusteeship is property and that the first defendant here, the appellant, should be considered to be a trustee. We do not think it necessary, in the view which we take of the disability attaching to the plaintiff for the filing of the suit, to consider the merits of this question. As we have held that the plaintiff has no right to maintain the suit, the appeal has to be allowed and the suit dismissed with costs throughout. The plaintiff will pay one set of costs in this appeal to the first defendant-appellant and another set to the contesting defendants-tenants. The memorandum of cross-objections does not arise as we are dismissing the suit and is therefore dismissed but in the circumstances without costs. The appellant will pay the Court-fee to the Government.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO, AND MR. JUSTICE RAGHAVA RAO.

Chullikana Shambatta and others .. *Appellants**

v.

Cherakoodlu Narayana Bhatta and others .. *Respondents.*

Transfer of Property Act (IV of 1882), section 92, paragraph 3—Scope—Partition between the branches of mortgagor joint Hindu family—One branch allotted larger share of properties and undertaking to discharge the whole of the mortgage debt—Subsequent mortgage by such branch to raise money to discharge the pre-partition mortgage—Covenant that the new mortgagee should be entitled to be subrogated to the rights of mortgagees under the pre-partition mortgages which were discharged—If confers a valid right of subrogation.

On the 20th May, 1910, *K* a Hindu and his two sons *V* and *G* borrowed Rs. 10,000 from *S* and created a usufructuary mortgage as security on the joint family properties. On the 10th April, 1926, *G* for himself and on behalf of his minor son *X* and his younger brother *H* the sole surviving coparceners (*K* and *V* having died meanwhile) borrowed Rs. 4,000 from *A* and created a simple mortgage for the amount. On the 10th June, 1930, a third mortgage was created in favour of *P* for Rs. 5,000

1. (1931) M.W.N. 193. Cal. 137 : L.R. 70 I.A. 57 (P.C.).
2. (1943) 2 M.L.J. 70 : I.L.R. (1943) 2

*Appeal No. 364 of 1947. 1st December, 1950.

on a document executed by *G* for himself and on behalf of his minor son *X* and *H* also for himself and on behalf of his minor son. In 1931 there was a partition of the family properties between *G's* branch and *H's* branch whereunder in consideration of *G's* branch discharging the family debts, it was allotted a larger share in the family properties while *H's* branch obtained a smaller share. This partition was evidenced by a document dated the 29th August, 1931, which contained a covenant between the two branches *inter se* by which *G* and his branch undertook to free the properties allotted to *H* and his branch from all debts and also a maintenance claim.

The usufructuary mortgage was for a period of 30 years to the end of the cultivation season of the year 1940. To raise money to discharge it, *G* and his son *X* who had become a major and also on behalf of his minor sons executed on 7th May, 1943, a usufructuary mortgage for Rs. 14,000 in favour of *C* and *D* with a covenant that *C* and *D* should be entitled to the benefit of, and be subrogated to the rights of the mortgagee under the mortgage of 20th May, 1916. *C* and *D* then instituted a suit for redemption of the usufructuary mortgage of 20th May, 1910 and for recovering possession of the properties and obtained a decree for redemption. The amount was paid and the mortgage was fully satisfied and redeemed. The properties allotted to *H's* branch were given possession of to *H's* widow and his two sons as *H* died during the pendency of the suit. On the 28th July, 1943 *G* and his sons executed a simple mortgage in favour of *C* and *D* of their share of the properties and raised Rs. 6,500 for discharging the second mortgage of 10th April, 1926, as by that time a final decree was obtained and execution proceedings to bring the properties to sale were impending. With this amount the second mortgage debt was fully discharged. This mortgage also contained a covenant that the mortgagee should be entitled to be subrogated to the rights of the mortgagees under the second mortgage. *P*, the third mortgagee (on the mortgage of 10th June, 1930), instituted a suit for enforcing his rights under his mortgage and impleaded as parties *G* and his sons as also *C* and *D*, the subsequent mortgagees from them and *E* a sub-mortgagee from them. *C*, *D* and *E* claimed that they were entitled to be subrogated to the rights of the first and second mortgagees. The Subordinate Judge held that the right of subrogation did not exist because of the covenant to pay in the partition deed. On appeal by the subsequent mortgagees *C*, *D* and their sub-mortgagee, *E*,

Held :—(1) Merely because there was an agreement between the mortgagors *inter se* it would not take away the right of the subsequent mortgagees to claim a right of subrogation where the requirements of paragraph 3 to Section 92, Transfer of Property Act have been fully satisfied.

(2) Under the third paragraph of Section 92, the agreement is required to be with the mortgagor under the mortgage which has been redeemed by payment out of the money advanced by a person. In this case *G* was the mortgagor under the two mortgages redeemed and in respect of which a right of subrogation is claimed by the persons who advanced the money and they obtained agreements that they should be entitled to be subrogated to the rights of the mortgagees whose mortgages have been redeemed.

(3) It cannot be said that an agreement with only one of the earlier mortgagors would not entitle the person advancing the money to be subrogated to the rights of the mortgagee whose mortgage has been redeemed. The word "mortgagor" in paragraph 3 of section 92 of the Transfer of Property Act means "mortgagor" in the singular and, if circumstances require, it may be interpreted as "mortgagors" in plural and not that it should always be interpreted as meaning "mortgagors" only.

(4) A co-mortgagor is entitled to redeem the mortgage either from and out of his funds or with money borrowed from a lender. There is no reason or justification for denying the co-mortgagor the right to give an agreement to his lender as contemplated by the third paragraph of section 92 of the Transfer of Property Act. The subject-matter of the section is the right of subrogation and if, in the first paragraph of the section, the right of subrogation in a co-mortgagor who redeems the mortgage is recognised, it would be repugnant to the subject and to the context to construe the word "mortgagor" in the third paragraph as meaning only all the mortgagors and not one of several mortgagors.

Accordingly the subsequent mortgagees are entitled to be subrogated to the rights of the mortgagees under the pre-partition mortgages.

Per Raghava Rao, J.—There is nothing in essence to distinguish the present case in which after partition *G* alone entered into a covenant for subrogation with the subsequent mortgagees from a case in which without such partition or such provision in the partition deed both *G* and *H* together entered into such a covenant. Only, in the latter case there is but one step of procedure—that of an agreement by both the mortgagors, while in the former there are two steps—an agreement between the two mortgagors substituting one of them as the person bound to pay the debt, for both of them and thereafter an agreement by that one with a third party conferring on him a right of subrogation. If *H* had entered into such covenant it may perhaps be arguable that having parted with his right of redemption in favour of *G*, *H* would not be competent to covenant with another in respect of subrogation, which is necessarily a right appendant to a pre-existing right of redemption without which it cannot spring into or continue in existence.

After and by virtue of the provision in the partition deed *G* became the sole mortgagor and *H* became a surety for him in relation to the rights of the prior mortgagees. If at that juncture *G* entered into a covenant for subrogation with his subsequent mortgagees, there is no reason why it should not be given effect to merely because *H* did not join in so doing.

If G or his branch claimed subrogation after themselves redeeming, their claim would be untenable in view of the covenant in the partition deed. But there is no reason why G's disability to claim subrogation in his own redemption should involve disability to create a right of subrogation by way of covenant in favour of another which does not exist in the case of the sole mortgagor himself.

Appeal against the decree of the Court of the Subordinate Judge, South Kanara, in O.S. No. 79 of 1945.

T. Krishna Rao for Appellants.

A. Narayana Pai for 1st Respondent.

The Court delivered the following

JUDGMENTS: *Satyanarayana Rao, J.*—This appeal raises an interesting and intricate question of law relating to subrogation. The case was ably argued on both sides and the problem raised is bare of authority. The right of defendants 8, 9 and 11 who are the appellants, to subrogation in respect of two earlier mortgages, was denied by the lower Court and hence this appeal.

On the 20th May, 1910, one Krishna Bhatta and his two sons, Venkatesa Bhatta and Govinda Bhatta borrowed a sum of Rs. 10,000, and created a usufructuary mortgage as security on the properties described in the deed of mortgage, Exhibit D-3. This mortgage was in favour of Madanna Bhatta and Subbanna Bhatta. On the 10th April, 1926, Govinda Bhatta for himself and on behalf of his minor son Ganapathi Bhatta and Vishnu Bhatta, the younger brother of Govinda Bhatta, Krishna Bhatta and Venkatesa Bhatta having died meanwhile, borrowed a sum of Rs. 4,000 from one Atchuta Bhatta and created a simple mortgage for the amount under Exhibit D-11. The family of Krishna Bhatta and his sons was undivided and at the time of Exhibit D-11, Govinda Bhatta and Vishnu Bhatta and Govinda Bhatta's minor son, were the sole surviving members of the coparcenary. On the 10th June, 1930, under Exhibit P-1 a third mortgage was created on the properties in favour of the plaintiff for Rs. 5,000 borrowed on that date and this document was executed by Govinda Bhatta for himself and on behalf of his minor son and Vishnu Bhatta also for himself and on behalf of his minor son. In 1931, there was a partition of the family properties between Govinda Bhatta's branch and Vishnu Bhatta's branch whereunder in consideration of Govinda Bhatta's branch discharging the family debts, it was allotted a larger share in the family properties while Vishnu Bhatta's branch obtained a smaller share. This partition arrangement is evidenced by Exhibit P-13 dated the 29th August, 1931. It contains a covenant between the two branches *inter se* by which Govinda Bhatta and his branch undertook to free the property allotted to Vishnu Bhatta and his branch from all debts and also a maintenance claim. The relevant clause in the deed is in these terms :

"As all the debts we have got as well as the maintenance have been allotted to the first individual among us (Govinda Bhatta), as, in so far as those debts are concerned, the property also has been allotted to him in excess, and also, as the property allotted to the second individual (Vishnu Bhatta) has been freed by us from all debts, all the said debts and their interest and also the maintenance should be paid by the said first individual only with liability of the property belonging to his share and receipt should be obtained. If, in that matter, payment is not made, and consequently, in respect of the said debts, the second individual incurs loss, the said first individual shall be bound to pay such entire losses together with interest thereon at 6¼ per cent. with liability of the property belonging to his share, with liability of the income therefrom and also upon his personal liability".

The usufructuary mortgage under Exhibit D-3 was for a period of 30 years to the end of the cultivation season of Vishu Sankramana of the year 1940. To raise the money for discharging the usufructuary mortgage, Govinda Bhatta and his son, who by then became a major and also on behalf of the minor sons of Govinda Bhatta executed a usufructuary mortgage for Rs. 14,000 on 7th May 1943, Exhibit D-2, in favour of defendants 8 and 9 with a covenant that the mortgagees under Exhibit D-2 should be entitled to the benefit of, and be subrogated to, the rights of the mortgagee under Exhibit D-3. After this mortgage, the mortgagees under Exhibit D-2 instituted O.S. No. 29 of 1944, Sub-Court, South Kanara for redemption of Exhibit D-3 and for recovering possession of the properties and obtained a decree for redemption. The amount was paid and the mortgage was fully satisfied and redeemed. The properties allotted to Vishnu Bhatta's branch were given

possession of to Vishnu Bhatta's representatives, *i.e.*, his widow and the two sons, as he died during the pendency of the suit. On the 28th July, 1943, Govinda Bhatta and his sons executed a simple mortgage, Exhibit D-10, of their share of the properties and raised Rs. 6,500 for discharging the second mortgage Exhibit D-11 as by that time O.S. No. 228 of 1942 was filed and a decree obtained in pursuance of that mortgage and even execution proceedings to bring the properties to sale were impending. With this amount the second mortgage debt was fully discharged. This mortgage also contained a covenant between the mortgagors and the mortgagees that the mortgagees should be entitled to be subrogated to the rights of the mortgagee under Exhibit D-11.

The plaintiff, the third mortgagee under Exhibit P-1 instituted the present suit out of which this appeal arises for enforcing his rights under the mortgage and impleaded as parties to the suit, Govinda Bhatta and his sons and also defendants, 8, 9 and 11, the first two being the mortgagees under Exhibit D-2 and D-10 and the third a sub-mortgagee under the first two. These mortgagee defendants claim in their written statement that by virtue of the covenants contained in Exhibit D-2 and D-10 they were entitled to be subrogated to the rights of the first and second mortgagees. This right was negatived by the learned subordinate Judge, who tried the case, on the grand that the covenant in the partition deed Exhibit P-13 put the appellants out of Court and he applied the principle that where there is a personal covenant to pay, the right of subrogation does not exist.

In this appeal by defendants 8, 9 and 11 it is contended on their behalf by their learned counsel, Mr. T. Krishna Rao, that, under paragraph 3 of section 92, Transfer of Property Act, his clients are entitled to be subrogated to the rights of the first and second mortgagees who have been redeemed by the moneys advanced by them with specific covenants contained in registered documents that they should be so subrogated. The agreement *inter se*, it is contended between Govinda Bhatta and Vishnu Bhatta in the partition deed, would not in any way affect the rights of his clients as there was no personal obligation by them to pay the mortgage amount to the first mortgagee, the plaintiff. This contention, in our opinion, is well founded. Merely because there was an agreement between the mortgagors *inter se* it would not take away the right of the appellants to claim a right of subrogation where the requirements of paragraph 3 to section 92, Transfer of Property Act, have been fully satisfied.

On behalf of the first respondent plaintiff, the contention raised was that the mortgagors under Exhibit D-3 and Exhibit D-11 are different from the person with whom the appellants had entered into an agreement, securing under it the rights of subrogation. The argument is that at the time the earlier three mortgages were executed, the family of the mortgagors was a joint undivided family and that therefore the mortgagor in substance and in effect was the joint family while the agreement by the appellants was only an agreement with Govinda Bhatta and his sons personally, since the joint family ceased to exist after the partition of 1931. In support of this contention, he relied on the analogy of cases decided under Madras Act IV of 1938 where it was held that if a debt due by a joint Hindu family is substituted by another debt due by an individual who formerly constituted a member of the joint family but became separated after partition, he was a different debtor since the original debtor was the joint family and the substituted debtor is a divided member of the family notwithstanding the fact that the liability substituted was in place of a pre-partition liability—Vide *Karuppanna Goundan* v. *Marutha Pillai*[1]. This line of cases under Madras Act IV of 1938, in our opinion, bears no analogy to the situation that arises under the Transfer of Property Act for the reason that a "person" is defined under Madras Act IV of 1938 as including an undivided Hindu family. In view of the recent amendment to Madras Act IV of 1938, even the line of decisions of which *Karuppanna Goundan* v. *Marutha Pillai*[1], is the type, is no longer good law. There is no definition of the word "person" in the Transfer of Property Act and therefore one has to fall back upon the definition

1. (1941) 1 M.L.J. 773.

contained in the General Clauses Act, X of 1897, which includes in that definition, a company or association or body of individuals, whether incorporated or not, but does not include a joint Hindu family. Section 58 of the Transfer of Property Act defines the mortgagor as the transferor of the property mortgaged, which implies that all the members of the family interested in the property are transferors whether they are *eo nomine* parties to the deed of mortgage or whether they are represented by the manager of the family who has the power to create a mortgage under circumstances permitted by Hindu law. The mortgagors therefore under Exhibit D-3, the first of the mortgages were Krishna Bhatta and his two sons, Venkatesa Bhatta and Govinda Bhatta. Vishnu Bhatta apparently was a minor at that time and was not impleaded as a party and must therefore be deemed to have been represented by Krishna Bhatta, the father, who was in law the manager of the family. Govinda Bhatta and Vishnu Bhatta were the mortgagors under the second mortgage Exhibit D-11. Vishnu Bhatta died and his interest devolved upon his representatives, the sons. They will be mortgagors under the inclusive definition of mortgagor in section 59-A of the Transfer of Property Act. The agreement between the appellants and Govinda Bhatta was one between one of the mortgagors under Exhibit D-3 and Exhibit D-11 and the appellants and it cannot be said that the person with whom the covenant was entered into was not a mortgagor under Exhibit D-3 and D-11. Under the third paragraph of section 92, the agreement is required to be with the mortgagor under the mortgage which has been redeemed by payment out of the money advanced by a person. In the present case, Govinda Bhatta was the mortgagor under the two mortgages which have been redeemed and in respect of which a right of subrogation is claimed by the persons who advanced the money, *i.e.*, the appellants and they obtained agreements that they should be entitled to be subrogated to the rights of the mortgagees whose mortgages have been redeemed.

This leads us on to the next contention which raises a more difficult problem. It is argued that where there is more than one mortgagor, the agreement under the third paragraph of section 92 must be with the mortgagors and an agreement with only one of them would not entitle the person advancing the money to be subrogated to the rights of the mortgagee whose mortgage has been redeemed notwithstanding the fact that the mortgage was redeemed in full. Section 13 of the General Clauses Act which is strongly relied on in support of this contention, is as follows :

"In all Central Acts and Regulations, unless there is anything repugnant in the subject or context, words in the singular shall include the plural and *vice versa*".

It is therefore argued that the word "mortgagor" must be construed as including all the mortgagors when there is more than one mortgagor and that the agreement must be by all of them. Section 13 of the General Clauses Act is an inclusive definition and therefore extends the meaning of the singular word so as to include the plural and is not a restrictive definition. The definition applies only if there is nothing repugnant in the subject or context. The function of an interpretation clause is not, as is very often, supposed, to substitute one set of words for another or to apply the meaning of the term under all circumstances, but merely to declare what may be included in the term when the circumstances required that it should be so interpreted. Craies in his book on Statute Law observes at page 195 :

"If, therefore, an interpretation clause gives an extended meaning to a word, it does not follow as a matter of course that if that word is used more than once in the Act, it is on each occasion used in the extended meaning, and it may be always a matter for argument, whether or not the interpretation clause is to apply to the word as used in the particular clause of the Act which is under consideration. 'It appears to me' said Lord Selborne in *Mayor* v. *Jacobs*[1], 'that the interpretation clause does no more than say that, where you find those words in the Act, they shall, unless there be something repugnant in the context, or in the sense, include fixtures'."

It is an elementary rule of interpretation of statutes that in construing a statute, all its parts should be considered together and must be reconciled, if possible. The "context" in a statute implies that a Court in constructing a statute, should not

1. (1875) L.R. 7 H.L. 493.

"isolate words or give them their abstract meaning or consider the different parts of a statute separately and independently. Every part of the statute must be considered together and considered as an integral part of the whole and kept subservient to the general intent of the whole enactment. Each part or section of the statute subject to construction should be construed in connection with every other part or section, even sections which are invalid or in conflict. Indeed all of the parts must be given effect according to the intent expressed or clearly revealed". (See *Crawford* on Statutory Construction, pages 352 and 353).

It has to be considered therefore in interpreting the word "mortgagor" in paragraph 3 of section 92, Transfer of Property Act, whether there is anything repugnant in the subject or context to compel a Court to interpret the word as meaning *only mortgagors* and does not permit the construction that it may be taken as meaning *mortgagor* or *mortgagors*, according to the circumstances particularly as the definition to the General Clauses Act is an inclusive definition and not a restrictive definition. All that section 13 of the General Clauses Act means is that the word need not be construed as "singular" under *all* circumstances but merely indicates the intention of the Legislature that the word may be interpreted in the plural wherever the circumstances require that it should be so construed. In other words, it means "mortgagor" in singular and, if circumstances require, it may be interpreted as "mortgagors" in plural and not that it should always be interpreted as meaning "mortgagors" only.

The subject-matter of section 92 is the right of subrogation and defines the limitations under which the right may be exercised. It is a section newly introduced by the Amending Act of 1929 and deals with two kinds of subrogation, *conventional* or *contractual* subrogation and *legal* subrogation. Subrogation means the substitution of one creditor for the other. In the first paragraph of the section which deals with legal subrogation the right is conferred upon the persons referred to in section 91, "*other than the mortgagor*" and also a co-mortgagor. It excludes the mortgagor from the benefit of the section as he is under a personal obligation to pay the debt and also as he cannot derogate from his own grant to the prejudice of the mortgagees. The third paragraph deals with conventional subrogation. Under the first paragraph, the person entitled to the benefit must have had a pre-existing interest in the property and the right is conferred when he redeems the mortgage for protection of his own interest. If, however, a person acquires an interest in property only by reason of the advance of money he makes to the mortgagor to redeem the prior mortgage, he is not entitled to a right of subrogation unless he advanced the money under an agreement with the mortgagor in writing registered that he should be entitled to the right of subrogation. To some extent, the law as it stood prior to 1929 when the section was introduced, is altered. The previous law was summarised by Lord Romer in *Rajah Janakinath Roy* v. *Raja Pramathanath Malia*[1], as follows:

"Taking first the law as it stood in December, 1927, it has nowhere been better expressed than it was by Mookerjee in *Gurdeo Singh* v. *Chandrika Singh*[2]. That learned Judge said this: 'It may be said, in general, that to entitle one to invoke the equitable right of subrogation, he must either occupy the position of a surety of the debt or must have made the payment under an agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security, or he must stand in such a relation to the mortgage premises that his interest cannot otherwise be adequately protected".

Under the previous law, a right by conventional subrogation could be claimed even though the agreement was not in writing registered but was only implied by conduct, even very slight evidence was considered sufficient to imply such an agreement. After the amendment of the Act, the right can be claimed by the person advancing the money only if the mortgagor has by a registered instrument agreed that he should be entitled to a right of subrogation. The first paragraph of section 92 confers upon a co-mortgagor a right of subrogation. Is there any reason for denying to one of several mortgagors a right to borrow money from a person in order to redeem the mortgage in its entirety and to give the lender a registered agreement enabling the lender to claim a right of subrogation? The object of the

1. (1940) 1 M.L.J. 446: I.R. 67 I.A. 82 at 2. (1907) I.L.R. 36 Cal. 193.
99: I.L.R. (1940) 1 Cal. 291 (P.C.).

advance of the money under the third paragraph, to the mortgagor, is undoubtedly to redeem the mortgage on the property. If a co-mortgagor is entitled to redeem the entire mortgage without the concurrence or consent of the other mortgagors, is there any reason to prevent him from borrowing money from a person to redeem the mortgage after giving him an agreement that he should be entitled to subrogation? A co-mortgagor is entitled to redeem the mortgage either from and out of his funds or with money borrowed from a lender. If so much is conceded, there is no reason or justification for denying the co-mortgagor the right to give an agreement to his lender as contemplated by the third paragraph of section 92. The subject-matter of the section is the right of subrogation and if in the first paragraph of the section, the right of subrogation in a co-mortgagor who redeems the mortgage is recognised, it would be repugnant to the subject and to the context to construe the word mortgagor in the third paragraph as meaning only all the mortgagors and not one of several mortgagors.

This conclusion gains support from an examination of the other sections of the Act in which the word "mortgagor" occurs. Sections 92 and 95 which expressly refer to one of several mortgagors assume that a co-mortgagor is entitled to redeem the mortgage. But which is the section in the Act which confers upon a co-mortgagor the right to redeem? Section 91 begins by stating that "besides the mortgagor", the three classes of persons enumerated in clauses (*a*), (*b*) and (*c*) of that section, are entitled to redeem and to institute a suit for redemption of the mortgaged property. Section 91, therefore, cannot be considered as conferring a right of redemption on a co-mortgagor. One must, therefore, go back to section 60 which is the section conferring a right of redemption on the mortgagor. In this section, again, the word is used in singular and not in plural. Does it mean, therefore, that if the word is to be interpreted in the manner contended for by the first respondent, that the right of redemption inheres in, and is exercisable by only all the mortgagors and not by any one of them? There is no other section in the Act conferring a right of such redemption on the co-mortgagor but the sections already referred to undoubtedly proceed on the assumption that he has such a right. The interpretation contended for by the first respondent, if accepted, would negative altogether the right of a co-mortgagor to redeem the mortgage. This cannot certainly be the intention of the Legislature in using the word mortgagor in singular in section 60. The word in section 60 must be interpreted as meaning mortgagor or mortgagors, if the circumstances so require and not as meaning only mortgagors under all circumstances and for all purposes. Sections 60-A, 60-B and 61 also use the word in singular and for the reasons already stated, there is no reason to put a restrictive construction upon the definition clause in section 13 of the General Clauses Act, particularly as the word "include" is used in the section and not the word "meaning". The contention therefore that all the mortgagors under Exhibits D-3 and D-11 should have joined in the agreements given to the appellants and in their absence, the right of subrogation is not exercisable by the appellants cannot be accepted.

The decision in *Bhudhai Sheik* v. *Emperor*[1], is an instance where section 13 of the General Clauses Act was not applied having regard to the context. The decision of Russel, J., in *In re Clayton's Settled Estates*[2], which deals with section 1 of the English Interpretation Act, 1889, where also a similar provision as in section 13 of the General Clauses Act occurs, is instructive in so far as that judgment deals with the method of approach to be adopted in arriving at a contrary intention.

There is also another difficulty raised in the interpretation of the word "mortgagor" in the third paragraph of section 92. If the word is restricted to the original mortgagor, that is to the person who is *eo nomine* a party to the mortgage which has been redeemed with the money advanced by the appellants, it would be confined to Govinda Bhatta under Exhibits D-3 and D-11 as Vishnu Bhatta who joined in the execution of Exhibit D-11 died by the time of the execution of the two mortgages in favour of the appellants, Exhibits D-2 and D-10. Section 59-A

1. (1905) I.L.R. 33 Cal. 292. 2. (1926) Ch. 279.

Transfer of Property Act lays down in inclusive definition of mortgagor and mortgagee. It states :

"Unless otherwise expressly provided, reference in this chapter to mortgagors and mortgagees shall be deemed to include references to persons deriving title from them respectively".

Krishna Bhatta represented his minor son Vishnu Bhatta also in executing the mortgage under Exhibit D-3 as he was the family manager. No doubt, the name of Vishnu Bhatta was not mentioned as one of the executants of Exhibit D-3 ; but that would not make any difference. On the death of Krishna Bhatta and Venkatesa Bhatta, the entire property devolved on Govinda Bhatta and Vishnu Bhatta and Vishnu Bhatta will therefore be a person deriving title under the mortgagor under Exhibit D-3. Similarly, after the death of Vishnu Bhatta his sons would be the mortgagors along with Govinda Bhatta under Exhibit D-11 in view of section 59-A of the Act. Govinda Bhatta and Vishnu Bhatta's sons will therefore be the mortgagors under the two mortgages which were redeemed with the moneys advanced by the appellants. There is no reason to restrict the meaning of the word mortgagor to the original mortgagor who is *eo nomine* a party. Under section 92 in the first paragraph, from the persons referred to in section 91, the mortgagor is excluded by the words " other than the mortgagor ". The mortgagor in the expression " other than the mortgagor" undoubtedly refers to the original mortgagor and not to persons deriving title through the mortgagor and for this the reason is that a mortgagor who discharged his own mortgage is not entitled to a right of subrogation. Persons deriving title from a mortgagor and becoming mortgagors by virtue of section 59-A must be excluded from " mortgagor " in the expression " other than the mortgagor " in section 92 as under section 91 persons deriving title or interest are enumerated in juxtaposition to mortgagor which is a clear indication that the word mortgagor in section 91 is used in a restricted sense and the persons deriving title from the mortgagor are independently entitled to redeem under section 91 and are also entitled to claim rights of subrogation under section 92 as the definition in section 59-A is applicable unless otherwise expressly provided. The rights of persons deriving title through a mortgagor are expressly provided in section 91 in juxtaposition to the mortgagor—See *Narayana Divakarappa* v. *Parameswarappa*[1]. The mortgagor in the third paragraph of section 92 therefore includes persons deriving title through a mortgagor and in the present case, Govinda Bhatta and the sons of Vishnu Bhatta will be mortgagors but in the view expressed above, it is open to even one of the several mortgagors to give a covenant in terms of the third paragraph of section 92 to a lender who advanced money to redeem the mortgage. It follows that the agreement given by Govinda Bhatta and his sons under Exhibit D-2 and Exhibit D-10 in favour of the appellants conferring upon them a right of subrogation would be valid.

The matter in the present case may also be looked at from one other aspect. The covenant in the partition deed between Vishnu Bhatta and Govinda Bhatta throws the entire liability of discharging the mortgages on Govinda Bhatta. As between Vishnu Bhatta and Govinda Bhatta, the agreement is certainly binding. They agreed, as between themselves, to treat Govinda Bhatta as the mortgagor. In other words, Govinda Bhatta in giving the covenant under the third paragraph to section 92 would be acting not only on his behalf but also on behalf of Vishnu Bhatta and his representatives. Therefore even if the concurrence of all the mortgagors is required such a requirement is satisfied in the case in view of the covenant contained in the partition deed.

The argument most strenuously pressed on behalf of the first respondent is that if one of several mortgagors is permitted to give such a covenant and is permitted to confer a right of subrogation by agreement, it would be detrimental to the interests of the other co-mortgagors and would prejudice their rights. It is dufficult to accept this argument. Subrogation implies the substitution of one creditor for another. Even a surety for the payment of a mortgage debt is entitled to redeem the mort-

1. I.L.R. 1943 Bom. 169.

gage though he is not interested in the property and is entitled to give a covenant conferring a right of subrogation. Even a simple money creditor who advances money would similarly be entitled to a stipulation at the time the money is advanced that he should have the right of subrogation in respect of the mortgage which is redeemed with the money advanced by him. No additional burden is thrown on the other co-mortgagors by the redemption of the mortgage by one of several mortgagors. It is as if for the previous mortgagee the new person is substituted. The co-mortgagors who have not joined in the redemption would be liable to pay exactly the same amount of debt and with the same stipulations as under the original mortgage and their liability is not enhanced in any manner by the substitution effected by their co-mortgagor. The rights of a subrogee are restricted only to the rights of the mortgagee in whose shoes he steps and it is that mortgage that he is entitled to enforce.

For the foregoing reasons we are of opinion that the view taken by the learned Subordinate Judge is erroneous and his decision therefore must be reversed. The appellants are entitled to be subrogated to the rights of the mortgagees under Exhibits D-3 and D-11. The appeal will be allowed and the decree of the lower Court must be modified accordingly with costs here and in the Court below.

Raghava Rao, J.—I agree, but wish to deliver a supplemental judgment in view of the importance, in particular, of the second of the points raised for the first respondent which is so far in its precise form destitute of authority and accordingly requires for its decision a careful consideration of the words of the material enactment in the light of the relevant first principles.

The first of the points developed by Mr. Narayana Pai in his well-informed and interesting argument—that is, the one founded on the analogy of cases decided under the Madras Agriculturists Relief Act—calls for but slight notice. I need only observe that that Act and the statute under consideration here are not at all in *pari materia*, and that the object and purpose as well as the language of the two enactments are so far dissimilar that cases decided under the former can have no bearing on cases arising under the latter.

It was not contended before us for the plaintiff-respondent that if the first point should fail, Govinda Bhatta, *eo nomine* a party to both Exs. D-3 and D-11 would not be a co-mortgation with Vishnu Bhatta constructively and through his father a party to Ex. D-3 and in his own name a party to Ex. D-11. What was contended was that while a co-mortgagor is undoubtedly and expressedly within the first paragraph of section 92, Transfer of Property Act, entitled to the legal subrogation provided for therein, a mortgagee from him only in exclusion of the other mortgagor with a covenant for subrogation from him is not within the third paragraph of the section, entitled to the conventional subrogation enacted by it. The argument is that a mortgagor in paragraph 3 means necessarily all the mortgagors where there are more than one, by force of section 13 of the General Clauses Act. The argument however is fallacious, as that section, an inclusive and not an exclusive provision, which says that, unless there is anything repugnant in the subject or context of a Central Act or Regulation, words in the singular shall include the plural, does not say and cannot mean that words in the singular shall exclude the singular. All that results from the language of the section is that the extended plural connotation entailed by the inclusion referred to therein may stand excluded by repugnancy in the subject or context, not that the original singular connotation should stand thus excluded.

It is said that expressions like "a co-mortgagor" of the first paragraph of section 92 and "one of several mortgagors" and "against his co-mortgagors" of section 95 afford a verbal contrast with a "mortgagor" of the third paragraph of section 92, the significance of which ought not to be lightly ignored. This again is not sound or cogent reasoning; it is just plausible and no more. The expression "a co-mortgagor" occurs in the first paragraph of section 92 in order statedly to preserve for the co-mortgagor a right which by reason of the words "other

than the mortgagor" may stand otherwise denied to him *prima facie*, because "other than the mortgagor" may *prima facie* mean not only "other than the sole mortgagor" where there is only one, but also any or all of the mortgagors where there are more than one. Likewise, in section 95 the words used are quite natural in and appropriate to the context of the relative rights of the several mortgagors *inter se* arising in the situation envisaged therein. There is consequently no verbal contrast of the kind relied upon by counsel which has to be reckoned with here as in any way detracting from the ordinary connotation attaching to the indefinite Article.

As observed in the Cyclopaedia of Law and Procedure, Vol. I, page 1, this Article properly placed before a singular noun and having the meaning of "one" is not necessarily a singular term and is often used in the sense of "any" and is then applied to more than one individual object. Then again, as pointed out in Stroud's Judicial Dictionary, Vol. I, page 1, "A" may sometimes be read as "The" (Ex parte *Hill* Re *Bird*,[1]), sometimes as "some" (*Rex* v. *Reley*[2]), and sometimes "one" (*Cambridge* v. *Harrison*[3]), but more frequently "A" is the equivalent of "any". To the same effect is the annotation in Bouvier's Law Dictionary, Vol I, page 1, which is as follows :

> "The Article 'A' is not necessarily a singular term. It is often used in the sense of 'any' and is then applied to more than one individual object".

If this last mentioned sense in which it is capable of application to more than one individual object is given to "A" is the expression "A mortgagor" occurring in the third paragraph of section 92, Transfer of Property Act, the expression although singular in form may well be treated as including the plural, in terms of and without violation to the interpretation clause of the General Clauses Act. The contention of the plaintiff respondent cannot in this view be regarded as well founded.

Even assuming that the effect of the opening words of section 13 of the General Clauses Act is to exclude the original unextended singular connotation of the expression "a mortgagor" in paragraph 3 of section 92, Transfer of Property Act or the connotation of "a mortgagor" as the equivalent of "any mortgagor" in that paragraph in a given case of repugnancy in the subject or context, the point next for consideration is whether there is any such repugnancy in the present case as to necessitate the inference of such exclusion. On principle, it is contended that if *A* and *B* are the holders of the entirety of the right of redemption which is the mortgagor's interest one of them only cannot, unless occupying a representative position in relation to the other, enter into a covenant with *C* for subrogation in respect of a prior mortgage redeemed with the money advanced by the covenantee from such one mortgagor. Here, says learned counsel, there is a fundamental distinction to take note of between legal subrogation in favour of a co-mortgagor redeeming and conventional subrogation in favour of a covenantee from a mortgagee. The particular subject and context of subrogation under the first paragraph of section 92, is, it is submitted, so far different from that of subrogation under the third, that because a co-mortgagor redeeming falls within the former provision, it does not follow that a covenantee from him to the exclusion of the other mortgagor necessarily falls within the latter. There is nothing, it is said, in the subject and context of the general law of subrogation or the particular topic of conventional subrogation, dealt with by the statute which renders the construction of the third paragraph contended for on behalf of the plaintiff-respondent repugnant to such subject and context. The statute itself, it is pointed out makes distinct and different provisions for the two types of subrogation in distinct and different wordings. Govinda Bhatta did not represent Vishnu Bhatta in entering into the convenant for subrogation, and the plaintiff is not therefore bound by the subrogation claimed. All this may be ; the respondent is however confronted on this branch of the argument with the difficulty that under the partition arrangement between Govinda Bhatta and Vishnu Bhatta, the former is constituted the

1. (1883) 52 L.J. Ch. 903 : 23 Ch. D. 695.
2. 59 L.J.M.C. 122.
3. 72 L.T. 592 : 64 L.J.M.C. 175.

sole debtor in relation to the prior mortgages. In order to surmount the difficulty Mr. Narayana Pai argues that this arrangement behind the back of the prior mortgagees does not bind them. But then, what matters it that it does not? How does it concern the prior mortgagees, who it is that actually pays them—one mortgagor or all, the covenantee from one or the covenantee from all? Is there any principle inherent in the nature of conventional subrogation which makes it material that the prior mortgagees should be parties to the arrangement? Mr. Narayayana Pai has suggested none ; nor have I been able to find any.

To examine the matter from this standpoint, I have first to observe that subrogation in the realm of the law of mortgages means no more than the substitution of one secured creditor for another arising either by operation of law or from out of a covenant on the part of the new creditor with the original creditor or the debtor. The doctrine is derived from the civil law and rests on the *fiction* of an equitable assignment of the security traceable to presumed intent in the case of legal subrogation a fiction similar to that of a *quasi* contract underlying sections 69 and 70 of the Indian Contract Act—and on the *fact* of such assignment attributable to an express covenant with the party interested—the original creditor or the original debtor in the case of conventional subrogation. In either case, the person making the payment is not a mere volunteer ; for if he were so, there would be no legal foundation for the equitable right of subrogation in his favour. In either case, he has an interest in the property—in the case of legal subrogation, a pre-existing interest entitling him to subrogation as the result of redemption, by the intendment and operation of law ; in the case of conventional subrogation, interest acquired by a covenant for subrogation with the debtor or the creditor. In either case there is no merger of relationship of creditor and debtor resulting from payment, no extinction or destruction of the debt but a preservation of it, a keeping alive as a shield against puisne incumbrances, resting on the theory of an implied equitable assignment of the debt to the person paying it up

In India under the law as it obtained before the amendment of the Transfer of Property Act in 1929 as in America where the law of subrogation in relation to mortgages was more fully developed and elaborately discussed than in England in cases and text books alike, the doctrine could only apply where the payment operated as a purchase or equitable assignment and not as an extinguishment of the claim. It only applied in favour of one who bought the debt either expressly or by paying it under circumstances which rendered the payment equal to a purchase. Whether the payment amounted to a purchase or extinguishment was really a question of intention, either express or presumed from the relation of the party to the debt or other circumstances under which the payment was made. Although the doctrine was sometimes described as so highly benevolent and inherently just that it could be moulded by Courts so as to ensure the rendering of complete justice and equity in every possible case, subrogation was held to arise only in those cases where the party claiming it advanced the money to pay a debt which in the event of default of payment by the debtor he would be bound to pay or where he had some interest to protect or where he advanced the money under an agreement, express or implied, made either with the debtor or with the creditor, that he would be subrogated to the rights and remedies of the creditor. *Vide* Jones on Mortgages, 6th Edition, Vol. 1, section 874 and *Gurdeo Singh* v. *Chandrikah Singh*[1].

The law as embodied in section 92, Transfer of Property Act, newly enacted in 1929, is in some respects different. The statute as amended requires that a party claiming subrogation must either fall within the one or other of the categories of persons mentioned in the first paragraph of section 92 or must hold a covenant for subrogation from the mortgagor in writing registered; as provided in the third paragraph. An agreement with the mortgagee although in writing registered is not specifically mentioned in or recognised by the section and it may well

1. (1907) I.L.R. 36 Cal. 193, 218.

be a question whether that sort of agreement with the mortgagee can be relied on as a ground for subrogation. I am inclined to think, though not called upon to express any final opinion in this case on that point, that it can be, as that amounts in substance to a legally valid and effective assignment of the secured debt by the mortgagee redeemed. Where there is no such covenant with the mortgagee in writing registered, of course, there can be no subrogation as under the old law on the basis of an implied agreement with the mortgagee.

Bearing these principles of subrogation law in mind if we ask ourselves the question whether there is anything therein which precludes subrogation in the present case, how does the matter stand? It seems to me that the question must be answered in the negative. There is nothing in my opinion, in essence to distinguish the present case in which after the partition, Govinda Bhatta alone entered into a covenant for subrogation with the present appellants from a case in which without such partition or such provision in the partition deed both Govinda Bhatta and Vishnu Bhatta together entered into such a covenant. Only, in the latter case there is but one step of procedure—that of an agreement by both the mortgagors, while in the former there are two steps—an agreement between the two mortgagors substituting one of them as the person bound to pay the debt, for both of them and thereafter an agreement by that one with a third party conferring on him a right of subrogation. The result reached in both the cases is, however, the same. A position of difference may perhaps arise on a question as to the availability of this limited ground of decision which I am dealing with, if after the partition constituting Govinda Bhatta the sole debtor, Vishnu Bhatta himself actually entered into a covenant for subrogation with a third party. In that case it may perhaps be arguable that having parted with his right of redemption in favour of Govinda Bhatta, Vishnu Bhatta would not be competent to covenant with another in respect of subrogation, which is necessarily a right appendant to a pre-existing right of redemption without which it cannot spring into or continue in existence. I do not propose however to pursue the point further or express any opinion on this by no means easy aspect of the matter, which does not arise for decision in the case on hand. I am, however, clearly of opinion that quite apart from the meaning to be assigned in this as well as any other case to the expression "a mortgagor" in the third paragraph of section 92, as already indicated as the first ground of decision, the appellants in the present case are in the alternative entitled to claim subrogation, although under a covenant from one mortgagor only without regard to the other, by force of the provision in the partition deed constituting Govinda Bhatta, as between the brothers, the sole debtor in respect of the prior mortgages.

The provision in the partition deed has really the effect of making Govinda Bhatta *sole owner of the equity of redemption*, and as pointed out in Sheldon on Subrogation, 2nd Ed, page 28, section 19, where a person advances money to pay off a mortgage debt under an agreement with *the owner of the equity of redemption* or his representative that he shall hold the mortgage as security for his advance, but the mortgage, instead of being assigned to him, is discharged, he is yet entitled as against subsequent parties in interest to be subrogated to the rights of the mortgagee and to enforce the mortgage. How the principles of subrogation law are to be applied to joint mortgagors and to the grantees of a mortgagor is dealt with at page 270 in section 178 of that same work in a passage which embodies the decision in *Cherry* v, *Monro*[1], and runs in these terms :

"*C* and *S* purchased a plot of land, and gave their joint note and mortgage for the price thereof. *C* afterwards conveyed his undivided half to *S*, subject to the mortgage, which *S* assumed and agreed to pay, and gave to *C* a bond of indemnity against the same. *S* subsequently conveyed the lot to a grantee with full covenants of warrantee and against incumbrances, and then became insolvent and left the State having failed to pay the mortgage debt. The mortgagee having brought a suit against *C* on the note, instead of proceeding against the land, *C* thereupon tendered to the mortgagee the full amount due, and demanded an assignment of the note and mortgage to a third person for his benefit, so that he might enforce them against the land for his indemnity; but the mortgagees refused to make such an assignment. It was held on a bill in equity then brought by *C* against the mortgagee

1. 2 Barb Ch. (N.Y.) 618.

and the grantee, of *S*, that the arrangement between *C* and *S* and the conveyance from the former to the latter constituted in equity the relation of principal and surety, not only between themselves personally, but also with reference to their interests in the mortgaged property; *"that the equitable rights of C and S were now the same as if S had originally owned the whole lot, and had given the mortgage for his own debt,* and *C* had been merely his surety; that accordingly the land was the primary fund for the payment of the debt, and the surety, if compelled by the mortgagee to pay the debt, would be entitled to be subrogated to the charge of the mortgage upon the land; and that *C*'s rights were not affected by the fact that he had taken a bond of indemnity from *S*, for as *S* was insolvent, his sureties on that bond might well insist that the land should be first resorted to for the payment of the mortgage debt, instead of its being collected from *C* and their liability to him upon the bond thus become fixed".

It follows from the principle of the passage quoted and the decision dealt with therein that in the present case after and by virtue of the provision in the partition deed, Govinda Bhatta became the sole mortgagor and Vishnu Bhatta became a surety for him in relation to the rights of the prior mortgagees. If at that juncture Govinda Bhatta entered into a covenant for subrogation with the present appellants, there is no reason why it should not be given effect to merely because Vishnu Bhatta did not join in so doing.

Mr. Narayana Pai next urges that far from supporting the appellants the provision in question in the partition deed constituting Govinda Bhatta the sole debtor creates for another reason an insuperable obstacle in their way; for, as the maxim goes, covenant excludes subrogation. This point of view is dealt with in paragraph 20 of the judgment under appeal, and the essence of the reasoning in support of the conclusion therein expressed against the present appellants, leaving alone the cases cited, is to be found in certain passages from Mulla's Commentary on the Transfer of Property Act, 2nd edition, as applied to the present case on the facts found by the learned Subordinate Judge. His reasoning comes to this: that the covenants in the partition deed binding Govinda Bhatta's branch to pay off not only the present plaintiff's mortgage but also the mortgages covered by Exs. D-3 and D-11 and in default, to indemnify Vishnu Bhatta's branch, exclude the subrogation now claimed by defendants 8 to 11 as under Exs. D-2 and D-10 because the rule that covenant excludes subrogation has been not only applied to the original mortgagor but also extended to the case of any purchaser of the equity of redemption or incumbrancer who discharges a prior incumbrance which he is by contract, express or implied, bound to discharge and even to the case of a transferee from the purchaser with notice of the covenant.

In order to determine the correctness of the reasoning and the soundness of the conclusion of the learned Subordinate Judge, it is necessary to bear in mind certain propositions which are well-settled and cannot be disputed; (1) when a mortgagor himself pays off a certain mortgage he cannot use it as a shield against a subsequent mortgage of his own, and this for the simple reason that he cannot derogate from his own grant and claim subrogation where he has simply performed his own obligation or covenant. Yet he can agree in the manner laid down in the third paragraph of section 92 of the Transfer of Property Act and confer a right of subrogation on the person advancing money under that paragraph. (2) A co-mortgagor whose right to redeem by payment of the whole debt and not of his proportionate share only was recognised in England as long ago as 1820 at the earliest (Vide *Cholmondeley* v. *Clinton*[1]) cited in the Law of Mortgages by H. C. Hanbury and C. H. M. Waldock, p. 233 and in India by the Privy Council as long ago as 1878 at the earliest that is, four years before the Transfer of Property Act (vide *Norendar Narain Singh* v. *Dwarkalal Munwar*[2]), is indisputably entitled so to redeem after the Act, although to what section of the statute the right should be ascribed has been a matter of some debate before us. That the right is not only implicit in sections like 92 and 95 where it is assumed but may well be assigned to section 60 does not, in my opinion, admit of any doubt in view of the last paragraph of section 60 which refers to a person interested in a share only of the equity of redemption. That

1. (1820) 37 E.R. 527 : 2 J. & W. 1, 134. 2. (1877) L.R. 5 I.A. 18 : I.L.R. 3 Cal. 397 at 408 (P.C.).

on the exercise of such right the co-mortgagor becomes entitled to legal subrogation is enacted by the first paragraph of section 92, Transfer of Property Act, the principle as I apprehend it, being that a co-debtor is a principal debtor in respect of his own share and a surety in respect of his co-debtor's share, and when a surety has paid the debt, he is entitled to avail himself of all the creditors' securities.

It may be that if the redeeming mortgagor binds himself by a bargain with his co-mortgagor that he shall himself discharge a certain mortgage by them both and that his co-mortgagor shall not be liable therefor, the bargain binds the redeeming mortgagor so far as to preclude him from asserting a claim of subrogation thereafter. So, in the present case if Govinda or his branch claimed subrogation after themselves redeeming, their claim would be untenable in view of the covenants in the partition deed. But do the covenants disable them from entering into a covenant with a third party conferring on him a right of subrogation where his money is advanced and utilised for the discharge of a prior mortgage? If, in the case to which proposition No. 1 above set forth relates the mortgagor although under disability to claim subrogation by virtue of his redemption is under no disability to enter into a covenant for subrogation with such third party, there is no reason why the redeeming co-mortgagor although under disability to claim subrogation should be under a disability to enter into such covenant. There is nothing in the covenants in the partition deed which in express language or by necessary implication deprives Govinda of his right to enter into such a covenant. In fact, Govinda has become by the partition arrangement between himself and Vishnu virtually the sole mortgagor himself, and there is no reason why his disability to claim subrogation in his own redemption should involve disability to create a right of subrogation by way of covenant in favour of another which does not exist in the case of the sole mortgagor himself.

The reasoning of the learned Judge in the present case suffers from the infirmity that he is mistaking the covenants in the partition deed between Govinda and Vishnu for covenants which exclude subrogation on the part of person or persons contemplated by the third paragraph of section 92, Transfer of Property Act on the assumption for which there is no warrant that such person or persons in spite of the covenant or covenants for subrogation in his or their favour fulfilling the requirements of form and substance alike enjoined by the statute must however go without the benefit of such covenant or covenants. The learned subordinate Judge does not seem to be alive at all to the true legal point of view governing the situation, which I may observe is tersely brought out by Somayya, J., in his judgment in *Nachiappa Gounden* v. *Samiappa Gounden*[1], delivered on behalf of the court consisting of himself and Yahya Ali J. At page 28 in the first column of the report occurs the relevant observation:

(1) "The equitable rule of subrogation gives a vendee a higher right than what the vendor has if certain conditions are fulfilled. Though the original mortgagor who is personally bound to pay is not entitled to subrogation when he pays an earlier mortgage a vendee or a mortgagee from him may be entitled to this right if the case satisfies the requirements of law as already discussed".

The whole judgment in that case which is closely and carefully reasoned contains, if I may say so with respect, a learned and lucid exposition of more aspects than one of the law of subrogation. In particular, it deals with the rules that 'covenant excludes subrogation' and its limitations at pages 24 to 29 of the report. First, the learned Judges observe at page 24, second column:

"That a covenant excludes subrogation, though a compendious method of expressing one aspect of the law of subrogation is really a misleading statement unless we bear in mind the true implications of that statement".

1. (1946) 2 M.L.J. 35 : A.I.R. 1947 Mad. 18.

Then they say:

"If there are two mortgages, *A* and *B*, and a subsequent alienee undertakes to pay off both the mortgages and pays *A* and does not pay *B*, he cannot take advantage of his own default and claim subrogation as against the holder of the mortgage *B*. In such a case his covenant to pay both the mortgages *A* and *B* prevents him from claiming the right of subrogation when he pays off *A* and defaults in payment of the mortgage *B*, in other words, covenant excludes subrogation".

Then, they deal with the question whether if an alienee undertakes to pay certain morgages from and out of the amount payable under the alienation taken by him he cannot claim subrogation in respect of those mortgages. They hold that he can after an exhaustive discussion of the relevant case law. In the course of the discussion they refer to the Privy Council ruling in *Mallireddi Ayyareddi* v. *Gopalakrishnayya*[1] as declaring *first* that it is settled law that the purchaser may by paying off an earlier charge treat himself as buying it and stand in the same position as his vendor, and as declaring *next* the limitation to the rule *viz.*,

"that it would not apply if the owner of the property (by which expression is meant the purchaser) had covenanted to pay the later mortgage debt."

The basis of the limitation to the rule as expounded by Varadachariar, J., in *Lakshmi Amma* v. *Sankaranarayana Menon*[2] is then referred to as being not that in paying off the prior mortgage the purchaser or puisne incumbrancer merely acts as the agent of the mortgagor but that there is the disability founded on the fact that the person claiming subrogation has covenanted to discharge the debt due to the very person against whom he seeks to claim priority. The learned Judges then proceed to refer to another point to be noticed in connection with the expression "covenant excludes subrogation" namely that the covenant must be with the original mortgagor who was personally bound to pay the mortgage or his heir at law. In the course of the discussion of that point they observe that a person entitled to legal subrogation under the first paragraph of section 92, Transfer of Property Act, may well convey that right to his vendee as in the case before them. Then they refer to the equitable rule of subrogation as giving the vendee a higher right than what the vendor has, in the passage which I have quoted as embodying the principle governing the situation here, to which the learned Subordinate Judge was not alive. Although the expression "already discussed" occurring in the locus citatus may suggest at first sight its relevancy only to legal subrogation, there is nothing in the principle rendering it inapplicable to conventional subrogation or showing that the learned Judges did not intend it to govern the latter kind of subrogation as well as the former. Then there follows a discussion of the two Privy Council decisions in *Jankinath Ray* v. *Pramathnath Malia*[3], and in *Manomohandas* v. *Janki Prasad*[4], which have, since the amendment of section 92 of the Transfer of Property Act in 1929, expounded the law of subrogation with reference to the amendment. The learned Judges thereafter dealt with the argument advanced before them that the covenant required for conventional subrogation was not present in that case and repel it by holding that the stipulation that the sale was to be free of all incumbrances implied a covenant that the vendee was to be entitled to subrogation on redeeming prior mortgages from out of the consideration for the sale.

I have given this resume of the decision of Somayya and Yahya Ali, JJ., in *Nachiappa Goundan* v. *Samiappa Gounden*[5], in order to show that the passage in their judgment on which I am relying is in the nature of a considered dictum occurring in the course of an erudite and exhaustive treatment of the subject of subrogation which is highly instructive. It is significant too to notice in this connection what the learned Judges say about the ruling of the Privy Council in *Jankinath Ray* v. *Pramathnath Malia*[3]. They refer first to the facts of that case thus:

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1. (1923) 46 M.L.J. 164 : L.R. 51 I.A. 140 : I.L.R. 47 Mad. 190 (P.C.).
2. (1935) 70 M.L.J. 1 : I.L.R. 59 Mad. 359 (F.B.).
3. (1940) 1 M.L.J. 446 : L.R. 67 I.A. 82 : I.L.R. (1940) 1 Cal. 291 (P.C.).
4. (1945) 1 M.L.J. 97.
5. (1946) 2 M.L.J. 35: A.I.R. 1947 Mad. 18.

"There were five mortgages in succession; (1) First mortgage by respondent 1 of his property *A* in favour of the appellant on 8th April, 1924, for a sum of Rs. 2,00,000, the said sum being repayable on 8th April 1925. (2) Second mortgage by respondent 1 of property *A* as well as property *B* in favour of the same person on 30th November, 1925, for a sum of Rs. 1,00,000, repayable on 30th November, 1926. Property *B* was also to be additional security for the first mortgage. (3) Third mortgage by respondent 1 in favour of the same person of properties *A*, *B* and *C* on 29th November 1926 for a sum of Rs. 1,00,000 repayable on 28th November 1927, wih similar stipulations with regard to properties *B* and *C* forming respectively additional security for the earlier mortgages. (4) Fourth mortgage of properties *A*, *B* and *C* and *D* by the same person in favour of the mortgagee of the three previous mortgages and another on 11th November, 1927, for a sum of Rs. 1,50,000 repayable on 11th November, 1929. Stipulations similar to those in the previous mortgages were repeated. (5) Fifth mortgage of *A*, *B*, *C* and *D* and other properties in favour of a different person, respondent 4 on 27th November, 1927, for Rs. 7,00,000 and a quarter. The mortgage money was left with respondent 4 to pay off all the four prior mortgages. By that time the time for payment of the first three mortgages had elapsed but the fourth mortgage was repayable only much later in 1929. So it was stipulated in the fifth mortgage that upon payment by the fifth mortgagee of the amount due under the first three mortgages he should be subrogated to the rights under those three mortgages. The mortgagee paid the first three mortgages "in full" but did not pay the fourth mortgage of 11th November 1927. The fourth mortgagee sued upon his mortgage in 1931 for sale of all the four items on the averment that the first three mortgages had been discharged and extinguished".

"Upon these facts", observed the learned Judges "the High Court held that respondent 4 (the fifth and last mortgagee) stood subrogated to the rights under the first three mortgages which he paid off. The Privy Council affirmed the decree of the High Court on the question of subrogation".

It seems to me that the position in the light of this Privy Council ruling is, shortly stated, this. If there is an express agreement for subrogation, it is immaterial that the discharged mortgages were paid off in pursuance of a covenant for the purpose or that the mortgage against which subrogation is claimed was also covenanted to be dicharged. Where there is no such agreement for subrogation, the fact that there is a covenant to pay a certain mortgage negatives any claim to subrogation as against that mortgage, and no priority can be asserted as against it by the discharge of earlier incumbrances (*vide* Mr. G. C. Venkatasubba Rao's Law of Property, 2nd Edn., page 760.)

It follows from the foregoing, that the learned Subordinate Judge in the present case has, in negativing the right of subrogation, claimed by defendants 8 and 9 and 11, allowed himself to be influenced by a number of decisions which did not have to deal with a specific covenant for subrogation in relation to the effect that it has upon the operation of a mere covenant to discharge prior mortgages without more. Such a specific covenant has the effect of rebutting the presumption against subrogation arising from a person's performance of his own obligation or covenant to discharge prior mortgages and of preserving for the person so discharging the conventional subrogation enacted in the third paragraph of section 92 of the Transfer of Property Act.

There was an argument advanced before us by Mr. Krishna Rao, the learned counsel for the appellants, that if regard were had to the provision of section 60-A (1) of the Transfer of Property Act his clients as transferees from and covenantees with Govinda's branch would be entitled to the right of subrogation now claimed by them. The argument still raises the question of the proper interpretation of the expression "a mortgagor" occurring in that section as well as in the third paragraph of section 92. The argument of Mr. Krishna Rao founded on the analogy of section 60-A (1) has therefore no independent merits about it, such as would conclude the matter in favour of his clients.

I agree for the reasons indicated in the foregoing as well as for the reasons given by my learned brother in his judgment that this appeal shoud be allowed.

K. S.

Appeal allowed

[THE SUPREME COURT OF INDIA.]

(Criminal Appellate Jurisdiction.)

PRESENT :—S. FAZL ALI, MEHRCHAND MAHAJAN, B. K. MUKHERJEA AND N. CHANDRASEKHARA AIYAR, JJ.

Ravula Hariprasada Rao .. *Appellant**

v.

The State .. *Respondent.*

Motor Spirit Rationing Order (1941), *clauses* 5, 22, 27 *and* 27-*A*—*Supply of petrol without taking coupons by employee of licensee*—*Infringement of clause* 27-*A by employee*—*Liability of licensee*—Mens rea—*Necessity.*

Unless a statute either clearly or by necessary implication rules out *mens rea* as a constituent part of a crime, an accused cannot be found guilty of an offence against the Criminal Law unless he has got a guilty mind. *Srinivas Mall Bairolia* v. *King-Emperor*, (1947) 2 M.L.J. 328 : I.L.R. 26 Pat. 460 (P.C.), relied on.

The language of clause 22 of the Motor Spirit Rationing Order does not lend support to the contention that even an innocent master will be criminally liable for an act of his servant. The clause is not aimed specifically against a supplier, but is general in its language and will hit the individual person, whether he be the supplier or not, who contravenes the provision. The language of the clause also suggests that only the person who furnishes motor spirit contrary to the provisions of the order will be affected by the contravention. Where an employee of a licensee of a petrol filling station sells petrol to a person without taking coupons in contravention of clause 22 of the order and accepts coupons in advance without supplying petrol in contravention of clause 27 of the same order and the master is not present at the time nor has he any knowledge of such supply of petrol by his servant, the master cannot be held vicariously liable for the act of his servant.

Isak Soloman Macnull v. *Emperor*, A.I.R. 1948 Bom. 364, approved and applied.

But if clause 27-A of the Motor Spirit Rationing Order is contravened, a person who comes within the definition of the word "supplier" must be held guilty of the contravention. The object of the clause clearly is that the supplier of petrol should set up a complete machinery to ensure that the necessary endorsements are made on the coupons against which petrol is supplied. It is conceivable that in many cases the default will be committed by the servants of the supplier who are in charge of the petrol pump, but that fact by itself will not exonerate the supplier from liability. In such a case the principal is liable without a *mens rea*.

On appeal against the Judgment and Order, dated the 19th August, 1947 (Rajamannar, J.) in Criminal Revision Petitions Nos. 1017 and 1018 of 1946.

K. Bhimasankaram, Senior Advocate (G. Durgabai, Advocate, with him), for Appellant.

Ganapati Aiyar, Advocate, for Respondent.

The Judgment of the Court was delivered by

Fazl Ali, J.—This appeal, which has been preferred after obtaining special leave to appeal from the Privy Council, is confined to the single question whether *mens rea* is necessary to constitute an offence under section 81 of the Defence of India Rules.

The facts of the case are briefly these. The appellant is the licensee of two petrol filling stations Nos. 552 and 276 at Guntur but is a resident of Chirala, 40 miles away. He is a Presidency First Class Bench Magistrate at Chirala and manages what has been described as a vast business at several places. Ch. Venkatarayudu and Dadda Pichayya, his employees, were respectively in charge of the aforesaid filling stations. In 1946, the appellant and his two employees were tried before the Sub-Divisional Magistrate of Guntur in respect of offences under the Motor Spirit Rationing Order, 1941, and were convicted in each of the cases on the 18th July, 1946. In the first case, the charges against the appellant and the employee in charge of the pump in question therein were that they on the 27th June, 1945, at Guntur, supplied petrol to 3 cars without taking coupons, in contravention of clause 22 read with clause 5 of the said Order promulgated under rule 81 (2) of the Defence of India Rules and that they on the same day and at the same place, accepted coupons relating to two other cars in advance without

* Criminal Appeal No. 15 of 1950. 19th March, 1951.

supplying petrol, in contravention of clause 27 of the Order. The charges in the second case were that the appellant and the employee in the second pump similarly supplied during the period of 24 hours from 6 a.m. of the 27th June, 1945, petrol to 4 motor vehicles without taking coupons, in contravention of clause 22 read with clause 5, accepted coupons of 3 other vehicles in advance without issuing petrol, in contravention of clause 27, and supplied petrol to 2 other vehicles against coupons but without making necessary endorsements and particulars on the reverse of the coupons, infringing thereby clause 27-A of the said Order. The Sub-Divisional Magistrate, Guntur, found the appellant and the employee concerned in each case guilty of the charges brought against them and sentenced the appellant (with whose case alone we are now concerned) to a fine of Rs. 30 on the first count and Rs. 20 on the second in the first case, with simple imprisonment for 1 week in default, and to a fine of Rs. 20 on each of the three counts in the second case with 1 week's imprisonment in default. The plea of the appellant before the Magistrate was that he was the presiding 1st Class Bench Magistrate at Chirala, that he was carrying on business in petrol at various centres through servants and he had issued instructions to them not to deviate from the rules under any circumstances and that he could not be made liable for transgression of the rules committed by his employees. The Magistrate however overruled the plea and convicted the appellant as stated above. The appellant thereafter preferred an appeal to the Sessions Judge at Guntur, who, while setting aside the conviction of the appellant on the second count in each case, confirmed the conviction and sentence in respect of the other charges, on the 9th September, 1946. This was confirmed in revision by the High Court at Madras on the 19th August, 1947. Thereupon, the appellant applied to the Privy Council for special leave, which was granted on the 9th July, 1948, limited to the single question whether *mens rea* is necessary to constitute an offence under rule 81 of the Defence of India Rules.

The question to be decided in this appeal arises upon the plea taken by the appellant, which has been already referred to, and the assumption on which the Courts below have proceeded in dealing with the case. The plea of the appellant that he was not present at Guntur when the alleged offences were committed has not been negatived by the lower Courts, but they have held that he was nevertheless liable, as the question of *mens rea* was not relevant to the offences with which the appellant was charged. This view is set out very clearly in the following passage which may be quoted from the judgment of the trial Magistrate :—

> " It is argued on behalf of accused 1 that he is not a resident of Guntur and that he has no knowledge of any infringement committed by accused 2. If any breach of the rules is committed by either proprietor or his servant, both are guilty whether they had the knowledge of the breach or not. The question of *mens rea* will, of course, affect the measure of punishment but it cannot affect the conviction (*vide* 1943 A.M.L.J. 38)."

Before deciding the question as to how far *mens rea* is material to conviction for the offences with which the appellant is charged, it is necessary to refer to the relevant provisions of the Defence of India Rules and the Motor Spirit Rationing Order, 1941. Rule 81 (2) of the Defence of India Rules empowers the Central or the Provincial Government to provide by order, in certain circumstances, for regulating amongst other matters, distribution, disposal, use or consumption of articles or things and for requiring articles or things kept for sale to be sold either generally or to specified persons or classes of persons or in specified circumstances. The Central Government in pursuance of the authority thus conferred made the Motor Spirit Rationing Order, 1941, for

> "securing the defence of British India, the efficient prosecution of the war and for maintaining supplies and services essential to the life of the community."

Clause 2 (*d*) of the Order defines " dealer " as meaning a supplier carrying on the business of supplying motor spirit as a retail business and includes a person having charge of a supply of motor spirit controlled by Government from which any person is furnished with motor spirit for private use. Sub-clause (*m*) defines " supplier "

as meaning a person carrying on the business of supplying motor spirit. Clause 5, which is the next relevant provision, runs thus :—

"Motor spirit required for any vehicle not covered by clause 3 or clause 4 shall be furnished or acquired only against the surrender to a supplier at the time of supply of valid ordinary coupons or of a valid supplementary coupon and only in accordance with any conditions or instructions appearing on or attached to the coupons."

Clause 22 lays down :—

"No person shall furnish or acquire a supply of motor spirit otherwise than in accordance with the provisions contained in this order."

Clause 27 is to the following effect :—

"No person shall surrender to a supplier and no supplier shall accept special receipts or coupons at a time other than the time at which the supply of motor spirit authorised by the special receipts or coupons or acknowledged by the receipts is furnished."

Clause 27-A runs as follows :—

"When motor spirit is furnished against the surrender of one or more coupons, the supplier shall immediately endorse, or cause to be endorsed, on each coupon so surrendered the registration or other identifying mark of the vehicle to which the motor spirit is furnished."

Rule 81 (4) of the Defence of India Rules, which provides for the imposition of a penalty, says that

"if any person contravenes any order made under this rule, he shall be punishable with imprisonment for a term which may extend to three years or with fine or both."

It is contended on behalf of the respondent that though ordinarily a person should not be held liable for the criminal acts of another and no person can be charged with the commission of an offence unless a particular intent or knowledge is found to be present, *mens rea* is not of the essence of the offences with which we are concerned in this case and the appellant must be held liable for the acts of his employees. The question raised in this appeal was considered by the Privy Council in *Srinivas Mall Bairolia* v. *King-Emperor*[1]. In that case, the appellants before the Privy Council were convicted under the Defence of India Rules relating to the control of prices and were sentenced to terms of imprisonment. The first appellant was acting as Salt Agent for part of the district of Dharbanga. He had been appointed to this office by the District Magistrate, and it was his duty to sell to licensed retail dealers the supplies of salt which were allocated by the Central Government to his part of Dharbanga district. The second appellant was employed by the first appellant and had been entrusted with the duty of allotting the appropriate quantity of salt to each retail dealer, and noting on the buyer's licence the quantity which he had bought and received. By rule 81 (2) of the Defence of India Rules, the Provincial Governments were empowered to make orders to provide for controlling the prices at which articles or things of any description whatsoever might be sold. The Defence of India Act, 1939, under which the rules were framed, empowered the Provincial Governments to delegate the exercise of their powers to certain officers, and the power to provide by order for controlling the prices at which various articles (among them salt) might be sold, had been delegated to the District Magistrates. Rule 81 (4) of the Rules provided for the punishment of persons guilty of contravening any such orders. Both the appellants were jointly charged with having sold salt on 3 days in July, 1943, to three named traders, in each case at a price exceeding the maximum price which had been fixed by order of the District Magistrate. The first appellant was also separately charged, in respect of the same sales, with having abetted the second appellant's contravention of the order. The trial Magistrate acquitted the first appellant of the substantive offences but convicted him on the three charges of abetting. The Sessions Judge and the High Court in revision confirmed the convictions. The Privy Council ultimately upheld the conviction of the appellants on the merits, but with regard to the view taken by the High Court that even if the first appellant was not proved

1. (1947) 2 M.L.J. 328 : I.L.R. 26 Pat. 460 (P.C.).

to have known of the unlawful acts of the second appellant, he was still liable on the ground that

"where there is an absolute prohibition and no question of *mens rea* arises, the master is criminally liable for the acts of the servant,"

their Lordships observed as follows :—

"With due respect to the High Court, their Lordships think it necessary to express their dissent from this view. They see no ground for saying that offences against those of the Defence of India Rules here in question are within the limited and exceptional class of offences which can be held to be committed without a guilty mind. See the Judgment of Wright, J., in *Sherras* v. *De Rutzen*[1]. Offences which are within that class are usually of a comparatively minor character, and it would be a surprising result of this delegated legislation if a person who was morally innocent of blame could be held vicariously liable for a servant's crime and so punishable 'with imprisonment for a term which may extend to three years'. Their Lordships agree with the view which was recently expressed by the Lord Chief Justice of England, when he said : 'It is in my opinion of the utmost importance for the protection of the liberty of the subject that a Court should always bear in mind that, unless the statute, either clearly or by necessary implication rules out *mens rea* as a constituent part of a crime, a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind (*Brend* v. *Wood*[2])'."

In our opinion, the view of the law as propounded by the Privy Council is the correct view, and, applying it to the present case, it is difficult to hold the appellant guilty of the offence under clause 22 read with clause 5 of the Motor Spirit Rationing Order, 1941. The language of clause 22 does not lend support to the contention that even an innocent master will be criminally liable for an act of his servant. This clause has already been quoted, but, to make the point clear, it may be stated that it provides that no person shall furnish . . . . . motor spirit otherwise than in accordance with the provisions contained in the Order. The clause is not aimed specifically against a supplier, but is general in its language, and will hit the individual person, whether he be the supplier or not, who contravenes the provision. The language of the clause also suggests that only the person who furnishes motor spirit contrary to the provisions of the Order will be affected by the contravention.

In the course of the arguments, reference was made on behalf of the appellant to the decision of the Bombay High Court in *Isak Soloman Macmull* v. *Emperor*[3], which is a case relating to the contravention of clause 22 of the Motor Spirit Rationing Order. In that case, the learned Chief Justice, who delivered the judgment, referred to the well-established rule that unless a statute either clearly or by necessary implication rules out *mens rea* as a constituent part of a crime, the defendant should not be held guilty of an offence under the criminal law unless he has a guilty mind. Relying upon this rule, he held that where a servant sells petrol to a bogus customer in the absence of coupons in contravention of the Motor Spirit Rationing Order, and the master is not present at the time nor has he any knowledge of the supply of petrol by the servants to the bogus customer, the master cannot be held to be vicariously liable for the act of the servant. In our opinion, this decision is correct and is directly applicable to the present case.

We have yet to deal with the third charge in the second case, which relates to the infringement of clause 27-A of the Motor Spirit Rationing Order. That clause, as already stated, makes it incumbent upon the supplier to endorse, or cause to be endorsed, the registration or other identifying mark of the vehicle to which the motor spirit is furnished. The substance of the charge on which the appellant has been convicted is that these particulars were not endorsed on several coupons against which petrol had been supplied. Here again, the main contention put forward on behalf of the appellant was that the appellant cannot be held guilty inasmuch as the default in question was committed not by him personally, but by his servants. Having regard to the language of the clause, however, this contention cannot be accepted. Clause 27-A, as we have already seen throws

1. (1895) 1 Q.B. 918, 921.
2. (1946) 110 J. P. 317, 318,
3. A.I.R. 1948 Bom. 364.

the responsibility for making the necessary endorsement on the supplier. The definition of the word 'supplier' in the Act has already been quoted, and there can be no doubt that if clause 27-A is contravened, a person who comes within the definition of the word 'supplier' must be held guilty of the contravention. The object of this clause clearly is that the supplier of petrol should set up a complete machinery to ensure that the necessary endorsements are made on the coupons against which petrol is supplied. It is conceivable that in many cases the default will be committed by the servants of the supplier, who are in charge of the petrol pump, but that fact by itself will not exonerate the supplier from liability.

In *Mousell Brothers* v. *London and North-western Railway*[1], Viscount Reading, C.J., dealing with a case under the Railways Clauses Consolidation Act, 1845, observed as follows :—

"*Prima facie*, then, a master is not to be made criminally responsible for the acts of his servant to which the master is not a party. But it may be the intention of the Legislature, in order to guard against the happening of the forbidden thing, to impose a liability upon a principal even though he does not know of, and is not party to the forbidden act done by his servant. Many statutes are passed with this object. Acts done by the servant of the licensed holder of licensed premises render the licensed holder in some instances liable, even though the act was done by his servant without the knowledge of the master. Under the Food and Drugs Acts there are again instances well known in these Courts where the master is made responsible, even though he knows nothing of the act done by his servant, and he may be fined or rendered amenable to the penalty enjoined by the law. In those cases the Legislature absolutely forbids the act and makes the principal liable without a *mens rea*."

In the same case, Atkin, J., expressed the same view in these words :—

"I think that the authorities cited by my Lord make it plain that while *prima facie* a principal is not to be made criminally responsible for the acts of his servants, yet the Legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed. If authority for this is necessary it will be found in the judgment of Bowen, L.J., in *Reg* v. *Tyler*[2]."

In *Mullins* v. *Collins*[3], the servant of a licensed victualler having knowingly supplied liquor to a constable on duty without the authority of his superior officer, it was held that the licensed victualler was liable to be convicted although he had no knowledge of the act of his servant. In dealing with the case, Blackburn, J., observed thus :—

"If we hold that there must be a personal knowledge in the licensed person, we should make the enactment of no effect."

There are many other cases in England in which the same view has been enunciated, and some of them have been collected and classified in the judgment of Wright, J., in *Sherras* v. *De Rutzen*[4]. The principle laid down in these cases has been followed in several cases in this country also.

In this view, the appeal is allowed in part, and while the conviction and sentence imposed on the appellant on the first charge in both the cases are quashed, the conviction and sentence on the third charge in the second case are affirmed.

Agent for Appellant : *S. Subramanian.*

Agent for Respondent : *P. A. Mehta.*

G.R./V.S.

Conviction and sentence on the first charge quashed. Conviction and sentence in the third charge affirmed.

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1. (1917) 2 K.B.D. 836 at 844.
2. (1891) 2 Q.B. 588 (592).
3. (1874) 9 Q.B. 292.
4. (1895) 1 Q.B. 918 (922).

[THE SUPREME COURT OF INDIA.]

(Criminal Appellate Jurisdiction).

PRESENT :—H. J. KANIA, *Chief Justice*, M. PATANJALI SASTRI AND S. R. DAS, JJ.

R. R. Chari .. *Appellant**

v.

The State of Uttar Pradesh .. *Respondent.*

Criminal Procedure Code (V of 1898), sections 190 and 197; Prevention of Corruption Act (II of 1947), sections 3 and 7 and Penal Code (XLV of 1860), sections 161 and 165—Prosecution of public servant for offence under sections 161 and 165, Penal Code—Warrant for arrest issued and accused arrested and investigation carried on prior to sanction to prosecute granted by the Government—Issuing of warrant if amounts to taking cognizance—Absence of sanction at that stage, if renders all proceedings illegal.

By virtue of the provisions of section 3 of the Prevention of Corruption Act, 1947, offences under sections 161 and 165 of the Penal Code become cognizable, notwithstanding what is provided in the Criminal Procedure Code. The order for the arrest of the accused which may be applied for and made during the police investigation by virtue of section 3 of the Act is before the Magistrate has taken cognizance of the offence under section 6 of the Act or section 190 of the Penal Code. Having regard to the wording of section 3 of the Prevention of Corruption Act, it would be wrong to assume that the Magistrate can issue a warrant only after taking cognizance of an offence under section 190, Criminal Procedure Code. Reading sections 197 and 190, Criminal Procedure Code and section 6 of the Prevention of Corruption Act in the light of the wording of the proviso to section 3 of the latter Act, it is clear that the stage at which a warrant is asked for under the proviso to section 3 of that Act is not on cognizance of the offence by the Magistrate as contemplated by the other three sections. Hence the absence of sanction of the Government at that stage would not render all the subsequent proceedings illegal even though the requisite sanction was obtained before the case was eventually taken cognizance of by the Magistrate.

On appeal against the Judgment and Order, dated the 28th April, 1950 of the High Court of Judicature at Allahabad (Dayal, J.) in Criminal Revision No. 1892 of 1949.

N. P. Asthana and *N. C. Chatterjee*, Senior Advocates (*K. B. Asthana*, Advocate, with them), for Appellant.

P. L. Banerjee, Advocate-General of United Provinces (*Sri Ram*, Advocate, with him) for Respondent.

The Judgment of the Court was delivered by

Kania, C.J.—This is an appeal by special leave against an order of the Allahabad High Court dismissing the revision petition of the appellant against the order of the Special Magistrate refusing to quash the proceedings on the ground that the prosecution of the appellant *inter alia* under sections 161 and 165 of the Indian Penal Code was illegal and without jurisdiction in the absence of the sanction of the Government under section 197 of the Criminal Procedure Code and section 6 of the Prevention of Corruption Act (II of 1947), hereafter referred to as the Act. The material facts are these. In 1947 the appellant held the office of Regional Deputy Iron and Steel Controller, Kanpur Circle, United Provinces and was a public servant. The police having suspected the appellant to be guilty of the offences mentioned above applied to the Deputy Magistrate, Kanpur, for a warrant of his arrest on the 22nd of October, 1947 and the warrant was issued on the next day. The appellant was arrested on the 27th of October, 1947, but was granted bail. On the 26th of November, 1947, the District Magistrate cancelled his bail as the Magistrate considered that the sureties were not proper. On the 1st of December, 1947, the Government appointed a Special Magistrate to try offences under the Act and on the 1st December, 1947, the appellant was produced before the Special Magistrate and was granted bail. The police continued their investigation. On the 6th December, 1948, sanction was granted by the Provincial Government to prosecute the appellant *inter alia* under sections 161 and 165 of the Indian Penal Code. On the 31st January, 1949, sanction in the same terms was granted by the Central Government. In the meantime as a result of an appeal made by the

*Criminal Appeal No. 1 of 1950.. 19th March, 1951.

appellant to the High Court of Allahabad the amount of his bail was reduced and on the 25th of March, 1949, the appellant was ordered to be put up before the Magistrate to answer the charge-sheet submitted by the prosecution.

On behalf of the appellant it is argued that when the warrant for his arrest was issued by the Magistrate on the 22nd of October, 1947, the Magistrate took cognizance of the offence and as no sanction of the Government had been obtained before that day the initiation of the proceedings against him, which began on that day without the sanction of the Government, was illegal. It is argued that the same proceedings are continuing against him and therefore the notice to appear before the Magistrate issued on 25th March, 1949, is also illegal. In support of his contention that the Magistrate took cognizance of the offences on 22nd March, 1947, he relies principally on certain observations in *Emperor* v. *Sourindra Mohan Chuckerbutty*[1]. It is therefore necessary to determine when the Magistrate took cognizance of the offence. The relevant part of section 190 of the Criminal Procedure Code runs as follows :—

190 (1) "Except as hereinafter provided, any Presidency Magistrate, District Magistrate or Sub-divisional Magistrate and any other Magistrate specially empowered in this behalf, may take cognizance of any offence—

(*a*) upon receiving a complaint of facts which constitute such offence;

(*b*) upon a report in writing of such facts made by any police officer;

(*c*) upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence has been committed . . . . . ."

It is clear from the wording of the section that the initiation of the proceedings against a person commences on the cognizance of the offence by the Magistrate under one of the three contingencies mentioned in the section. The first contingency evidently is in respect of non-cognizable offences as defined in the Criminal Procedure Code on the complaint of an aggrieved person. The second is on a police report, which evidently is the case of a cognizable offence when the police have completed their investigation and come to the Magistrate for the issue of a process. The third is when the Magistrate himself takes notice of an offence and issues the process. It is important to remember that in respect of any cognizable offence, the police, at the initial stage when they are investigating the matter, can arrest a person without obtaining an order from the Magistrate. Under section 167 (*b*) of the Criminal Procedure Code the police have of course to put up the person so arrested before a Magistrate within 24 hours and obtain an order of remand to police custody for the purpose of further investigation, if they so desire. But they have the power to arrest a person for the purpose of investigation without approaching the Magistrate first. Therefore in cases of cognizable offence before proceedings are initiated and while the matter is under investigation by the police the suspected person is liable to be arrested by the police without an order by the Magistrate. It may also be noticed that the Magistrate who makes the order of remand may be one who has no jurisdiction to try the case.

The offences for which the appellant is charged are under the Criminal Procedure Code non-cognizable and therefore if the matter fell to be determined only on the provisions of the Crimihal Procedure Code the appellant could not be arrested without an order of the Magistrate. The position however is materially altered because of section 3 of the Act which runs as follows :—

3. "An offence punishable under section 161 or section 165 of the Indian Penal Code shall be deemed to be a cognizable offence for the purposes of the Code of Criminal Procedure, 1898, notwithstanding anything to the contrary contained therein.

Provided that a police officer below the rank of Deputy Superintendent of Police shall not investigate any such offence without the order of a Magistrate of the first-class or make any arrest therefor without a warrant."

It therefore follows that for the Prevention of Corruption Act offences under sections 161 and 165 of the Indian Penal Code become cognizable, notwithstanding what is provided in the Criminal Procedure Code. The proviso to section

1. (1910) I.L.R. 37 Cal. 412.

3 of the Act puts only two limitations on the powers of the police in connection with the investigation relating to those offences under the Act. They are : (1) that the investigation should be conducted by an officer not below the rank of a Deputy Superintendent of Police unless a Magistrate of the first class otherwise orders ; and (2) if an arrest has to be made an order of the Magistrate has to be obtained. The important point to be borne in mind is that the order of the Magistrate, which has to be obtained, is during the time the police is investigating the case and not when they have completed their investigation and are initiating the proceedings against the suspected person under section 190 of the Criminal Procedure Code. The order which may be applied for and made during the police investigation by virtue of section 3 of the Act is therefore before the Magistrate has taken cognizance of the offence under section 6 of the Act or section 190 of the Criminal Procedure Code. That appears to us to be the result of reading sections 3 and 6 of Act II of 1947 and section 190 of the Criminal Procedure Code read with the definition of cognizable offence in the Code.

The argument of the appellant is that when the Magistrate issued the warrant in October, 1947, he did so on taking cognizance of the offence under section 161 or 165 of the Indian Penal Code under section 190 of the Criminal Procedure Code. It was contended that without such cognizance the Magistrate had no jurisdiction to issue any process as that was the only section which permitted the Magistrate to issue a process against a person suspected of having committed an offence. In our opinion having regard to the wording of section 3 of the Act the assumption that the Magistrate can issue a warrant only after taking cognizance of an offence under section 190 of the Criminal Procedure Code is unsound. The proviso to section 3 of the Act expressly covers the case of a Magistrate issuing a warrant for the arrest of a person in the course of investigation only and on the footing that it is a cognizable offence. Section 3 of the Act which makes an offence under section 161 or 165 of the Indian Penal Code cognizable has provided the two safeguards as the proceedings are contemplated against a public servant. But because of those safeguards it does not follow that the warrant issued by the Magistrate under section 3 of the Act is after cognizance of the offence, and not during the course of investigation by the police in respect of a cognizable offence. The only effect of that proviso is that instead of the police officer arresting on his own motion he has got to obtain an order of the Magistrate for the arrest. In our opinion, it is wrong from this feature of section 3 of the Act alone to contend that because the warrant is issued it must be after the Magistrate has taken cognizance of it and the Magistrate's action can be only under section 190 of the Criminal Procedure Code. The material part of section 197 of the Criminal Procedure Code provides that where any public servant who is not removable from his office save with the sanction of Government is accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the appropriate Government. This section read as following section 190 shows that the word 'cognizance' in this section indicates the stage of initiation of proceedings against a public servant. Sections 190 to 199 (*b*) of the Criminal Procedure Code are grouped together under the caption "Initiation of proceedings." The sections dealing with the stage of investigation by the police in the case of cognizable offences are quite different. Under section 6 of the Act it is provided that no Court shall take cognizance of an offence punishable under section 161 or 165 of the Indian Penal Code . . . alleged to have been committed by a public servant except with the previous sanction of the appropriate Government. Reading sections 197 and 190 of the Criminal Procedure Code and section 6 of the Act in the light of the wording of the proviso to section 3, it is therefore clear that the stage at which a warrant is asked for under the proviso to section 3 of the Act is not on cognizance of the offence by the Magistrate as contemplated by the other three sections.

Learned counsel for the appellant relied on some observations in *Emperor* v. *Sourindra Mohan Chukerbutty*[1], in respect of the interpretation of the word 'cognizance'. In that case, on the 24th April, 1909, a dacoity took place at N. and on the same day the police sent up a report of the occurrence to the Sub-divisional officer of Diamond Harbour. On the 2nd September, one of the accused was arrested and made a confession on the 18th October. The case was subsequently transferred by the District Magistrate of Alipore to his own file and on the 20th January, 1910, an order under section 2 of the Criminal Law Amendment Act (XIV of 1908) was issued in the following terms :—

"Whereas the District Magistrate of the 24-Parganas has taken cognizance of offences under sections 395 and 397, Indian Penal Code, alleged to have been committed by the persons accused in the case of *Emperor* v. *Lalit Mohan Chuckerbutty* and others . . . . . and whereas it appears to the Lieutenant-Governor of Bengal . . . . . the provisions of Part I of the Indian Criminal Law Amendment Act should be made to apply to the proceedings in respect of the said offences, now, therefore, the Lieutenant-Governor . . . . . directs . . . . . that the provisions of the said Part shall apply to the said case."

S. surrendered on the 24th of January, was arrested by the police and put before the Joint Magistrate of Alipore who remanded him to jail. Applications for bail on his behalf were made but they were dismissed. The Sessions Judge was next moved unsuccessfully for bail under section 498 of the Criminal Procedure Code. *S.* then moved the High Court for a Rule calling upon the District Magistrate to show cause why bail should not be granted on the grounds (1) that no order had been made applying Act XIV of 1908 and (2) that there did not appear any sufficient cause for further inquiry into the guilt of *S.* The first contention rested on the assertion that the Magistrate has not taken cognizance of the offence of dacoity on the 20th of January. The learned Judges pointed out that the argument was advanced because the legal adviser of *S.* had not an opportunity to see the record of the case. On the facts it was clear that the Magistrate had taken cognizance of the offence on the 20th of January. The observations

"taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a magistrate as such applies his mind to the suspected commission of an offence"

have to be read in the light of these facts. As noticed above, the Magistrate had expressly recorded that he had taken cognizance of the case and thereupon the provisions of the Criminal Law Amendment Act were made applicable to the case. The question argued before the High Court was in respect of the power of the High Court to grant bail after the provisions of the Criminal Law Amendment Act were applied to the case. In our opinion therefore that decision and the observations therein do not help the appellant.

In *Gopal Marwari* v. *Emperor*[2], it was observed that the word 'cognizance' is used in the Code to indicate the point when the Magistrate or a Judge first takes judicial notice of an offence. It is a different thing from the initiation of proceedings. It is the condition precedent to the initiation of proceedings by the Magistrate. The Court noticed that the word 'cognizance' is a word of somewhat indefinite import and it is perhaps not always used in exactly the same sense.

After referring to the observations in *Emperor* v. *Sourindra Mohan Chuckerbutty*[1], it was stated by Das Gupta, J., in *Superintendent and Remembrancer of Legal Affairs, West Bengal* v. *Abani Kumar Banerjee*[3] as follows —

"What is taking cognizance has not been defined in the Criminal Procedure Code and I have no desire to attempt to define it. It seems to me clear however that before it can be said that any magistrate has taken cognizance of any offence under section 190 (1) (*a*), Criminal Procedure Code, he must not only have applied his mind to the contents of the petition but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter —proceeding under section 200 and thereafter sending it for inquiry and report under section 202, When the magistrate applies his mind not for the purpose of proceedings under the subsequent sections of this Chapter, but for taking action of some other kind, *e.g.*, ordering investigation under section

1. (1910) I.L.R. 37 Cal. 412.
2. A.I.R. 1943 Pat. 245.
3. A.I.R. 1950 Cal. 437.

156 (3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence."

In our opinion that is the correct approach to the question before the Court.

Moreover in the present case on the 25th March, 1949, the Magistrate issued a notice under section 190 of the Criminal Procedure Code against the appellant and made it returnable on the 2nd of May, 1949. That clearly shows that the Magistrate took cognizance of the offence only on that day and acted under section 190 of the Criminal Procedure Code. On the returnable date the appellant contended that the sanction of the Central Government was void because it was not given by the Government of the State. On the decision going against him he appealed to the High Court and to the Privy Council. The appellant's contention having thus failed, the Magistrate proceeded with the trial on the 26th of November, 1949. The only question which is now presented for our decision therefore is whether there was any sanction granted by the Government before the Magistrate took cognizance of the offence and issued the notice under section 190 of the Criminal Procedure Code on the 25th March, 1949. To that the clear answer is that the Government had given its sanction for the prosecution of the appellant before that date. It seems to us therefore that the appellant's contention that the Magistrate had to take cognizance of the offences without the previous sanction of the Government is untenable and the appeal fails.

Agent for Appellant : *S. S. Shukla.*

Agent for Respondent : *C. P. Lal.*

G.R./V.S. ——— *Appeal dismissed.*

[THE SUPREME COURT OF INDIA.]

(Civil Appellate Jurisdiction).

PRESENT :—H. J. KANIA, *Chief Justice*, S. FAZL ALI, M. PATANJALI SASTRI, MEHRCHAND MAHAJAN, B. K. MUKHERJEA, S. R. DAS AND VIVIAN BOSE, JJ.

The State of Madras .. *Appellant**

v.

Srimathi Champakam Dorairajan .. *Respondent.*

AND

The State of Madras .. *Appellant**

v.

C. R. Srinivasan ... *Respondent.*

Constitution of India (1950), *Article* 29 (2)—*Right of a citizen to get admission into any educational institution maintained by the State or receiving aid out of State funds—Nature and extent of—Denial of right on ground of caste—If a breach of his fundamental rights—Validity of the Madras Communal G.O. regulating admissions to Colleges.*

The right to get admission into any educational institution of the kind mentioned in clause (2) of Article 29 of the Constitution is a right which an individual citizen has as a citizen and not as a member of any community or class of citizens. This right is not to be denied to the citizen on grounds only of religion, race, caste, language or any of them. If in spite of his having the necessary academic qualifications he is refused admission only on grounds of religion, race, caste, language or any of them, then there is a clear breach of his fundamental right.

The provisions of Article 46 which charges the State with promoting with special care the educational and economic interests of the weaker sections of the people cannot override the provisions of Article 29 (2) inasmuch as the directive principles of State policy which by Article 37 are expressly made enforceable by a Court cannot override the provisions found in Part III. The chapter of Fundamental Rights is sacrosanct and not liable to be abridged by any Legislative or Executive Act or order except to the extent provided in the appropriate Article in Part III. The directive principles of State policy have to conform to and run as subsidiary to the chapter of Fundamental rights.

The classification in the Madras Communal G. O. regulating admission to colleges proceeds on the basis of religion, race and caste and is opposed to the Constitution and constitutes a clear vio-

*Cases Nos. 270 and 271 of 1951. 9th April, 1951.

lation of the fundamental rights guaranteed to the citizen under Article 29 (2) of the Constitution and is therefore void under Article 13.

(Appeal under Article 132 (1) of the Constitution of India from the Judgment and Order dated the 27th July, 1950[1], of the Madras High Court in Civil Miscellaneous Petition No. 5225 of 1950.)

V. K. T. Chari, Advocate-General, Madras (*R. Ganpathy Iyer*, Advocate, with him) for Appellant.

Alladi Krishnaswami Iyer, Senior Advocate (*Alladi Kuppuswami Iyer*, Advocate, with him), for Respondents in both the cases.

The Judgment of the Court was delivered by

Das, J.—This judgment covers both Cases No. 270 of 1951 (*State of Madras* v. *Srimathi Champakam Dorairajan*[1]) and Case No. 271 of 1951 (*State of Madras* v. *C. R. Srinivasan*) which are appeals from the judgment pased by the High Court of Judicature at Madras on July 27, 1950, on two separate applications under Article 226 of the Constitution complaining of breach of the petitioners' fundamental right to get admission into educational institutions maintained by the State.

The State of Madras maintains four Medical Colleges and only 330 seats are available for students in those four Colleges. Out of these 330 seats, 17 seats are reserved for students coming from outside the State and 12 seats are reserved for discretionary allotment by the State and the balance of the seats available are apportioned between four distinct groups of districts in the State.

Likewise, the State of Madras maintains four Engineering Colleges and the total number of seats available for students in those Colleges are only 395. Out of these, 21 seats are reserved for students coming from outside the State, 12 seats are reserved for discretionary allotment by the State and the balance of the seats available are apportioned between the same four distinct groups of districts.

For many years before the commencement of the Constitution, the seats in both the Medical Colleges and the Engineering Colleges so apportioned between the four distinct groups of districts used to be filled up according to certain proportions set forth in what used to be called the Communal G. O. Thus, for every 14 seats to be filled by the selection committee, candidates used to be selected strictly on the following basis :—

Non-Brahmin (Hindus)	..	6
Backward Hindus	..	2
Brahmins	..	2
Harijans	..	2
Anglo-Indians and Indian Christians	..	1
Muslims	..	1

Subject to the aforesaid regional and what have been claimed to be protective provisions, selection from among the applicants from a particular community from one of the groups of districts used to be made on certain principles based on academic qualifications and marks obtained by the candidates. In the case of the Medical Colleges, not less than 20 per cent. of the total number of seats available for students of the State were filled by women candidates separately for each region, it being open to the selection committee to admit a larger number of women candidates in any region if qualified candidates were available in that region and if they were eligible for selection on merits *vis-a-vis* the men candidates in accordance with the general principles governing such admissions as laid down in those rules. It appears that the proportion fixed in the old Communal G. O. has been adhered to even after the commencement of the Constitution on January 26, 1950. Indeed, G. O. No. 2208, dated June 16, 1950, laying down rules for the selection of candidates for admission into the Medical Colleges substantially reproduces the communal proportion fixed in the old Communal G. O.

1. (1950) 2 M.L.J. 404 (F.B.).

On June 7, 1950, Srimathi Champakam Dorairajan made an application to the High Court of Judicature at Madras under Article 226 of the Constitution for protection of her fundamental rights under Article 15 (1) and Article 29 (2) of the Constitution and prayed for the issue of a *writ of mandamus* or other suitable prerogative writ restraining the State of Madras and all officers and subordinates thereof from enforcing, observing, maintaining or following or requiring the enforcement, observance, maintenance or following by the authorities concerned of the notification or order generally referred to as the Communal G. O. in and by which admissions into the Madras Medical Colleges were sought or purported to be regulated in such manner as to infringe and involve the violation of her fundamental rights. From the affidavit filed in support of her petition, it does not appear that the petitioner had actually applied for admission in the Medical College. She states that on inquiry she came to know that she would not be admitted to the College as she belonged to the Brahmin community. No objection, however, was taken to the maintainability of her petition on the ground of absence of any actual application for admission made by her. On the contrary, we have been told that the State had agreed to reserve a seat for her should her application before the High Court succeed. In the peculiar circumstances, we do not consider it necessary to pursue this matter any further. But we desire to guard ourselves against being understood as holding that we approve of a person who has not actually applied for admission into an educational institution coming to Court complaining of infringement of any fundamental right under Article 29 (2). The High Court by its judgment delivered on July 27, 1950, allowed this application of Srimathi Champakam Dorairajan. The State of Madras has now come up before us on appeal which has been numbered Case No. 270 of 1951.

Sri Srinivasan who had actually applied for admission into the Government Engineering College at Guindy, filed a petition praying for a *writ of mandamus* or any other writ restraining the State of Madras and all officers thereof from enforcing, observing, maintaining or following the Communal G. O. in and by which admission into the Engineering College was sought to be regulated in such manner as to infringe and involve the violation of the fundamental right of the petitioner under Article 15 (1) and Article 29 (2) of the Constitution. In the affidavit filed in support of his petition, the petitioner has stated that he had passed the Intermediate Examination held in March 1950 in Group 1, passing the said examination in first class and obtaining marks set out in paragraph 1 of his affidavit. It will appear that in the optionals which are taken into consideration in determining the academic test for admission in the Engineering College the petitioner Srinivasan secured 369 marks out of a maximum of 450 marks. The High Court has by the same judgment allowed this application also and the State has filed an appeal which has been numbered 271 of 1951. The learned counsel appearing for the State of Madras conceded that these two applicants would have been admitted to the educational institutions they intended to join and they would not have been denied admission if selections had been made on merits alone.

Article 29 which occurs in Part III of the Constitution under the head ' Cultural and Educational Rights ' runs as follows :

" (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."

It will be noticed that while clause (1) protects the language, script or culture of a section of the citizens, clause (2) guarantees the fundamental right of an individual citizen. The right to get admission into any educational institution of the kind mentioned in clause (2) is a right which an individual citizen has as a citizen and not as a member of any community or class of citizens. This right is not to be denied to the citizen on grounds only of religion, race, caste, language or any of them. If a citizen who seeks admission into any such educational institution has not the requisite academic qualifications and is denied admission on that

ground, he certainly cannot be heard to complain of an infraction of his fundamental right under this Article. But, on the other hand, if he has the academic qualifications but is refused admission only on grounds of religion, race, caste, language or any of them, then there is a clear breach of his fundamental right.

The learned Advocate-General appearing for the State contends that the provisions of this Article have to be read along with other Articles in the Constitution. He urges that Article 46 charges the State with promoting with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and with protecting them from social injustice and all forms of exploitation. It is pointed out that although this Article finds a place in Part IV of the Constitution which lays down certain directive principles of State policy and though the provisions contained in that part are not enforceable by any Court, the principles therein laid down are nevertheless fundamental for the governance of the country and Article 37 makes it obligatory on the part of the State to apply those principles in making laws. The argument is that having regard to the provisions of Article 46, the State is entitled to maintain the Communal G.O., fixing proportionate seats for different communities and if because of that Order, which is thus contended to be valid in law and not in violation of the Constitution, the petitioners are unable to get admissions into the educational institutions, there is no infringement of their fundamental rights. Indeed, the learned Advocate-General of Madras even contends that the provisions of Article 46 override the provisions of Article 29 (2). We reject the above noted contentions completely. The directive principles of the State policy, which by Article 37 are expressly made unenforceable by a Court cannot override the provisions found in Part III which, notwithstanding other provisions, are expressly made enforceable by appropriate writs, orders or directions under Article 32. The chapter of Fundamental Rights is sacrosanct and not liable to be abridged by any Legislative or Executive Act or order, except to the extent provided in the appropriate Article in Part III. The directive principles of State policy have to conform to and run as subsidiary to the Chapter of Fundamental Rights. In our opinion, that is the correct way in which the provisions found in Parts III and IV have to be understood. However, so long as there is no infringement of any Fundamental Right, to the extent conferred by the provisions in Part III, there can be no objection to the State acting in accordance with the directive principles set out in Part IV, but subject again to the Legislative and Executive Powers and limitations conferred on the State under different provisions of the Constitution.

In the next place, it will be noticed that Article 16 which guarantees the fundamental right of equality of opportunity in matters of public employment and provides that no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of any employment or office under the State also includes a specific clause in the following terms :

"(4) Nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State."

If the argument founded on Article 46 were sound then clause (4) of Article 16 would have been wholly unnecessary and redundant. Seeing however, that clause (4) was inserted in Article 16, the omission of such an express provision from Article 29 cannot but be regarded as significant. It may well be that the intention of the Constitution was not to introduce at all communal considerations in matters of admission into any educational institution maintained by the State or receiving aid out of State funds. The protection of backward classes of citizens may require appointment of members of backward classes in State services and the reason why power has been given to the State to provide for reservation of such appointments for backward classes may under those circumstances be understood. That consideration, however, was not obviously considered necessary in the

case of admission into an educational institution and that may well be the reason for the omission from Article 29 of a clause similar to clause (4) of Article 16.

Take the case of the petitioner Srinivasan. It is not disputed that he secured a much larger number of marks than the marks secured by many of the Non-Brahmin candidates and yet the Non-Brahmin candidates who secured less number of marks will be admitted into six out of every 14 seats but the petitioner Srinivasan will not be admitted into any of them. What is the reason for this denial of admission except that he is a Brahmin and not a Non-Brahmin. He may have secured higher marks than the Anglo-Indian and Indian Christians or Muslim candidates, but, nevertheless, he cannot get any of the seats reserved for the last mentioned communities for no fault of his except that he is a Brahmin and not a member of the aforesaid communities. Such denial of admission cannot but be regarded as made on ground only of his caste.

It is argued that the petitioners are not denied admission only because they are Brahmins but for a variety of reasons, *e.g.*, (*a*) they are Brahmins, (*b*) Brahmins have an allotment of only two seats out of 14 and (*c*) the two seats have already been filled up by more meritorious Brahmin candidates. This may be true so far as these two seats reserved for the Brahmins are concerned but this line of argument can have no force when we come to consider the seats reserved for candidates of other communities, for so far as those seats are concerned, the petitioners are denied admission into any of them not on any ground other than the sole ground of their being Brahmins and not being members of the community for whom those reservations have been made. The classification in the Communal G.O. proceeds on the basis of religion, race and caste. In our view, the classification made in the Communal G.O. is opposed to the Constitution and constitutes a clear violation of the fundamental rights guaranteed to the citizen under Article 29 (2). In this view of the matter, we do not find it necessary to consider the effect of Articles 14 or 15 on the specific Articles discussed above.

For the reasons stated above, we are of opinion that the Communal G.O. being inconsistent with the provisions of Article 29 (2) in Part III of the Constitution is void under Article 13. The result, therefore, is that these appeals stand dismissed with costs.

Agent for Appellant : *P. A. Mehta.*

Agent for Respondent : *M. S. K. Sastri.*

G.R./V.S. *Appeals dismissed.*

[THE SUPREME COURT OF INDIA.]

(Original Jurisdiction).

PRESENT :—H. J. KANIA, *Chief Justice*, S. FAZL ALI, M. PATANJALI SASTRI, MEHRCHAND MAHAJAN, B. K. MUKHERJEA, S. R. DAS AND VIVIAN BOSE, JJ.

B. Venkataramana .. *Petitioner**

v.

The State of Madras and another .. *Respondents.*

Constitution of India (1950)—*Article* 16—*Fundamental right guaranteed under clauses* (2) *and* (3) *of Article* 16—*If infringed by rule of communal rotation laid down by Madras Communal G. O. regulating recruitment to office of District Munsiffs.*

In view of Clause (4) of Article 16 of the Constitution the reservation of posts in Government service (in this case post of District Munsiff) in favour of any backward class of citizens cannot be regarded as unconstitutional. But the ineligibility of a Brahmin for any of the posts reserved for communities other than Harijans and Backward Hindus cannot but be regarded as founded on the ground only of his being a Brahmin. This ineligibility created by the rule of communal rotation as laid down in the Madras Communal G.O. is not sanctioned by clause (4) of Article 16 and it

* Petition No. 318 of 1950. 9th April, 1951.

is an infringement of the fundamental right guaranteed to the petitioner as an individual citizen under Article 16 (1) and (2). The Communal G.O. is repugnant to the provisions of Article 16 and is as such void and illegal.

(Under Article 32 of the Constitution for a writ of *certiorari* and *prohibition*).

B. Somayya, Senior Advocate (*N. Krishna Rao*, Advocate, with him) for Petitioner.

V. K. T. Chari, Advocate-General Madras (*R. Ganapathi Iyer*, Advocate, with him) for Respondents.

The Judgment of the Court was delivered by

Das, J.—This is an application under Article 32 of the Constitution of India complaining of the infringement of the petitioner's fundamental right to employment in the State service of the first respondent.

By a notification dated 16th December, 1949, published in the *Fort St. George Gazette*, dated 20th December, 1949, the Madras Public Services Commission invited applications for 83 posts of District Munsiffs in the Madras Subordinate Civil Judicial Service. It was notified that out of the 83 posts to be filled by direct recruitment, 12 were to go to persons already in the service holding certain classes of employment in the Madras Civil Judicial Department and that the remaining 71 posts would be filled up from among the Official Receivers, Assistant Public Prosecutors and practising members of the Bar. It was further notified that the selection of the candidates would be made from various castes, religions and communities in pursuance of the rules prescribed in what are popularly described as Communal G. Os., namely, for Harijans 19, Muslims 5, Christians 6, Backward Hindus 10, Non-Brahmin Hindus 32 and Brahmins 11. Different and unequal age limits for candidates of the abovementioned different classes were fixed and no age limit was fixed for Harijans and Backward Hindus.

The petitioner is a graduate having secured a first class degree in Mathematics. He also passed the B.L. Degree Examination in the second class. He has been practising as an Advocate in Nellore for over seven years. Admittedly, therefore, he possesses the requisite qualifications for being selected as a District Munsiff. Indeed, it is admitted that the marks secured by him would entitle him to be selected if the provisions in the Communal G.O. were disregarded. In April and May, 1950, the Madras Public Services Commission interviewed the candidates. It is claimed by the Petitioner that he did well in the *viva voce* examination held by the Public Services Commission in which one of the Judges of the Madras High Court was also present as a representative of the High Court. Out of the 83 posts, 12 were selected from the Madras Judicial Department. The Madras Public Services Commission in its notification in the Supplement to Part I-B to the *Fort St. George Gazette*, dated 6th June, 1950, published the list of selected candidates under each community. Harijan 1, Muslims 7, Christians 4, Backward Hindus 13, Non-Brahmin Hindus 42 and Brahmins 4. The present petition was filed on 21st October, 1950, praying for an order declaring that the rule of the communal rotation, in pursuance of which the selection to the posts of District Munsiffs was made in the Madras Subordinate Civil Judicial Service, was repugnant to the provisions of the Constitution and, therefore, void, for directing the Madras Public Services Commission to cancel the selections already made, prohibiting the State of Madras, from filling up the posts from out of the candidates selected in pursuance of the notification dated 16th December, 1949, and for directing the disposal of the petitioner's application for the said post after taking it on the file on its merits and without applying the rule of communal rotation.

The Constitution by Article 16 specifically provides for equality of opportunity in matters of public employment. The relevant clauses are as follows :—

"(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of any employment or office under the State.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State."

Clause (4) expressly permits the State to make provision for the reservation of appointments of posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services of the State. Reservation of posts in favour of any backward class of citizens cannot, therefore, be regarded as unconstitutional. The Communal G.O. itself makes an express reservation of seats for Harijans and Backward Hindus. The other categories, namely, Muslims, Christians, non-Brahmin Hindus and Brahmins must be taken to have been treated as other than Harijans and Backward Hindus. Our attention was drawn to a schedule of Backward Classes set out in Schedule III to Part I of the Madras Provincial and Subordinate Service Rules. It was, therefore, argued that Backward Hindus would mean Hindus of any of the communities mentioned in that Schedule. It is, in the circumstances, impossible to say that classes of people other than Harijans and Backward Hindus can be called Backward Classes. As regards the posts reserved for Harijans and Backward Hindus it may be said that the petitioner who does not belong to those two classes is regarded as ineligible for those reserved posts not on the ground of religion, race, caste, etc., but because of the necessity for making a provision for reservation of such posts in favour of a backward class of citizens, but the ineligibility of the petitioner for any of the posts reserved for communities other than Harijans and Backward Hindus cannot but be regarded as founded on the ground only of his being a Brahmin. For instance, the petitioner may be far better qualified than a Muslim or a Christian or a Non-Brahmin candidate and if all the posts reserved for those communities were open to him, he would be eligible for appointment, as is conceded by the learned Advocate-General of Madras, but, nevertheless, he cannot expect to get any of those posts reserved for those different categories only because he happens to be a Brahmin. His ineligibility for any of the posts reserved for the other communities, although he may have far better qualifications than those possessed by members falling within those categories, is brought about only because he is a Brahmin and does not belong to any of those categories. This ineligibility created by the Communal G.O. does not appear to us to be sanctioned by clause (4) of Article 16 and it is an infringement of the fundamental right guaranteed to the petitioner as an individual citizen under Article 16 (1) and (2). The Communal G.O., in our opinion, is repugnant to the provisions of Article 16 and is as such void and illegal. This, in our opinion, is sufficient to dispose of this application and we do not consider it necessary to consider the effect of Articles 14 or 15 of the Constitution on the case of the respondents.

We are informed that this petition was made after most of the selected candidates had taken charge of the posts to which they were appointed. As a result of this judgment we do not direct the Madras Public Services Commission to cancel the selections already made in so far as the candidates selected have already taken charge of their posts. We understand, however, that all the posts have not yet been filled up and there will be no difficulty in considering the petitioner's application on its merits without reference to the Communal G.O. which offends against the provisions of Part III of the Constitution. We, therefore direct the respondents to consider and dispose of the petitioner's application for the post after taking it on file on its merits and without applying the rule of communal rotation. The petitioner will be entitled to his costs of this application.

Agent for Petitioner : *M. S. K. Sastri.*

Agent for Respondents : *P. A. Mehta.*

G.R./V.S.

Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE VISWANATHA SASTRI.

V. G. Row .. *Petitioner**

v.

The State of Madras .. *Respondent.*

Criminal Law Amendment Act (XIV of 1908), as amended by Indian Criminal Law Amendment (Madras) Act (XI of 1950)—If offends against Articles 14 and 19 of the Constitution of India—Declaration of an association as an unlawful association—Legality.

An association was declared an unlawful association within the meaning of the Criminal Law (Madras) Amendment Act on the grounds that it has for its objects interference with the administration of law and the maintenance of law and order and constitutes a danger to the public peace. The Central Act and (Madras) Amending Act (XI of 1950) were challenged on the grounds :

(*a*) the Amending Act repealed section 16 of the Central Act and there was no other provision which gave power to the State Government to declare an association unlawful,

(*b*) the Act contravened Articles 14 and 19 of the Constitution of India.

Held, (*a*) Though the power to issue a notification was not expressly conferred upon the Government, such a power could be implied necessarily from the language of section 15 (2) (*b*) as amended as well as from the subsequent provisions of the Amending Act. It is a well recognised legislative practice to infer from a reference in the definition clause to a declaration or notification by the Government, an implied power to the Government to make such a declaration or issue such a notification. So the State Government has power to issue a notification declaring an association as unlawful under new sub-clause (2) of section 15.

(*b*) (*Satyanarayana Rao, J.*, Contra) The Act did not contravene Article 14 of the Constitution. 'Equality before law' is understood to mean supremacy of the regular law of the land as opposed to arbitrary power, that a man shall be punished for a breach of law, but for nothing else and equal subjection of all classes to the ordinary law of the land administered by the ordinary law Courts. The impugned act did not offend these principles. Also 'equal protection of law' is a pledge of the protection of equal law. It requires that persons subjected to a piece of legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed It prevents any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. The Act by itself does not discriminate between persons. It does not specify any class or group by a political or religious or linguistic or territorial denomination and declare that they alone are unlawful associations. No doubt, the procedure laid down in the Amendment Act is different from the procedure which obtains in the case of other offences. This would amount to a classification and it cannot be said that this classification is discriminatory. As the impugned Article did not discriminate between the persons, it did not offend Article 14 of the Constitution.

(*c*) The Amending Act is void as it is inconsistent with the provisions of Article 19 of the Constitution and it follows that the Original Act before its amendment became void on the coming into force of the Constitution. The Indian Constitution has not adopted in its entirety either the British example of the supremacy of the Parliament or the American example of the Judicial Supremacy. The Legislature of the Union and the States are not supreme as the British Parliament is. Equally, the Judicial Supremacy which is a part of the American Constitutional practice does not exist under the Indian Constitution. Neither the Supreme Court nor the High Court can declare void any State law on the ground that the Court or majority of the Judges composing the Court think it unreasonable or undesirable. Restriction in a case like this must be (1) in the interests of public order or morality, and (2) reasonable. The restrictions in the Act are in the interests of public order or morality, administration of law being covered by public order. But the restrictions are not reasonable It is for the Court to decide which is reasonable and the Court has to take various circumstances into account, one of which is the consideration of the procedural provisions of law. In the procedural part of the Act there are unreasonable restrictions in the form of (i) absence of any provision for the communication of the order of the Government declaring an association to be unlawful to the association or its members, except a notification in the Official Gazette; (ii) the prohibition against any person making a representation in respect of the notification from taking any part in the proceedings of the Advisory Board.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a Writ of *Certiorari* calling for the records in G. O. No. 1517, Public (General) Department, dated 10th March, 1930 and quash the order therein and to declare the Indian Criminal Law Amendment Act of 1908 as void and of no effect and to declare section 12 of the Madras Maintenance of Public Order Act (Act XXIII of 1949) as void and of no effect

* Civil Mis. Petition No 3590 of 1950. 14th September, 1950.

and to direct the respondent to deliver to the petitioner all the records seized by the City Police together with the trunk and to direct the respondent not to interfere in any way with the lawful activities of the People's Education Society, Madras or its members.

M .K. Nambiar, M. Sekhara Menon and *N. S. Mani* for Petitioner.

The Advocate-General (*K. Kuttikrishna Menon*) instructed by the State Counsel (*Messrs. John and Row*) on behalf of the Respondent.

The Order of the Court was made by

Satyanarayana Rao, J.—This is a petition under Article 226 of the Constitution of India for the issue of a Writ of *Certiorari* for calling the records and quashing the order of the State of Madras in G. O. Ms. No. 1517, Public (General) dated 10th March, 1950, declaring under section 16 of the Criminal Law Amendment Act, 1908, the People's Education Society as an unlawful association. The petitioner is the General Secretary of the People's Education Society registered in November, 1947, under the Societies Registration Act, 1860 (Act XXI of 1860) and is also a barrister-at-law and an advocate of this Court and the Supreme Court.

The objects of the Society as stated in the affidavit of the petitioner are among others : (*a*) to encourage, promote, diffuse, and popularise useful knowledge in all sciences and more specially Social Science : (*b*) to encourage, promote, diffuse and popularise political education among people ; (*c*) to encourage, promote and popularise the study and understanding of all social and political problems and bring about social and political reforms ; and (*d*) to promote, encourage and popularise art, literature and drama. The notification by the respondent, the State of Madras, dated 10th March, 1950, under section 16 of the Criminal Law Amendment Act, 1908, declaring the Society an unlawful association is in the following terms :

"Whereas in the opinion of the State Government, the Association known as the People's Education Society, Madras, has for its object interference with the administration of the law and the maintenance of law and order, and constitutes a danger to the public peace.

Now, therefore, His Excellency the Governor of Madras, in exercise of the powers conferred by section 16 of the Indian Criminal Law Amendment Act, 1908 (Central Act XIV of 1908) hereby declares the said Association to be an unlawful association within the meaning of the said Act."

After the aforesaid declaration, it is alleged in the affidavit of the petitioner that the City Police searched the office of the said society purporting to act under a search warrant issued by the Commissioner of Police, Madras, under section 12 of the Madras Maintenance of Public Order Act (XXIII of 1949) and seized certain articles. The petitioner denies that the objects of the society were those stated in the notification and he also asserts that the order, that is, the notification, was not served upon the petitioner and that he was never given any opportunity or warning before the order was made. On 31st March, 1950, the Government passed a further order under section 17 (E) (3) of the Indian Criminal Law Amendment Act, 1908, declaring their intention to forfeit to the Government an amount of Rs. 2,405-14-0 belonging to the Society in the hands of Messrs. Best & Company, Limited, as the money was intended to be used for the purpose of the unlawful association, namely, the People's Education Society, Madras. Notice of this intention was also given to Messrs. Best & Company, Limited, who are in possession of the funds. The amount, in question, it is alleged in the affidavit, represents compensation money for non-delivery of certain rotary press materials and the petitioner alleges that this fund was not intended to be used for any unlawful purpose. The Order of the Government dated 10th March, 1950, is impugned in the affidavit as being illegal and void as the Indian Criminal Law Amendment Act, 1908, became void on the 26th January, 1950, as being inconsistent with the fundamental rights guaranteed under Part III of the Constitution of India more particularly the rights specified under Articles 19, 21 and 31 of the Constitution. The petitioner also questions the legality of the search and the order of the Government of 31st March, 1950, proposing to forfeit the funds in the hands of Messrs. Best & Company.

On behalf of the respondent, the Deputy Secretary to the Government of Madras filed a counter-affidavit in which it is asserted that the real objects of the society were not those contained in its Memorandum of Association but it was intended really to be a propaganda organization of the Madras branch of the Communist Party and was formed by the leading communists of Madras, the first Secretary of the association being Mr. M. R. Venkataraman, who was also Secretary of the Madras Committee of the Communist Party of India. It is admitted by the Deputy Secretary in the counter-affidavit that the association had ceased to function from March 1949, as all the prominent communists had either been detained or gone underground. The association owns a house, No. 4, Rundall's Road, Vepery, which was purchased for a sum of Rs. 55,000 in or about 29th November, 1947. The society placed an order for the purchase of rotary printing press which arrived in Madras on the 5th February, 1948, but with some parts missing and was taken delivery of by the petitioner and M. R. Venkataraman on the 5th February, 1948. The press was thereafter sold by the petitioner to one Sadanad on the 25th April, 1949. Though the society was not in a position to function according to the allegations in the counter-affidavit, the petitioner as its Joint Secretary, continues to collect the rent from the premises. It is claimed in the counter-affidavit that the order of Government of 10th March, 1950, declaring the said association to be an unlawful association within the meaning of section 15 of the Indian Criminal Law Amendment Act, 1908, was perfectly justified in the circumstances stated in it.

Sub-clause (2) of section 15 of the Criminal Law Amendment Act, 1908, (unamended) defines an "unlawful association" as meaning an association

"(*a*) which encourages or aids persons to commit acts of violence or intimidation or of which the members habitually commit such acts, or (*b*) which has been declared to be unlawful by the Provincial Government under the powers hereby conferred."

The power to declare an association unlawful is conferred on the Provincial Government by section 16 which is as follows :—

"If the Provincial Government is of opinion that any association interferes or has for its object interference with the administration of the law or with the maintenance of law and order, or that it constitutes a danger to the public peace, the Provincial Government may, by notification in the official Gazette, declare such association to be unlawful."

If, after an association is declared an unlawful association a member continues to be a member or takes part in any of its activities or collects funds he is liable to be punished with imprisonment for a term which may extend to six months or with fine or with both under section 17 of the Act. There are also other penal consequences enumerated in the Act which might follow as a result of the declaration under section 16.

The present application was filed by the petitioner on the 10th April, 1950 and a *rule nisi* was issued by this Court on the 11th April, 1950. After the decision of the Supreme Court in *A.K. Gopalan's Case*[1] (the judgment in which was delivered on the 19th May, 1950), the State of Madras passed the Indian Criminal Law Amendment (Madras) Act, 1950 (Madras Act XI of 1950) which was published in a Gazette Extraordinary of *Fort St. George* on the 16th August, 1950. By this Act the definition of an 'unlawful association' in section 15 (2) (*b*) of the Indian Criminal Law Amendment Act, 1908, has been substituted by the following clause :

"(*b*) which has been declared by the State Government by notification in the Official Gazette to be unlawful on the ground (to be specified in the notification) that such association—

(i) constitutes a danger to the public peace, or

(ii) has interfered or interferes with the maintenance of public order or has such interference for its object, or

(iii) has interfered or interferes with the administration of the law, or has such interference for its object."

For section 16 of the unamended Act two new sections 16 and 16-A have been substituted. These two sections provide a procedure for the issue of a notification

1. (1950) S.C.J. 174 : (1950) S.C.R. 88 : (1950) 2 M.L.J. 42 (S.C.).

declaring an association unlawful and for reference to an Advisory Board constituted under section 16-A to decide about the existence of a sufficient cause for the issue of the notification. If there be no sufficient cause in the opinion of the Advisory Board, justifying the notification the State Government has to cancel the notification. The procedure in these two sections is somewhat on the lines of the Madras Maintenance of Public Order Act. Section 16 requires that the notification issued under clause (*b*) of sub-section (2) of section 15 in respect of any association should specify grounds on which it was issued, the reasons for its issue and such other particulars, if any, as may have a bearing on the necessity for the issue of the notification. It also fixes a reasonable period within which any office-bearer or member of the association or any other person interested may make a representation to the State Government in respect of the issue of the notification. The State Government is prohibited by sub-section (2) of section 16 from disclosing any facts which it considers to be against the public interest to disclose. After the expiry of the time fixed in the notification for making representation, 16-A requires that the State Government should place the matter before an Advisory Board constituted in accordance with the provisions of sub-section (2) of the same section. What the Advisory Board should do after a reference is made is provided in sub-section (3) of section 16-A. Sub-clause (4) requires that the Advisory Board should express its opinion whether or not there was sufficient cause for the issue of the notification in respect of the association concerned and should also indicate whether the opinion is unanimous or is only that of the majority of the members. Sub-section (5) negatives the right of the persons affected to appear in person or by an advocate before the Advisory Board and the proceedings of the Advisory Board and its report, except the portion relating to its opinion or that of the majority of its members, are made confidential. Under sub-section (6) if there is no sufficient cause in the opinion of the Advisory Board or the majority of its members, the State Government has to cancel the notification in respect of such association.

Section 17 of the unamended Act is not touched in any manner by this Amending Act. Section 17-A and 17-F have also been amended by sections 4 and 5 of the Amending Act. Section 6 of the Amending Act contains certain saving provisions. It states :

"6 (1) All notifications issued in respect of associations by the State Government before the commencement of this Act under section 16 of the said Act and not cancelled before such commencement shall, as from such commencement have effect as if they had been issued under section 15 (2) (*b*) of the said Act as amended by this Act : Provided as follows :—

(i) In the case of every association to which any such notification applies, the State Government shall issue a supplementary notification as soon as may be after the commencement of this Act, specifying the ground, the reasons and the particulars, if any, referred to in section 16 (1) (*a*) of the said Act as amended by this Act, and fixing a reasonable period for the making of the representations referred to in section 16 (i) (*b*) of the said Act amended as aforesaid ;

(ii) The procedure prescribed by section 16-A of the said Act as amended by this Act shall be followed thereafter."

(The other parts of the section are omitted as not relevant).

By the time this application came on for hearing before us on the 21st August, 1950, the Amending Act came into force. As section 16 of the unamended Act which conferred upon the Provincial Government a power to declare an association unlawful was repealed by the Amendning Act, Mr. M. K. Nambiyar, the learned Advocate for the petitioner raised a preliminary point that as there is no power to issue a notification under any of the provisions of the new Act and as the new section 15 (2) (*b*) merely assumes the existence of such a power but does not expressly confer it upon the State Government, the whole proceedings are void. Though the validity of the provisions of the Act were impugned in the affidavit as offending Articles 19, 21, and 31 of the Constitution of India, in the arguments before us the learned advocate for the petitioner restricted his contentions to Articles 14 and 19 of the Constitution. According to him the provisions of the unamended Act and the Amending Act are inconsistent with Articles 14 and 19 sub-clauses (i) (*a*), (*c*) and (*f*) of the Constitution and are void, The third contention was that if the unamended Act, particularly section 16, became void after the 26th of January,

1950, a notification issued under a void section could not be validated by section 6 of the Amending Act.

On a consideration of section 16 of the unamended Act and section 15 (2) (*b*) introduced by the Amending Act, it would seem at first sight that, as the unamended section 16 is no longer in force, the contention that there is no power conferred on the State to declare an association unlawful is well founded. Section 15 (*b*) of the unamended Act expressly states that the definition includes " an association declared to be unlawful by the Provincial Government under the powers hereby conferred." The power ' hereby conferred ' contemplated by that clause is undoubtedly section 16 of the unamended Act. In the Amending Act while section 16 is omitted all that we have is clause (*b*) of sub-section (2) of section 15, which does not expressly confer a power on the State Government to declare an association unlawful. It assumes, by its language, that the State Government has such a power. No doubt the power to declare an association unlawful is not a natural or common law or prerogative right of the State. It can acquire such a power only under an enactment conferring such power. The learned Advocate-General who appeared for the respondent contended that though the power was not expressly conferred by the new sub-clause (*b*) of sub-section (2) of section 15 it is implied in it by necessary intendment, and it must be held that the Legislature must be deemed to have conferred such a power. He drew our attention to various Acts of the Central and Provincial Legislatures, particularly of Madras, from 1886, wherein as a matter of fact, the legislative practice followed was to include in the definition section an implied power to issue a notification. As examples I may refer to sub-clause (19) of section 2 of the Cantonments Act, 1924 (Act II of 1924) ; sub-clause (4) of sub-section (8) of section 3 of the Madras Prohibition Act, 1937 (Act X of 1937) and sub-clause (4) of sub-section (13) of section 3 of the Madras Abkari Act, 1886 (Act I of 1886). None of the clauses in the various Acts however came up for judicial consideration. We cannot altogether ignore the legislative practice adopted from such a long time and which remained unchallenged. There is also some authority in support of the view that such a power may be implied. Maxwell on Interpretation of Statutes, 9th Edition at page 361, sets out an instance in point and states :

" The enactment that at the election of poor law guardians the votes should be taken and returned as the Commissioners should direct, impliedly authorised the appointment of a returning officer. An Act, which, after empowering the parishioners to elect an assistant overseer, provided that this power should cease where an assistant overseer had been appointed by the Poor Law Commissioners (who had previously no power to make such an appointment) and while their order of appointment remained in force, would seem to have given the Commissioners that power by implication."

An implied power for the Justices to summarily convict under section 57 of the Contagious Diseases (Animals) Act, 1870, was recognised in *Cullen* v. *Trimble*[1], by the Court of Appeal in England.

In *Baxter* v. *Ah Way*[2], the question no doubt that directly came up for consideration was whether the power conferred upon the Governor-General in Council under section 52 (*g*) of the Customs Act, 1901, to prohibit importation of goods was a delegation of a legislative power or conditional legislation From examination of the sections referred to in that case it appears however that section 52 of the Act enumerated prohibited goods in a series of sub-sections, and included in it, sub-section (*g*) which is in these terms :

" All goods the importation of which may be prohibited by proclamation."

It was not disputed in that case that that clause conferred ample power to issue a proclamation prohibiting the importation of goods and was treated by Griffith, C.J., as authorising the issue of such a proclamation. Of course this is not a decision on the question but the legislative practice in other countries also seems to be in consonance with that which has obtained in this country from a very long time. In a recent decision, of the Bombay High Court which had to construe section 4 of the Bombay Prize Competition Tax Act (Act XI of 1939), it was held that when the section required that prize competition shall not be conducted unless

1. (1872) L.R. 7 Q.B.C. 416.

2. 8 Common Wealth Reports, 626.

a licence in respect of such a competition has been obtained by the promoter thereof from the Collector carried with it also the implied power assumed in the section on the part of the Collector to issue a licence. (*Parpia* v. *Chamarbagwalla*[1]).

Mr. Nambiar the learned advocate for the petitioner emphasised the well-known principle of interpretation of Statutes that it is the duty of the Court to ascertain the meaning of the Act as it stands and the Court had nothing to do with the unexpressed intention of the Legislature. Reference was made in support of this view to *Attorney-General* v. *West Riding of Yorkshire County Council*[2], and to the observations of Lord Cambell, C.J., in the well known case of *Woodward* v. *Watts*[3], where at page 457 (838 of the E.R.) the learned Chief Justice stated :

"I must take the words as I find them, and following the golden rule, construe the words so as to put a just construction on them. If this leads to hardship or inconvenience, the remedy must be sought from the Legislature."

This rule of construction, it must be observed, does not at all come into conflict with the principle that from the language employed in a Statute a power may be implied, if it is possible to do so. The language of the new sub-clause (*b*) of sub-section (2) of section 15 proceeds undoubtedly on the assumption that the State Government has power to issue the notification. It was also argued that the statute being a penal one, must receive a strict construction and nothing should be implied which is not expressly provided for. No doubt it was the practice in England in the earlier decisions to observe a distinction of that kind between criminal statutes and civil Acts. The tendency however of modern decisions is to do away with this difference as pointed out by Maxwell on Interpretation of Statutes (the 9th Edn.) at page 288 :

"The tendency of modern decisions, upon the whole, is to narrow materially the difference between what is called a strict and beneficial construction. All statutes are now construed with a more attentive regard to the language, and criminal statutes with a more rational regard to the aim and intention of the Legislature, than formerly".

If the language and the context of the Statute which has to be construed compel the Court to imply a power, there is no reason to make a distinction between a penal statute and a civil one and adopt different rules of interpretation, having regard to their nature. The State Government has therefore, in my opinion undoubted power to issue a notification declaring an association unlawful under the new sub-clause (*b*) of sub-section (2) of section 15. It would have been better for the draftsman of the new Act to have made it explicit instead of leaving it to be implied so as to avoid any room for controversy.

I shall now examine, how and to what extent the provisions of the Criminal Law Amendment Act, unamended and amended, are inconsistent with the fundamental rights in part III of the Constitution. It is not seriously disputed by the learned Advocate-General though he did not concede, that section 16 of the unamended Act is void as being inconsistent with the fundamental rights recognised in the Constitution. That section confers upon the Provincial Government the power to declare an association unlawful if it is of opinion that the association interferes or has for its object interference with the administration of law or with the maintenance of law and order or that it constitutes a danger to the public peace. That declaration is final and conclusive and cannot be questioned in a prosecution under section 17 of the Act. The accused has no right or opportunity to show that the declaration was erroneous and was not justified. It is a naked arbitrary power conferred upon the Provincial Government and to impose a restriction on the right of a free association conferred by Article 19 (*c*) of the Constitution and is of such an absolute nature which cannot and, indeed, was not attempted to be supported as a reasonable restriction on the exercise of the rights. In my opinion it offends also Article 14 as it denies equal protection of the laws to persons. As no serious attempt was made on behalf of the respondent to support the legality of that provision it is unnecessary to give more reasons to hold that it is inconsistent with the provisions of Part III of the Constitution. In view of Article 13 of the

1. 50 Bom L.R. 728 : A.I.R. 1949 Bom. 109.
2. (1907) A.C. 29.
3. (1853) 2 El. and Bl. 452 : 118 E. R. 836.

Constitution it must be held that section 16 which is inconsistent with the provisions of the Constitution is void.

The more important question on which there was serious controversy before us was whether the Amended Act is consistent with Articles 19 and 14 of the Constitution.

Our task in interpreting Article 19 of the Constitution has to a large extent been lightened by the ecent pronouncement by the Supreme Court in *A. K. Gopalan's Case*[1], and one or two other later decisions. It has been decided authoritatively by a majority of the learned Judges of the Supreme Court in *A. K. Gopalan's Case*[1], that Article 19 has no application to a legislation dealing with preventive or punitive detention. The observations of the learned Chief Justice Kania, C.J., in that case afford useful guidance in the manner of approach and the method of interpreting Article 19. The learned Chief Justice observed at page 180 :

"The Article has to be read without any preconceived notions. So read, it clearly means that the legislation to be examined must be directly in respect of one of the rights mentioned in the sub-clauses. If there is a legislation directly attempting to control a citizen's freedom of speech or expression, or his right to assemble peaceably and without arms, etc., the question whether that legislation is saved by the relevant saving clause of Article 19 will arise. If, however, the legislation is not directly in respect of any of these subjects, but as a result of the operation of other legislation, for instance, for punitive or preventive detention, his right under any of these sub-clauses is abridged, the question of the application of Article 19 does not arise. The true approach is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of the detenu's life."

The Article has no application says the learned Chief Justice to a legislation directly aimed at preventive or punitive detention.

The fundamental rights, that is, rights of freedom, conferred by sub-clauses (*a*) to (*g*) of clause (1) of Article 19 and the effect of the restrictions contained in clauses (2) to (6) of the same Article have also been considered and the scope of the Articles viewed in the light of the restrictions imposed has been clearly laid down by the learned Chief Justice at page 181 :

"In order to appreciate the true scope of Article 19 it is useful to read it by itself and then to consider how far the other Articles in Part III affect or control its meaning. It is the first Article under the caption "Right to Freedom". It gives the rights mentioned in 19 (1) (*a*) to (*g*) to all citizens of India. These rights read by themselves and apart from the controls found in clauses (2) to (6) of the same Article, specify the different general rights which a free citizen in a democratic country ordinarily has. Having specified those rights, each of them is considered separately from the point of view of a similar right in the other citizens, and also after taking into consideration the principle that individual liberty must give way, to the extent it is necessary, when the good or safety of the people generally is concerned. Thus the right to freedom of speech and expression is given by 19 (1) (*a*). But clause (2) provides that such right shall not prevent the operation of a law which relates to libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State. Clause (2) thus only emphasises that while the individual citizen has a free right of speech or expression, he cannot be permitted to use the same to the detriment of a similar right in another citizen or to the detriment of the State. Thus, all laws of libel, slander, contempt of Court or laws in respect of matters which offend against decency or morality are re-affirmed to be operative in spite of this individual right of the citizen to freedom of speech and expression. Similarly, that right is also subject to laws which prevent undermining the security of the State or against activities which tend to over-throw the State. A similar analysis of clauses (3) and (4) shows similar restrictions imposed on similar grounds. In the same way clause (5) also permits reasonable restrictions in the exercise of the right to freedom of movement through the territory of India, the right to reside and settle in any part of the territory of India or the right to acquire, hold and dispose of property, being imposed by law provided such reasonable restrictions on the exercise of such right are in the interest of the general public. . . . Reading Article 19 in that way as a whole the only concept appears to be that the specified rights of a free citizen are thus controlled by what the framers of the Constitution thought were necessary restrictions in the interest of the rest of the citizens."

To a similar effect are the observations of Das, J., at page 288 where the learned Judge observed :

"It will be noticed that of the seven rights protected by clause (i) of Article 19, six of them, namely, (*a*), (*b*), (*c*), (*d*), (*e*) and (*g*) are what are said to be rights attached to the person (*Jus Personarum*). The remaining item, namely, (*f*) is the right to property (*Jus Rerum*). If there were nothing

1. (1950) S.C.J. 174 : (1950) S.C.R. 88 : (1950) 2 M.L.J. 42 (S.C.).

else in Article 19 these rights would have been absolute rights and the protection given to them would have completely debarred Parliament or any of the State Legislatures from making any law taking away or abridging any of those rights. But a perusal of Article 19 makes it abundantly clear that none of the seven rights enumerated in clause (i), is an absolute right, for each of these rights is liable to be curtailed by laws made or to be made by the State to the extent mentioned in the several clauses (2) to (6) of that Article. Those clauses save the power of the State to make laws imposing certain specified restrictions on the several rights. The net result is that the unlimited legislative power given by Article 246 read with the different legislative lists in the Seventh Schedule is cut down by the provisions of Article 19 and all laws made by the State with respect to these rights must, in order to be valid, observe these limitations. Whether any law has in fact transgressed these limitations is to be ascertained by the Court and if in its view the restrictions imposed by the law are greater than what is permitted by clauses (2) to (6) whichever is applicable the Court will declare the same to be unconstitutional and, therefore, void under Article 13. Here again there is scope for the application of the 'Intellectual yardstick' of the Court. If, however, the Court finds, on scrutiny, that the law has not overstepped the constitutional limitations, the Court will have to uphold the law, whether it likes the law or not."

This pronouncement of the highest Court in the land as the final authority on the interpretation of the Constitution of India makes it unnecessary for me to define in my own words the ambit of Article 19 of the Constitution.

Before I proceed to examine the provisions of the Act now impugned it is necessary to deal with the extreme contention urged on behalf of the petitioner by his learned advocate. It is said that the restrictions imposed by clauses 2 to 6 of Article 19 are in effect and substance identical with the power of the Supreme Court under the American Constitution to determine the validity of a legislation by the Congress and the States under the 5th and 14th Amendments respectively under the "Due Process of Law Clause". Under the guarantee given by the American Constitution. by the "Due Process of Law" the Supreme Court arrogated to itself an unlimited power to declare a law invalid if according to the majority of the Judges of the Supreme Court that law was unreasonable. The Judges of the Supreme Court applied their own intellectual yardstick to test the validity and reasonableness of a piece of legislation. The Supreme Court is supreme under the American Constitution while the Parliament or the Legislature is supreme under the English Constitution. The makers of our Constitution did not recognise either the supremacy of the Court or that of the Legislature. The function of the Court under our Constitution it seems to me, is only to see whether the Legislature kept itself within bounds laid down by the Constitution in enacting a law or has overstepped those limitations. If the Court considers that a particular law is unreasonable notwithstanding that it was within the competence of the Legislature and that it did not transgress any of the limitations imposed by the Constitution, the Court has no power to declare its invalidity on that ground. The meaning of the expression "Due Process of Law" is elastic and varied from time to time as will be evident from a perusal of Willis on Constitutional Law, Weaver's Constitutional Law and Willoughby on the Constitution of the United States. As a corrective to the unlimited power claimed and exercised by the Supreme Court of the U. S. A. the doctrine of "Police powers" was brought into being. The scope of "Due Process of Law" clause was considered by the learned Judges in *A. K. Gopalan's Case*[1], in interpreting Article 21 of the Constitution and it was held that the framers of our Constitution deliberately refrained from adopting the American model and employed in Article 21 language which excluded such a conception. The learned Chief Justice at page 185 considered the meaning of "due process of law" and its scope in the light of the authorities and summarized his view in the following words :

"The discussion of the meaning of 'Due Process of Law' found in Willis on Constitutional Law and in Colley's Constitutional Limitations shows the diverse meanings given to that expression at different times and under different circumstances by the Supreme Court of United States of America, so much so that the conclusion reached by these authors is that the expression means reasonable law according to the view of the majority of the judges of the Supreme Court at a particular time holding office. It also shows how the meaning of the expression was widened or abridged in certain decades. Moreover, to control the meaning so given to that expression from time to time the doctrine of police powers was brought into play. That doctrine, shortly put, is that legislation meant for the good of the

1. (1950) S.C.J. 174 : (1950) S.C.R. 88 : (1950) 2 M.L.J. 42 (S.C.).

people generally, and in which the individual has to surrender his freedom to a certain extent because it is for the benefit of the people at large, has not to be tested by the touchstone of the 'Due Process of Law' formula."

The other learned Judges also discussed this subject elaborately in the light of the authorities and rejected the contention that Article 21 of the Constitution should be interpreted in the light of that formula (*see* for example Mookerjee, J., at pages 272 to 275 and Das, J., at pages 298 and 299). Das, J. summarised his conclusion at page 299, in these words :

"The nett result is that the all inclusive and indefinable doctrine of due process of law has in America now been brought back to its original status of a procedural due process of law by the enunciation and application of the new doctrine of police power as an antidote or palliative to the former. Who knows when the pendulum will swing again."

Clauses (3) to (6) of Article 19 alone use the expression "reasonable restrictions" and not clause (2). As pointed by my Lord, the Chief Justice, in the course of the arguments, if the extreme contention of the petitioner that the doctrine of due process of law had been embodied in clauses (2) to (6) of Article 19, sub-clause (2) gives no room for applying a standard of reasonableness in determining the validity of the restrictions contained in sub-clause (2). Sub-clause (2) imposes a restriction upon the right to freedom of speech and expression conferred by sub-clause (*a*) of clause (1) of Article 19 and it enacts :

"Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State."

If the argument of the petitioner was correct, it will be open to a Court in respect of a legislation affecting the right guaranteed under Article 19 (1) (*a*) to examine the reasonableness of the law relating to libel, slander, defamation, etc., and to declare the restrictions imposed under such law as unreasonable. But the language of clause (2) excludes a judicial review of such law on that ground. Further, even in the other clauses the restrictions are directed to a particular object, for example, in clause (3) the object of the restriction permitted is in the interest of public order and the functions of the Court in testing the validity of an Act is to see whether the reasonable restrictions imposed by the law are in the interests of public order. To the same effect are also the other clauses. It is therefore impossible to accept the contention that the power of the Court to declare a law invalid as contravening clauses (2) to (6) of Article 19 is co-extensive with the power of the Supreme Court under the American Constitution. The framers of our Constitution have deliberately abstained from adopting the doctrine of "Due Process of Law" whether it is under Article 21 or under Article 19. If they intended to adopt it instead of providing elaborate limitations, varying with the nature of the right or freedom conferred under clause (1) of Article 19 they would have easily adopted a simpler and more compendious formula as in the 5th Amendment or the 14th Amendment of the American Constitution. I am unable, therefore to accept the extreme contention of the learned advocate for the petitioner.

In the light of the foregoing I now proceed to examine whether all or any of the provisions of the Criminal Law Amendment Act, 1908, as amended by Madras Act XI of 1950 contravene the provisions of Article 19.

The clauses relied on are (*a*), (*c*) and (*f*). It has been accepted before us that the Act is a direct legislation dealing with the right to form associations or unions and attempts to control the freedom recognised by that clause. The object of the legislation is no doubt preventive but it is agreed that in its ultimate results it is punitive in character. It is also common ground that the special provisions relating to preventive detention in Article 22 of the Constitution have no application. It was strongly urged on behalf of the petitioner that the Act practically deprived the right of a citizen to form an association or union and the restrictions imposed are unreasonable. Clause (*c*) has been very strongly relied on in the course of the arguments. The right to form an association, it is conceded, includes the right

to continue an association. The Act, therefore, does not only prevent formation of associations but also prevents continuance of associations, and, therefore, affects the fundamental rights of the citizen in sub-clause (*c*) of Article 19. The restriction on this right is contained in clause (4) of the said Article. It says :

> " Nothing in sub-clause (*c*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing, in the interests of public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause."

As laid down by the Supreme Court the only question that arises for consideration therefore is whether the restrictions are reasonable and whether they were imposed in the interests of public order or morality.

Under section 16 of the unamended Act a declaration could be made if the object of the association was such as to interfere with the administration of the law or with the maintenance of law and order, or that it constitutes a danger to the public peace. The notification actually issued under that section by the Government on 10th March, 1950, practically follows the language of the section though instead of using the disjunctive ' or ' uses the conjunctive ' and '. The new section 15 (*b*) empowers the Government to declare as unlawful on all or any of the three grounds specified in sub-clause (*b*) but none of them include the maintenance of law. The object of both the Acts is undoubtedly to impose restriction in the interest of public order. The use of ' and ' instead of ' or ' in the notification has given room for the contention that the notification in any event cannot be deemed to be valid under the amended Act as the maintenance of law and maintenance of order are two distinct matters and the maintenance of law is not one of the grounds recognised by the new section and it is therefore uncertain on which of the grounds the decision to declare the association unlawful was based. If permissible grounds are mixed up with grounds not so permissible it is difficult to infer that the order was issued on permissible grounds alone ; and if there is such an indefiniteness it should be held that the notification is invalid under the new Act. I do not however think that the expression maintenance of law is something different and wholly dissociated from the expression maintenance of public order. The two words " law " and " order " are two component parts of the same idea and cannot be disassociated. It cannot, therefore, be held that the notification is invalid on that ground. The object of the two Acts is undoubtedly therefore the maintenance of public order and therefore one of the conditions in sub-clause (4) of Article 19 is satisfied.

The next question is whether the restrictions imposed are reasonable. I feel no difficulty in answering the question under the unamended Act. An unrestricted power is conferred by section 16 on the Provincial Government to declare an association unlawful and the satisfaction of the existence of the grounds enumerated in the section is the subjective satisfaction of the Provincial Government and not of an external authority. The declaration carried with it a finality and it is not a justiciable right. No machinery is provided to test the correctness of the order by the persons affected and no opportunity is provided for them to show that the association is not such as falls within the purview of the grounds enumerated in the section. The declaration carries with it the penalities specified in section 17, 17-A to 17-B. The declaration cannot be questioned in a proceeding under section 17 nor under section 17-A or 17-B or 17-E.

The penalties contemplated under these sections proceed on the basis that the declaration is valid and is not subject to any judicial review. A total prohibition of a right of a person to defend himself is not only a restriction of the right to defend himself but a negation of it. It cannot be argued and indeed no attempt was made to support the position that the provisions of section 16 is a reasonable restriction.

The position however under the Amending Act is somewhat different ; and the arguments of the learned Advocate-General were directed mainly to establish that the rigor of the law under section 16 of the unamended Act has been considerably modified by the new Act and that ample provision was made in the new

Act to enable the person aggrieved to defend himself and show that the declaration was not justified. Both under the unamended Act and the new Act so far as 'associations' falling under sub-clause (*a*) of sub-section (2) of section 15 are concerned, there is an undoubted right of the members of the association to show that they are not within the mischief of that clause, whether it is a prosecution under section 17 or the other penalties imposed under sections 17-A to 17-E. That such is the position was not seriously challenged. But then both the unamended Act and the new Act place associations declared unlawful by the Provincial Government and the other associations within section 15 (2) (*a*) on a different footing altogether. While the new Act to some extent seems to modify the rigor of the law it does not provide an adequate and just remedy for the person aggrieved to challenge the correctness of the declaration. In the first place there is no provision in the Act for service of the grounds on any of the members or office-bearers of the association. The learned Advocate-General attempted to argue that the issue of a notification which contains the grounds on which the declaration is made is itself a good substitute for services of the grounds on the members or office-bearers of the association. In support of this contention, however, no authority has been cited before us. An association is defined in section 15 (1) of the Act as any combination or body of persons whether the same be known by any distinctive name or not. If the association has a distinctive name and has a place of business, the ordinary mode of serving the notice may be to leave a notice at the place where the association carries on its business. If it has no distinctive name the association can be described only by the names of persons who form the combination or the names of the body of persons. The Government, therefore, must know in such an event, the names of the persons who constitute the combination or association. A combination cannot be of known and unknown persons so as to make both the known and unkown persons punishable under section 17 by virtue of the notification. If the persons are unknown it is difficult to see how the Government could be in a position to state in their grounds that the association has for its object all or any of the objects specified in section 15 (2) (*b*). In my view it is impossible to accept the argument that the issue of notification tantamounts to service of the grounds on the aggrieved persons.

In Vol. 6, page 392 of Halsbury's Laws of England, 2nd Edition, of the seven important liberties such as the right of personal freedom, the right of security of property, freedom of speech, etc., the following right is also recognised as a fundamental right.

"It seems that there should be added to this list the following rights which appear to have become well-established :—(*b*) the right of the subject to have any case affecting him tried in accordance with the principles of natural justice, particularly the principles that a man may not be a judge in his own cause, and that no party ought to be condemned unheard, or to have a decision given against him unless he has been given a reasonable opportunity of putting forward his case . . . . . ."

That the observance of procedural requirements is obligatory even when a judicial power is exercised by the executive as laid down by Bowen, J., in *Leeson* v. *General Council of Medical Education*[1]. The principle is no doubt part of the British system of law but has been followed and applied in this country. This implies, that there must be a due enquiry and the accused person must have notice of what he was accused and should have a reasonable opportunity of putting forward his case before he is deprived of all or any of his liberties or rights of freedom. To defend himself he must have notice of the grounds on which he is sought to be deprived of his freedom.

This Act as amended does not provide for testing the correctness or the validity of the notification in the ordinary manner in a Court of law when the man is accused of an offence under section 17 or is sought to be deprived of his liberty. If he is charged with an offence under section 17 it should ordinarily be open to him to show that the notification was not justified ; but instead of that, the Act provides a machinery for ascertaining the opinion of the Advisory Board as a substitute for trial under ordinary law. No doubt the notification itself besides specifying the

[1] (1889) 4 Ch. D. 366 (383).

grounds fixes a reasonable period for any office-bearer or member of the association or any other person interested, to make a representation to the State Government regarding the notification. This assumes that the person had knowledge of the notification. If he makes a representation there is no time-limit within which the State Government should place the matter before the Advisory Board constituted under sub-section (2). Nor is there any time-limit within which the Advisory Board should give its opinion. It has been pointed out in this Court on more than one occasion in dealing with cases under the Madras Maintenance of Public Order Act that as the Legislature did not fix any period of time for the steps to be taken by the Government it has resulted in grave injustice to the person detained as he was kept in prison without even an enquiry by the Advisory Board for a period longer than would be permissible if the detention order was confirmed. Notwithstanding these decisions it passes one's comprehension why the Legislature did not take the elementary precaution of fixing a time-limit for the State Government to send the papers to the Advisory Board and for the Advisory Board to submit its opinion. The person has no right to lead any evidence and the matter has to be disposed of merely on the representation made by him and the information, if any, which the Advisory Board, would be able to obtain under sub-clause (3). The declaration does not require any confirmation by the Government as a result of the opinion of the Advisory Board and therefore it may be assumed that its operation commences from the date of the notification unless ultimately the State Government decides to cancel it consequent on the adverse opinion of the Advisory Board or the majority of its members. The proceedings of the Advisory Board are of course confidential and there is no appeal provided to any authority against the order of the State Government. The Legislature seems to have followed to some extent the procedure permitted by the Constitution under Article 22 in respect of the preventive detention.

The satisfaction regarding the existence of the grounds is of course the subjective satisfaction of the Government and this is expressly stated in the unamended section 16 and I think the omission of the expression 'opinion of the Government' in section 15 (2) (*b*) makes no difference. It therefore comes to this: that by an executive notification a person is effectively prevented from showing that the association is not unlawful which entails the consequence that he is liable to the penalties provided in section 17, 17-A to 17-E. Is there any justification or reason for abridging the right of the person to defend himself and to have the matter tried in the ordinary manner? No doubt in cases of emergency the initial order passed upon a subjective satisfaction may be permissible but at a subsequent stage a right should be given to the citizen to establish if he can, that that satisfaction was based upon no or on insufficient data. If this right is denied I think it is an unreasonable restriction on the freedom conferred by Article 19 (1) (*c*). Suppose for example in the case of an offence falling under section 302 of the Indian Penal Code, a procedure of this description is substituted for an ordinary trial in a criminal Court. Can it for a moment be contended that as there is the intervention of a Tribunal of some sort the right is made justiciable and the legislation is valid? There is practically no difference between a situation of that description and a situation envisaged under the new Act, except that before punishing a man an executive declaration is interposed which is not open to challenge. The learned Advocate-General drew our attention to passages from the judgment of the Supreme Court in *A. K. Gopalan's case*[1], where the majority of the Judges upheld subjective satisfaction as permissible. But the remarks of the learned Judges were confined to preventive detention and not to punitive detention. If an offence under the ordinary law is committed or a new offence is created by the Statute there is no reason for not adopting the ordinary modes of procedure for trying such offences.

From this it does not necessarily follow that in certain cases and for good reasons it may not be open to the Legislature to introduce a trial by other impartial Tribunals than by ordinary Courts in the land. The trial in such a case must be

1. (1950) S.C.J. 174 : (1950) S.C.R. 88 : (1950) 2 M.L.J. 42 (S.C.).

a real trial in the sense that the person accused has a resonable opportunity of placing his case before the Tribunal and a guarantee of a fair trial. If this is not provided it is difficult to hold that the abridgment of the right to defend oneself in the ordinary mode is not an unreasonable restriction on the right.

The learned Advocate-General pressed upon us the recent decision of the Supreme Court in *Khare* v. *State of Delhi*[1], which related to an externment order made by the District Magistrate of Delhi under the East Punjab Public Safety Act, 1949. Dr. Khare was served with the order of externment directing him to remove himself from Delhi district and not to return to it for a period of three months. The Madhya Bharat Government passed an order directing him to reside in Nagpur. The validity of the first order was challenged by a writ of *Habeas Corpus* under Article 32 of the Constitution of India as the Act offends the freedom of movement under sub-clause (*d*) of clause (1) of Article 19. Section 4 (6) of the Punjab Act provided that where an externment order has been made the grounds *may* be communicated to the externee by the authority making the order and in any case when the order is to be enforced for more than three months he shall have a right of making a representation which shall be referred to the Advisory Tribunal constituted under section 3 (4) of the Act. The Act did not provide as to what the Advisory Tribunal should do after the matter was referred to it. The main argument in the case was whether the restrictions imposed by the Act were reasonable restrictions within the meaning of clause (5) of Article 19. In interpreting clause (5) of Article 19 the learned Chief Justice observed at page 441 :

"In my opinion, clause (5) must be given its full meaning. The question which the Court has to consider is whether the restrictions put by the impugned legislation on the exercise of the right are reasonable or not. The question whether the provisions of the Act provide reasonable safeguards against the abuse of the power given to the executive authority to administer the law is not relevant for the true interpretation of the clause. The Court on either interpretation, will be entitled to consider whether the restrictions on the right to move throughout India, *i.e.*, both as regards the territory and the duration, are reasonable or not. The law providing reasonable restrictions on the exercise of the right conferred by Article 19 may contain substantive provisions as well as procedural provisions. While the reasonableness of the restrictions has to be considered with regard to the exercise of the right, it does not necessarily exclude from the consideration of the Court the question of reasonableness of the procedural part of the law. It is obvious that if the law prescribes five years' externment or ten years externment, the question whether such period of externment is reasonable, being the substantive part, is necessarily for the consideration of the Court under Cl. (5). Similarly if the law provides the procedure under which the exercise of the right may be restricted, the same is also for the consideration of the Court, as it has to determine if the exercise of the right has been reasonably restricted."

One of the grounds taken was that there was no obligation on the part of the externing authority to serve the grounds upon the externee as section 4 (6) of the Act only provided that the grounds 'may' be communicated to the externee and not 'shall'. The learned Chief Justice construed the word 'may' in the context as equivalent to 'shall' and that, therefore, it was obligatory to serve the grounds even if the externment order was only for a period of three months. The absence of an express provision in the Act regarding the duties of the Advisory Board, it was held did not invalidate the Act as the reference necessarily carried with it the implication that it is to be considered by the Advisory Board. The majority of the learned Judges therefore were of the opinion having regard to the duration of the order which was only three months and in view of the construction placed on section 4 (6) that it was obligatory upon the externing authority to serve the grounds, that the restrictions were not unreasonable. Mukherjea, J., however took a different view. No doubt in that case the question was not whether the substitution of an Advisory Board for an ordinary Tribunal was not an unreasonable abridgment of the right of the subject as no such contention apparently was raised. It must also be noticed that it was not a case of preventive detention within the meaning of Article 22 of the Constitution. Notwithstanding this, the effect of substitution of an Advisory Board and a procedure analogous to that of preventive detention was not considered unreasonable by the majority of the learned Judges. It is therefore argued with some force by the learned Advocate-General that in

1. (1950) S.C.J. 328.

the light of this decision the procedure laid down by the new Act should be held reasonable. I think, however, that the scope of the two Acts are entirely different. The orders contemplated under the Punjab Act are only for a limited duration ; whereas the declaration under the present Act continues in force until it is cancelled by the State Government. Thereafter if the person continues to be a member of such an unlawful association he is liable to be punished under section 17. His property is liable to be forfeited ; the premises in which the association carried on its activities are liable to be taken possession of by the State Government. Further, under the present Act, there is no provision at all for serving the grounds on which the notification is based. The Act makes an invidious distinction between associations with objects falling within the purview of sub-clause (*a*) of clause (2) of section 15 and clause (*b*) for which there is no sort of justification. Had the Chief Justice of the Supreme Court come to the conclusion that the service of the grounds was not obligatory, perhaps his opinion would have been different regarding the reasonableness of the Act as did the dissenting Judges. Of course, the difference between the learned Judges was regarding the interpretation of the word 'may' in section 4 (6) of the Punjab Public Safety Act. Where a Municipal Board granted a monopoly in trade to *A* under a bye-law which conferred the power to issue a licence which resulted in preventing B who carried on similar trade previously from carrying on his business, the Supreme Court held that the restriction imposed by the bye-law was unreasonable under Article 19 (6) of the Constitution and notwithstanding a remedy by way of an appeal to the local Government was provided (*Rashid Ahmad* v. *Municipal Board, Kairana*[1].) I have, therefore, no hesitation in holding that the restrictions imposed by the new Act are unreasonable.

The argument based on clauses (*a*) and (*f*) of sub-section (1) of Article 19 may be easily disposed of. The Act is not a direct legislation relating to the freedom recognised under clause (*a*) or clause (*f*). These two rights are not deprived as a result of direct legislation relating to the rights of freedom to form associations or unions under clause (*c*). It is therefore unnecessary to consider whether the restrictions under the new Act offend the provisions in clauses (2) and (5) of Article 19. If the impugned provisions of the Act are otherwise valid, they cannot be treated as offending those provisions.

It may be pointed out that in view of the decision of the Supreme Court in what is known as the *Cross Roads Case*[2] which had to consider whether provision in section 9 (1) (*a*) of the Madras Maintenance of Public Order Act was outside the scope of the authorised restriction of clause (2) of Article 19, the expression "security of the State" in sub-clause (2) of Article 19 is not identical with public order. Although a restriction in an Act may have been imposed in the interest of public order such restrictions would not be restrictions on freedom of speech and expression directed solely against the undermining of the security of the State or the overthrow of it and would not be covered by clause (2) of Article 19. Therefore such restrictions will be unconstitutional and void.

It was next contended that the provisions of the impugned Act denied to persons equality before the law and also contravene the provision in Article 14 regarding "equal protection of the laws". Article 14 under the caption "Right to Equality" states :—

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

This Article in my opinion relates to two different concepts. One is "equality before the law" and the second "equal protection of the laws". Two obligations are cast upon the State, that is, to secure to a person equality before the law and also to give equal protection of the laws to the person. The expression "equality before the law" is not used in the American Constitution, though "equal protection of the laws" occurs in the 14th Amendment. The expression "due process of law" is used in a more elastic sense as to include equality before the law and also

1. (1950) S.C.J. 324. (F.C.).
2. (1950) S.C.J. 418 : (1950) 2 M.L.J. 390

equal protection of the laws. Though in the 5th Amendment of the American Constitution equal protection of the laws is not specifically mentioned it is specifically stated however in the 14th amendment as it was thought that there should be an amplification in that direction so far as the State legislation was concerned." Professor Dicey in his Law of the Constitution treats "equality before the law" as one of the three meanings of the expression "rule of law" which formed the fundamental principle of the English Constitution. He defines it at page 202, 9th edition, as meaning :

"The equal subjection of all classes to the ordinary law of the land administered by the ordinary law Courts ; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals; there can be with us nothing really corresponding to the 'administrative law' (*droit administratif*) or the 'administrative tribunals' (*tribunaux administratifs*) of France. The notion at the bottom of the 'administrative law' known to foreign countries is, that affairs or disputes in which the Government or its servants are concerned are beyond the sphere of the civil courts and must be dealt with by special and more or less official bodies. This idea is utterly unknown to the law of England, and indeed is fundamentally inconsistent with our traditions and customs."

In other words, this expression implies in my opinion that the Legislature should not make a distinction between the rich and the poor, officials and non-officials, and make discrimination on any other basis between one subject and the other. All must be treated as equal before the law. The argument on this part of the case by Mr. Nambiar was that accused in criminal cases must be treated alike and no distinction should be made between persons accused of one kind of offence and another. The acceptance of this argument would lead in my opinion to very disastrous results. The Criminal Procedure Code itself draws a distinction between the modes of trial of various offences and the Penal Code imposes different penalties varying with the nature of the offences. If the view contended for were to be accepted all these will be inequalities and must be declared void. His contention is that accused under section 17 of the Criminal Law Amendment Act are treated differently as they are not allowed to challenge and show that the declaration by notification is not well founded ; as this right is denied, it is said, that there is a violation of the right. What is contemplated by the clause in my opinion is not a discrimination between persons accused of offences but a discrimination between one set of persons and others, having regard to their status or other considerations.

The next point for consideration is whether under the impugned provisions equal protection is denied. The last clause of the 14th Amendment of the American Constitution in which a similar limitation occurs states :

"Nor shall any State deprive any person of life, liberty, or property, without due process of law ; nor deny to any person within its jurisdiction equal protection of the laws."

There is no similar express prohibition in the 5th Amendment which relates to the Federal legislation. The fourteenth amendment was originally introduced to protect the rights of the Negroes but was subsequently extended even to Chinamen in the well-known *Laundry Case*, *Vick Wo* v. *Hopkins*[1]. That the requirement of "Due Process of Law" to a considerable extent includes the guarantee of equal protection of law is established in *Smyth* v. *Ames*[2]. The distinction however between the two limitations was noticed by Chief Justice Taft in *Truax* v. *Corrigan*[3]. He there pointed out :

"It may be that they (the two prohibitions) overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not conterminous . . . . . The due process clause . . . . . of course tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty, and property, which the Congress or the Legislature may not withhold. Our whole system of law is predicated on the general fundamental principle of equality of application of the law . . . . . But the framers and adopters of this (fourteenth) amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They, therefore, embodied that spirit in a specific guaranty. The guaranty was aimed at undue favour and individual or class privileges, on the one hand, and at hostile discrimination

1. 118 U.S. 356.
2. 169 U.S. 466.
3. 257 U.S. 312.

or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process.

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As observed in *Hayes* v. *Missouri*[1] :

"the clause does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions both in the privileges conferred and in the liabilities imposed."

The scope and intent of this provision of equal protection of the laws was defined by Field, J., in *Barbier* v. *Connelly*[2] in a passage which has since become classic. He observed :

"The Fourteenth Amendment in declaring that no State 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary deprivation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights ; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property ; that they should have like access to the Courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts ; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances, and that no greater burdens should be laid upon one than laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences. But neither the amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the State, sometimes termed its 'police power', to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits, for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. Though in many respects necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favouring others, is prohibited ; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment. In the execution of admitted powers unnecessary proceedings are often required, which are cumbersome, dilatory and expensive, yet, if no discrimination against anyone be made and no substantial right be impaired by them, they are not obnoxious to any constitutional objection. The inconveniences arising in the administration of the laws from this clause are matters entirely for the consideration of the State ; they can be remedied only by the State."

This passage brings out to what extent discrimination is permissible. While *class* legislation is prohibited a reasonable *classification* by law has always been considered as not amounting to a denial of equal protection. An illustration of class legislation is the *Laundry Case*[3]. In that case the validity of an Ordinance of the

1. 120 U.S. 68.
2. (1885) 113 U.S. 27.
3. (1886) 118 U.S. 356.

City of San Francisco which required persons intending to establish laundries in frame houses to obtain the previous consent of certain municipal officials was considered. It conferred a discretion to the officials in the nature of a naked and arbitrary power to give or withhold the consent not only as to the places but also as to persons. On the face of it the legislation impugned was not discriminatory. The evidence in the case established that it was in fact directed exclusively against a particular class of persons, namely the Chinese. The Court held

"Though the law be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution".

The quotation from the judgment of Field, J., brings out also the distinction between classification and class legislation. As pointed out by Weaver on the Constitutional Law at page 397 :

"Class legislation is that which makes an improper discrimination by conferring particular privileges upon a class of persons, arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privilege granted and between whom and the persons not so favoured no reasonable distinction or substantial differences can be found justifying the inclusion of one and the exclusion of the other from such privilege".

The State has the undoubted authority notwithstanding the formula of the "equal protection of the laws" the power to classify the subjects of legislation based on particular objects or to classify persons to accomplish a particular result. The classification however as pointed out by Weaver

"must not be arbitrary, artificial or evasive and there must be a reasonable, natural and substantial distinction in the nature of the class or classes upon which the law operates. Unless the classification is clearly unreasonable and arbitrary Court would not interfere with the legislation."

This subject is dealt with by Willis on the Constitutional Law at page 579. Under this clause the right of all persons to have a like access to the Courts of the country for the protection of their persons and property is undoubtedly recognised. No impediment should be imposed in respect of such right except as applied to the exercise of the same rights by others constituted similarly. The effect of the impugned provisions of the Amended Act is undoubtedly to create a distinction between associations within the purview of clause (*a*) of sub-clause (2) of section 15 and clause (*b*). For no conceivable reason the right of access to the persons aggrieved to the Courts of the country for the protection of their rights in the ordinary manner and under ordinary procedure is denied. The Advisory Board can well be described as merely a means of solving the conscience of the State, to adopt the language of Allen on Law and Orders at page 79.

An examination of the provisions of the amended Act undoubtedly leads to the conclusion that the remedy provided for is ineffective to give a right of equal opportunity to the person affected. It is not based upon any reasonable classification and there is no reason or justification for making the invidious distinction between one kind of unlawful association and another. All members of an unlawful association are not placed in the same footing and there is no justification for the Legislature to have selected persons forming as association within the meaning of sub-clause (*b*) of section 15 (2) for a special kind of treatment, unlike other persons who are accused of offences either under the Penal Code or under Special Laws. Nor is there any reason for not following the ordinary procedure for trial of offences laid down in the Criminal Procedure Code. The legislation is not directly aimed at preventive detention in which case the Constitution recognises an abridgment of the right.

I have therefore no hesitation in holding that the impugned provisions of the Amended Act is wholly inconsistent with Article 14.

It must therefore be held that section 16 of the unamended Act and the following sections 17 and 17-A to F and the provisions of the Amended Act must be held void. Under Article 13 of the Constitution it is void only to the extent to which it is inconsistent with the provisions of Part III.

There remains one other contention raised on behalf of the petitioner. Under section 6 of the Amended Act the notifications already issued under the repealed section 16 and not cancelled before the commencement of the Amended Act are treated as having been issued under the new section 15 (2) (*b*) of the Amended Act and their operation commences from the date of the commencement of the Amended Act. The argument is that as the notification in question was issued under the unamended section 16 which is no longer in existence and which is void, the Legislature had no power to validate notifications issued under a void Act. I am however convinced on a reading of the clear provisions of the section that the object of the section is not to validate the notifications but merely to treat the paper on which the notification is contained as a notification issued under section 15 (2) (*b*) and its operation commences not from its date but from the date of the commencement of the Act. Instead of issuing a large number of notifications once more and presumably in order to save time, the Legislature intended to treat the notifications already issued as notifications issued under the Amended Act. The power is given to the State Government under the first proviso to section 6 to issue supplementary notification specifying the ground and the reasons and the particulars referred to in section 16 (1) (*a*) of the Amended Act and also to give a reasonable period for making representations. Thereafter the procedure prescribed in the subsequent provisions in section 16 has to be followed. I do not therefore think that there is any force in the argument of the learned counsel for the petitioner.

It was also urged that section 12 of the Madras Maintenance of Public Order Act under which a search warrant was issued also offends the provisions of Article 14 and Article 19 of the Constitution. I do not see any force in this contention and we have no power under this writ to direct a return of the articles seized by the police in pursuance of the search warrant.

Mr. N. S. Mani, who followed Mr. Nambiyar raised a further contention that the Act offends the guarantee of equal protection of laws under Article 14 as section 17 (3) of the Criminal Law Amendment Act makes the offence under section 17 (1) non-bailable notwithstanding anything contained in the Criminal Procedure Code. Section 496 of the Code of Criminal Procedure provides for the grant of bail when a person is accused of a bailable offence and section 497, when a person is accused of any non-bailable offence. Section 497 empowers the Court if certain conditions exist to release a person on bail even when he is accused of a non-bailable offence. The effect of clause (3) of section 17 of the Criminal Law Amendment Act it was argued is to take away the right of obtaining bail even in suitable cases. It has been held by Panchapakesa Ayyar, J., in *Ramalingayya, In re*,[1] that notwithstanding the provisions in clause (3) of section 17 of the Criminal Law Amendment Act, the Court has power to grant bail in suitable cases and, in fact, in that case the learned Judge granted bail. In my opinion the view taken by the learned Judge is correct and, therefore, there is no violation of the guaranty of equal protection of laws on this ground.

It follows, therefore, that the rule *nisi* must be made absolute and the order of the State of Madras in G.O. No. 1517, dated 10th March, 1950, must be quashed and that the order of 31st March, 1950, in G.O. No. 1732, must also be quashed.

Viswanatha Sastri, J.—The facts and the relevant statutory provisions have been stated in the judgment of my learned brother Satyanarayana Rao. J., which I have had the advantage of reading. Were it not for the importance of the issues involved, I should have been content to express my formal concurrence in the opinions just now read. The case confronts us with the duty, at once difficult and delicate, laid upon us by the Constitution of India, of adjudicating upon the validity of State legislation when it is challenged as transgressing the limits of legislative power granted to the State by the Constitution. A written Constitution, like ours, is fundamental law which limits by express rules the powers of the executive and the

1. (1950) 1 M.L.J. 87.

Legislature. Judicial review, itself a limitation on the supremacy of the Legislature, is a fundamental part of our constitutional scheme and it is the duty of the Court to declare void an enactment which is contrary to the Constitution. The main question before us is whether the Criminal Law Amendment Act (XIV of 1908) in its original form or as amended by Madras Act XI of 1950, squares with the constitutional mandate.

I shall deal briefly with one or two preliminary points argued before us. In this judgment I shall refer to the Criminal Law Amendment Act (XIV of 1908) as "the Act" and to the Articles of the Constitution of India as "Articles". The Act was amended by Madras Act XI of 1950 which came into force on 16th August, 1950. Section 16 of the Act as it originally stood expressly empowered the Provincial Government by notification in the Official Gazette to declare any association which, in its opinion, interfered or had for its object interference with the administration of the law or the maintenance of public order or which constituted a danger to the public peace, an "unlawful association". Section 15 (2) (*b*) of the Act defined an "unlawful association" as an association declared to be unlawful by the Provincial Government. Section 3 of the Amending Act XI of 1950, deleted section 16 and section 2 substituted for section 15 (2) (*b*) of the Act a clause that any association declared by the State Government by notification in the Official Gazette to be unlawful on the ground that it constituted a danger to the public peace or interfered with or had for its object interference with the maintenance of public order or the administration of the law, was an "unlawful association." The argument of Mr. Nambiar for the applicant is that the power of the Government to declare an association unlawful on the grounds above specified came to an end with the repeal of section 16 which in terms conferred that power. The argument of the learned Advocate-General for the respondent is that the power has been conferred impliedly by the new definition of an "unlawful association" in section 15 (2) (*b*) as an association declared by the State Goverment to be such by a notification and that the unskilfulness of the draftsman should not be pressed into service for nullifying the Act. In numerous legislative enactments, both Central and Local, this familiar drafting device of investing, under the guise of a definition clause, the executive Government or some other body, with implied authority to declare or notify so as to bring the person or thing notified within the purview of the enactments, has been adopted. Many such instances were cited to us by the learned Advocate-General. The power to notify is conferred, not expressly but by necessary intendment in such cases. *See* Maxwell on the Interpretation of Statutes (9th edition), page 361, *Cullen* v. *Trimble*[1]. It is a somewhat unusual procedure for an amending Act to do away with an express power already existing and conceal it in the interstices of a definition. If the draftsman of Madras Act XI of 1950 had been asked why he had deleted the express power conferred by section 16 of the Act and resorted to this indirect method, he would perhaps have answered, that he was improving the graces of style and following time-honoured legislative practice. The construction contended for by the applicant would nullify the Act. The cardinal principle of statutory construction is, if possible, to save and not to destroy an enactment. Even penal enactments have to be construed in a rational way with due regard to the aim and intention of the Legislature. A power may be conferred expressly as well as by necessary implication. The only commonsense conclusion is to hold that the Legislature has not nullified the Act which it avowedly sought to improve by means of the amendment.

It was boldly argued by the Advocate-General that the State had the prerogative right to declare associations unlawful and imprison its members in the interests of public order. Such an argument was never heard in England after the Magna Charta and assertions of such prerogatives cost an English King his head and another his throne. Such a contention is unthinkable under our Constitution.

1. (1872) 7 Q.B. 416.

It was next argued that in a matter so vitally affecting the freedom and civil rights of citizens, the Legislature could not delegate to the State Government the power of declaring an association unlawful, which declaration involves serious penal consequences and deprivation of property. If the Act, before or after its amendment, was within the competence of the State Legislature—I assume for the purpose of this part of the case that it was—the delegation is not bad. In one sense it may be considered to be a delegation because another body specified by the Legislature is authorised to do something which it might have done itself. It is now too late in the day to contend that such a delegation is objectionable. It is impracticable for the Legislature to pass a separate enactment with reference to each association declaring it to be unlawful. The power has necessarily to be given to the executive Government to determine from time to time and with reference to the activities of each particular association, whether or not it should be dealt with as an unlawful association. Modern Government would be almost impossible without some amount of delegation of authority to executive bodies. The point is now well established by authority. *Empress* v. *Burah*[1]; *King Emperor* v. *Benori Lal Sarma*[2], per the Chief Justice of India in *A. K. Gopalan* v. *The State of Madras*[3] and in *Dr. Khare* v. *The State of Delhi*[4]. The orders now under consideration are not invalidated solely by reason of the fact that they were made by Government in the exercise of a delegated power. But this point will have a bearing on the interpretation of Article 19 (4) of the Constitution.

The next contention of the applicant was that the Act, even after its amendment, and *a fortiori* before its amendment, was repugnant to Articles 14 and 19 (1) (*a*), (*c*) and (*f*) of the Constitution and was therefore void under Article 13. The learned Advocate-General did not contend that the Act, before its amendment, was not inconsistent with the Constitution, though he said that he should not be understood to have made any admission on the point. It is common ground, however, that if the Act as amended were held to be repugnant to the Constitution, the unamended Act was clearly void. It is also admitted that before the enactment of the Constitution, the Act was quite valid. The Act has been on the Statute book since 1908 and has undergone amendments from time to time, Madras Act XI of 1950 being the latest.

The question for decision is whether, in the frame in which the Act is cast, it can receive effect as a lawful exercise of legislative authority. In such enquiry it has been held by the Judicial Committee that Courts must ascertain " the true nature and character " of the enactment or its " pith and substance " and consider the provisions of the Constitution by which affirmatively legislative powers have been created and negatively such powers have been restricted. Entry No. 1 in the State List (II) of the seventh schedule to the Constitution refers to " public order ". Entry No. 1 in the Concurrent List refers to " Criminal law " and Entry No. 2 to " Criminal Procedure." Under Article 246 of the Constitution the State Legislature, in respect of " public order ", and the Parliament and the State Legislature in respect of " Criminal law " and " Criminal Procedure ", have power to legislate. Under Article 245, however, this legislative power must be exercised subject to the provisions of the Constitution. Article 13 (1) and (2) provide that all laws inconsistent with or in derogation of the fundamental rights of citizens declared and guaranteed in Part III of the Constitution shall, to the extent of such inconsistency or contravention, be void. The Legislature has power to create or define crimes and prescribe the procedure for trial and the imposition of penalties in respect of such offences, without transgressing the limits of Part III of the Constitution. When a power is conferred to legislate on a particular topic it is important in determining the scope of the power to regard what is ordinarily treated in legislative practice and particularly the legislative practice in India as comprised in that

1. (1878) L.R. 5 I.A. 178 : I.L.R. 4 Cal. 172 (P.C.).
2. (1945) 1 M.L.J. 76 : L.R. 72 I.A. 57 : I.L.R. (1945) Kar. 97 : 1945 F.L.J. 1 (P.C.).
3. (1950) 2 M.L.J. 42, 57 : 1950 S.C.R. 88 : 1950 S.C.J. 174 (S.C.).
4. (1950) M.W.N. 440, 442 : (1950) S.C.J. 328 (S.C.).

subject. The impugned Act deals with "public order" which has always been regarded in Indian legislation as comprising public safety and the orderly administration of law. It also deals with criminal law and procedure. The only question is whether it offends Part III of the Constitution.

In this connection many American decisions and text-books have been cited to us by learned counsel on both sides. These decisions afford valuable guidance though they have only a persuasive value here. The generality and brevity of the American Constitution provided mere starting points for judicial exposition and the Constitution now consists mostly of case-law. The outlook of the Supreme Court has varied with changes in time and the *personnel* of the Court. The dissents of one generation, notably the classic dissents of Justice Holmes, became the law of the next generation of Judges. But always the Constitution was regarded as a superior and paramount law controlling and annulling legislative acts repugnant to it. Very early in the history of the American Republic, the power and duty of the Court to interpret the law enacted by the Legislature was assumed to carry with it the power to vote legislation as being unconstitutional. Notwithstanding the separation of powers and the establishment of three separate and independent agencies of Government functionally differentiated from one another, the supremacy of the judiciary became the established rule of the American Constitution. By reason of the assumption of this wide power, the Supreme Court not only adjudicated upon actual disputes but also controlled national policies. It had to move with the current of public opinion of the time. It asserted the federal or national power under Marshall, C.J., restored to the States some of their lost power under Taney, C.J., voted regulatory social and economic legislation of the States as a violation of the "due process" clause, later upheld it as a proper exercise of the "police power", sterilized the federal Goverment's anti-trust and anti-cartel legislation and later gave life to it.

With reference to civil rights or liberties the American decisions have been more consistent, though even here, their outlook or mode of approach has not been uniform. The American Constitution was framed by men whose ancestors had left their homes to escape religious and political tyranny and whose tradition had been to regard the State as the enemy of civil liberty. Their primary concern was for safeguarding the life, liberty and property of individual citizens. The extent to which Government was viewed as the enemy of liberty would be apparent from the very first section of the Bill of Rights :—

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; of abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of their grievances."

This tendency was revealed in the early decisions of the Supreme Court also. But times have changed and judicial opinion in America has not remained static. New concepts of civil liberty ensuring the safety of the State and the protection of citizens not *against* the Government but by the Government have found expression in recent times. What might have been thought as an essential and inviolable right of the citizen two or three generations ago, is not asserted or maintained as such in America to-day.

I shall have to say something later in the course of this judgment with reference to the growth of the power of judicial review of legislative decisions in America. In approaching the question before us, we have to remember that the Constitution of India was framed with full knowledge of the working of many Federal and Republican Constitutions in other countries; that it was intended to fashion a Constitution suited to the particular needs and conditions of this country: and that it descends into particulars and details unlike the Constitution of America. Its object, to quote the preamble, was to secure to all citizens

"justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of statute and opportunity" and to promote "fraternity, assuring the dignity of the individual and the unity of the Nation."

These high purposes were intended to be fulfilled under the protection and authority of a stable and well-ordered democratic State. I humbly venture to think that where the law of the Constitution as expounded by learned American Judges of the Supreme Court is left in a state of conflict, doubt or uncertainty with varying statements of the law by different Judges, it is open to us to choose and accept that judicial opinion which, subject to the guidance of the Supreme Court, we consider, is in consonance with the principles of our Constitution, and suited also to the needs and conditions of our country. This seeming digression has been necessitated by the course taken by the arguments before us.

Article 14 of the Constitution provides that the " State shall not deny to any person equality before the law or the equal protection of the laws." The impugned Act is said to be a violation of this provision. The first part of Article 14 is of English and Irish origin and the latter part is a verbatim adoption of a phrase found in the 14th Amendment of the American Constitution. The argument was presented in diverse forms. Reliance was placed on Dicey's Law of the Constitution (9th Edition) at pages 202-203 where one aspect of the doctrine of " the rule of law " which, according to the author, forms a fundamental principle of the English Constitution, was thus stated :—

" It means, again, equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Courts."

Founding himself on this passage, Mr. Nambiar argues that the impugned Act enacts a highly discriminatory law, empowering the executive Government of the day to select groups or associations of persons whose policies and activities the Government may not approve, and to subject them to severe penalties in the shape of imprisonment and loss of property, without a trial in the ordinary Courts according to the ordinary law of criminal procedure. Whatever may be the validity of this contention otherwise, it is in my opinion, a misapplication of Dicey's doctrine. What the author meant in the passage cited was that if a public officer committed a tort or a crime in England, he would be liable for it in the ordinary civil and criminal Courts of the land, unlike in France where administrative Tribunals determined the dispute. This thesis was elaborated in a whole chapter and conclusions favourable to the English legal system were drawn by Dicey. The passage referring to " equality before the law " had no reference and could not have had any reference, in view of the absolute legislative supremacy of Parliament, to any legislative enactment or to that part of the law which gives powers to and imposes duties upon public authorities. This is made clear by a passage in Dicey following the one already cited :—

" The 'rule of laws' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals ; there can be with us nothing corresponding to the administrative law (*droit administratif*) or the administrative tribunals (*tribunaux administratifs*) of France."

The argument went further. It was said the sections 120-A and 120-B and sections 141 to 151 of the Penal Code dealt with associations of people whose object and purpose were as heinous, if not more, and that in such cases, the accused had a right to be tried in accordance with the ordinary law of criminal procedure with a right to engage counsel, cross-examine witnesses, lead rebutting evidence and address arguments in open Court. These rights were denied to persons brought under the impugned Act which enabled the Government to make an association unlawful by its mere declaration. There was here a denial of equality before the law and of equal protection of the laws. So ran the argument. Reliance was placed on the following decisions. *Barbier* v. *Connelly*[1] ; *Yick Wo* v. *Hopkins*[2] ; and *Smyth* v. *Ames*[3] for the proposition that the " equal protection of the laws " necessarily involved and implied, (1) exclusion of arbitrariness ; (2) access to courts ; and (3) freedom from deprivation of personal liberty or property except as the result of a conviction by the ordinary Courts of the land. The impugned Act is aimed

1. (1885) 113 U.S. 27.
2. (1886) 118 U.S. 356.
3. (1898) 169 U.S. 466.

at associations whose activities constitute, in the opinion of the Government, a danger to the public peace or an interference with the maintenance of public order or the administration of the law. In this respect it does not differentiate between associations according to their political, economic or social doctrine and objectives. It lays down only one test for all groups or associations before they are declared illegal. The grounds on which alone the Government is empowered to declare associations unlawful are laid down by the Act. They are grounds which might apply to all associations, political, religious, economic or academic, if their real activities bring them within the mischief of the Act. That united and joint action involves greater danger to public peace and public order than the utterances and acts of individuals must be conceded. The exercise of the statutory power of the Government is hedged in with conditions and limitations which apply in the case of all associations. The State has not, in dealing with its citizens by legislation, arbitrarily singled out a class of citizens and subjected that class to oppression, discrimination or disability. The impugned Act strikes down all groups or associations having the object or activity prohibited by the Act and menacing the public peace. The possibility of an abuse of governmental power may be relevant to another portion of the argument which I shall consider later, but *ex facis* the impugned Act does not discriminate between one association and another but applies a common test to all associations. " Equality before the law " is not, in my opinion, violated by the impugned Act.

The arguments based on the expression " equal protection of the laws ", like the American decisions interpreting it, mix up the two concepts of " equal protection of the laws " and " due process of law " both of which find a place in one sentence in section 1 of the 14th Amendment :—

" No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ; nor shall any State deprive any person of life, liberty or property without due process of law ; nor deny to any person within its jurisdiction the equal protection of laws."

Our Constitution has carefully avoided the use of the expression " due process of law " which has been a terror to legislative bodies and a paradise for Courts and lawyers in America. The guarantees of " due process of law " and " equal protection of the laws " are secured to all persons, whether American citizens or not. The two guarantees differ in theory. " Equal protection of the laws " is a guarantee against discriminatory legislation while " due process of law " is a guarantee that all legislation shall conform to certain well established standards or principles. But these rights are in most cases treated together in considering the constitutional validity of legislative enactments and only occasionally differentiated.

" In not a few cases the Courts have referred to both prohibitions leaving it uncertain which prohibition was deemed the most pertinent and potent in the premises"—Willoughby's Constitutional Law, Vol. III, page 1929.

The possible distinction is indicated in *Truax* v. *Corrigan*[1] where Taft, C.J. said :—

" It may be that they (the two prohibitions) overlap, that a violation of one may involve at times the violation of the other, but the spheres of protection they offer are not conterminous . . . . The due process clause . . . . . of course tends to secure equality of law in the sense that it makes a required minimum or protection for everyone's right of life, liberty and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general fundamental principle of equality of application of the law . . . . . The guarantee was aimed at undue favour and individual or class privileges, on the one hand, and at hostile discrimination or the oppression of inequality on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process."

In *Barbier* v. *Connolly*[2] relied upon by Mr. Nambiar the Supreme Court expanded the meaning of " equal protection of laws " by saying that " not only that there should be no arbitrary deprivation of life or liberty or arbitrary deprivation of property but that equal protection should be given to all under like circumstances in the enjoyment of their rights ; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property ; that they should have like access to the Courts of the country for the protection of their persons and property, the prevention of wrongs and the enforcement of contracts ; that no impedi-

1. 257 U.S. 312.

2. (1885) 113 U.S. 27.

ment should be interposed to the pursuits by any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice, no different or higher punishment shall be imposed upon one than such as is prescribed to all for like offences." It is not right, in my opinion, to treat these words as if they were part of the Constitution itself or as a precise definition. Crimes against society are treated differently from crimes against individuals, and crimes against property from crimes against the person. The law of criminal procedure provides different modes of trial for different offences. Sentences varying in their severity are imposed for the same offence according to the circumstances of the crime and the condition of the accused. Relations between debtor and creditor, employer and workman, and landholder and tenant are not regulated by the *laissez faire* theory or by the principle of freedom of contracts and are even taken out of the jurisdiction of Courts. The bulk of modern social and economic legislation applies not to all citizens generally but only to special classes considered by the public opinion of the day as deserving of special protection. The prohibition against the denial of equal protection of the laws does not therefore require that the law should have an equality of operation on persons as such, but on persons according to their relation. Distinguishing, selecting and classifying objects of legislation within a wide range of discretion and according to the needs and circumstances of society from time to time, are both necessary and permissible, provided the discretion is based on some reasonable or intelligible grounds. The power of the State to prescribe regulations for promoting the health, morals, and education, of the people, the economic and industrial development of the country, and for preserving peace and order, called the "police power" in America, involves some kind of selection, classification and special treatment. Reasonable classifications made and restrictions imposed by law do not amount to a denial of equal protection. Though the classification must have relation to the purpose of the Legislature, logical appropriateness of the inclusion or exclusion of objects or persons is not required and the Legislature must have great freedom of discretion in this respect. A classification having some reasonable basis does not offend the rule of "equal protection of the laws" merely because it is not made with mathematical, logical or scientific accuracy or because in practice and actual working it results in some inequality. *Gulf C. and S. F. Ry. Co.* v. *Ellis*[1]; *Heath Williган Manufacturing Co.* v. *Worst*[2]. All that can be said is that the classification must not be an arbitrary, capricious or colourable selection which no reasonable man would make but must rest upon some difference which bears a reasonable and just relation to the act in respect of which the classification is made. The classification, as stated in one of the books quoted to us (Weaver on Constitutional Law, page 397), "must not be arbitrary, artificial or evasive". There must be a reasonable distinction in the nature of the class or classes on which the law operates. He who assails the legitimacy of the classification must establish beyond doubt that it does not rest on any reasonable basis, the presumption being that it does. *Gulf C. and S. F. Ry. Co.* v. *Ellis*[1]; *Connolly* v. *Union Sewer Pipe Co.*[3]; *Lindsley* v. *Natural Carbonic Gas Co.*[4]. The 14th Amendment is not "a pedagogic requirement of the impracticable" said Justice Holmes. Legislation may be and in practice is often limited as to objects or territory, the only requisite being that all persons subject to it are treated alike under like circumstances "both in the privileges conferred and the liabilities imposed". *Hayes* v. *Missouri*[5]; *Giles* v. *Teasley*[6]. The degrees of evil, detriment or injury to the State or to the citizens arising from unsocial conduct might justify a classification. The classification of crimes proceeds on this basis and the only requisite is that the like should be treated alike. It has been pointed out in America that in considering whether a State has violated the rule as to equal protection of laws, paraphrased as "the

1. 165 U.S. 150, 155.
2. 207 U.S. 338.
3. (1902) 184 U.S. 540.
4. (1911) 220 U.S. 61, 78.
5. 120 U.S. 68.
6. 193 U.S. 148.

protection of equal laws", the court "is free to go behind the face of the law and inquire into the fairness of its actual working and enforcement" *Yick Wo* v. *Hopkins*[1]; *Regan* v. *Farmers Loan and Trust Co.*[2].

To apply these principles to the impugned Act, it deals with a type of association having objects and activities which threaten public peace and the maintenance of public safety or order and it was the object of the Legislature to penalise all such associations in public interests. There is no discrimination between persons or groups of persons according to their political, social or religious affiliations. The classification cannot be said to be arbitrary, irrational or unreasonable. Within reasonable limits it is open to the Legislature to determine by what process and in what form penalties may be imposed for infraction of the penal law. Neither a change of the ordinary venue nor the constitution of a Special Tribunal for the trial of a particular type of offences, irrespective of the persons or the associations concerned, can, by itself, be said to be a violation of the rule of "equal protection of the laws". The procedure enacted by law must, however, give reasonable notice and a fair opportunity to be heard before a decision is given or a penalty is imposed. *Cincinnati Street Ry. Co.* v. *Snell*[3]. This last qualification lies in the penumbra of the "due process" rule and will be dealt with later when I discuss the "reasonableness" of the impugned Act. Except for this reservation, the impugned Act does not offend the principle of "equal protection of laws".

The further question is whether the impugned Act violates Article 19 of the Constitution. The fundamental rights of citizens declared in Article 19 of our Constitution are referred to in the 14th Amendment as "the right to life, liberty and property". Our Constitution expands the concept and also limits its scope. The doctrine of "natural rights" extolled in Thomas Jefferson's Declaration of American Independence and expounded by John Locke, permeated the minds of the framers of the American Constitution and influenced its judicial exposition in the early days. The conception of natural rights, an universal sense of equality, and the possession by individual citizens of certain inherent and inalienable rights and the need for their protection against governmental encroachment found expression in the "due process" clause of the 5th and 14th Amendments and the "equal protection of the laws" in the 14th Amendment. The total number of these rights, their substance and content and the limitations on their exercise were not precisely formulated, but they were all compendiously described as "civil rights". They were safeguarded and guaranteed to the citizen by the American Bill of Rights and the 14th Amendment and by the Judicial interpretation of the clauses relating to "due process" and "equal protection of the laws". In our Constitution these rights and the limitations on their exercise are defined in Chapter III. We are here concerned with Article 19 whose object and scope were thus explained by the learned Chief Justice of the Supreme Court in *A. K. Gopalan* v. *The State of Madras*[4]:—

> "It is the first Article under the caption "Rights to freedom". It gives the rights mentioned in 19 (1) (*a*) to (*g*) to all citizens of India. These rights read by themselves and apart from the controls found in clauses (2) to (6) of the same Article, specify the different general rights which a free citizen in a democratic country ordinarily has."
>
> "Having specified those rights, each of them is considered separately from the point of view of a similar right in the other citizens, and also after taking into consideration the principle that individual liberty must give way, to the extent it is necessary when the good or safety of the people generally is concerned . . . . . The only concept appears to be that the specified rights of a free citizen are thus controlled by what the framers of the Constitution thought were necessary restrictions in the interest of the rest of the citizens."

The Constitution however insists that the Legislatures have no power to abrogate the rights defined and declared in Article 19 (1) but gives them the power in Article 19 (3) to (6) to impose "reasonable restrictions" on the exercise of those rights.

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1. 118 U.S. 356.
2. 154 U.S. 362.
3. 193 U.S. 30.
4. (1950) 2 M.L.J. 42, 48-49 : (1950) S.C.R. 88 : (1950) S.C.J. 174 (S.C.).

The following questions immediately present themselves and call for an answer. Whose reasonableness is to prevail in the matter of imposing restrictions on the exercise of fundamental rights, whether of the Legislature or of the Courts? What are the standards by which reasonableness has to be measured? If the Court is to be the judge of reasonableness, are there any, and if so, what limits to the power of judicial review? To some extent they were answered by Mr. Justice Das of the Supreme Court in *A. K. Gopalan* v. *The State of Madras*[1] :—

"Whether any law has in fact transgressed these limitations is to be ascertained by the Court and if, in its view, the restrictions imposed by the law are greater than what is permitted by clauses (2) to (6) of Article 19, whichever is applicable, the Court will declare the same to be unconstitutional and, therefore, void under Article 13. Here again there is scope for the application of the 'intellectual yardstick' of the Court. If, however, the Court finds, on scrutiny, that the law has not overstepped the constitutional limitations, the Court will have to uphold the law, whether it likes or not."

Mr. Nambiar boldly argued that the power of this Court to invalidate legislation contravening Article 19 was of greater amplitude than that possessed by the Supreme Court of America and that we were at liberty to examine any legislative Act on its own merits and upset it if, in our opinion, it imposed unreasonable restrictions on the exercise of fundamental rights. One would wish one had to write on a clean slate and the books held no authority on the subject. Not only are there decisions, but a mass of commentary on what the cases really come to. Reconciliation of the decisions or dicta is beyond my capacity and I must confess I have only a partial knowledge of American case-law. Before I embark on a consideration of American precedents on this topic, I have to make a preliminary observation.

The American Constitution was based on the theory of division of powers and expressly vested the judicial power of the State in the Supreme Court as a separate and distinct organ of Government. A provision vesting the judicial power of the State in Courts is not found in our Constitution; but that does not, in my opinion, affect the power of the Courts from the highest to the lowest to declare legislation unconstitutional if it is hit at by Article 13 of the Constitution. The prerogative writs, however, can be issued only by the High Courts and the Supreme Court of India. This feature of the American Constitution enabled the Judges of the Supreme Court to test the propriety of impugned legislation by their own notions of what was fair and reasonable in the circumstances. Legislative decisions were thus brought under the control of the Supreme Court and subjected to judicial correction. I shall show presently that judicial opinion has not been uniform as to the limits of judicial review in America. Under the "due process" clause of the 14th Amendment the Supreme Court assumed power to invalidate all legislation which appeared unreasonable to the majority of the Judges for the time being. Under our Constitution, in respect of matters not falling within Chapter III, the appropriate Legislatures have plenary power to legislate; and in respect of rights declared and guaranteed by Chapter III their power is restricted, as for instance, by clauses (2) to (6) of Article 19. Our Constitution too has recognised that it is made for people whose opinions might differ fundamentally, that there are occasions in which the temptations may be severe to abridge the fundamental rights of citizens and that such an abridgment might be attempted by a party having a temporary majority in the Legislatures. Such an abridgment is often made in a concealed form, less open to scrutiny, and much more convenient, by giving power to the Government for declaring by notification that a particular thing is authorised or prohibited. The Constitution has therefore provided for judicial review of the reasonableness of the restrictions imposed by legislation on the exercise of the citizens' fundamental rights. This Court is expressly empowered by Article 226 of the Constitution to protect those fundamental rights by appropriate legal processes against illegal or unauthorised encroachment by the Legislature. This power is not permissive but its exercise is obligatory on this Court. Compare *Julius* v. *Lord Bishop of Oxford*[2]. This Court has therefore a duty to exercise a

1. (1950) 2 M.L.J. 42, 140 : (1950) S.C.R. 88 : (1950) S.C.J. 174 (S.C.).
2. (1880) 5 A.C. 214.

jealous scrutiny in considering any invasion of the liberty or freedom of citizens by the exercise of governmental power, executive or legislative. I use the words "liberty" and "freedom" in the comprehensive sense in which they are dealt with in Chapter III.

Freedom of assembly and freedom of association and discussion of matters of public interest are indispensable to the effective use of the processes of popular Government. These rights are guaranteed to citizens by Article 19 (1) read with Article 13 of the Constitution. The liberty that is thus protected is liberty in a community or society organised under the Constitution. The guarantees are not absolute and they do not protect unsocial actions subversive of the community itself. These privileges are not "absolutes" but are subjected under Article 19 (3) to (6) of the Constitution to reasonable restrictions imposed by the State to ensure the existence of an orderly society. Under Article 19, clauses (3) to (6) of the Constitution the Court has to take the role of a reasonable man and decide what are just and proper restrictions on the exercise of the fundamental rights dealt with in Article 19 (1) (*b*) to (*g*). The hypothetical reasonable man is personified in the Court to which is entrusted the task of deciding whether the restrictions imposed by law are reasonable, after giving due weight to all relevant considerations. An undefined standard of reasonableness may sometimes be difficult to apply but the task is one which judges have had to perform from time immemorial. Our Constitution designedly leaves it to the Court to pronounce upon the justice and fairness, in the broader sense, of legislation imposing restrictions on the exercise of fundamental rights of citizens enumerated in Article 19 (1) (*b*) to (*f*). Mr. Nambiar invited us to consider and decide whether there is any factual justification for the impugned Act remaining on the Statute book. He referred to the decisions in *Whitney* v. *California*[1] and *Terminiello* v. *Chicago*[2]. This opens up the controversy encircling the "due process" clause of the 14th Amendment.

Till about the year 1890 "judicial review" was restricted to controlling the "competency of the Legislature to deal with certain subjects and not the way in which the Legislature dealt with them". *Munn* v. *Illinois*[3], *Chicago Milwaukee and St. Paul Ry. Co.* v. *Minnesota*[4]. The evolutionary growth of the judicial power resulted in the Supreme Court establishing its right to take cognizance of the reasonableness of impugned legislation and to adjudicate upon its constitutionality. The limit to the power of the judges to substitute their own judgment for that of the Legislature came to be regarded as their own sense of "self-restraint". The Court went on to hold that

> "a legislative declaration or finding is necessarily subject to independent judicial review *upon the facts* and the law by Courts of competent jurisdiction to the end that the constitution as the Supreme law of the land may be maintained . . . . . The principle applies whether rights of person or of property are protected by constitutional limitations." Per Hughes, C.J., in *St. Joseph Stockyard Co.* v. *U. S.*[5]

Thus the "due process" clause became an irresistable weapon of judicial attack on legislative decisions. The expression "due process", a term of elusive import, was not defined by the Constitution. Originally it was understood to mean the modes of procedure known to the English common law especially in connection with the trial of cases, civil and criminal, before Courts. Later on it was construed to mean "reasonable law and procedure", that is to say, reasonable in the view of the judges of the Supreme Court. As a consequence of this extended meaning given to "due process" as the equivalent of reasonable law, judicial review ceased to have any defined limits. The Court assumed power to come to its own independent judgment, whether the end or objective of the Legislature was legitimate and proper and whether the enacted law was a fair and reasonable method of accomplishing that objective. "Unreasonableness" or "unfairness" shed its

1. 274 U.S. 357.
2. 337 U.S. 1.
3. (1876) 94 U.S. 113.
4. (1890) 134 U.S. 418.
5. (1936) 298 U.S. 38.

old technical legal meaning and became an ethical test. The Court claimed the right to decide whether the evils assumed or asserted by the Legislature did in fact exist, whether they warranted the remedy prescribed, whether the enacted law was calculated to bring about the desired result, whether the end itself was constitutional and whether the procedure was fair and just. Even with reference to legislation trenching upon the property rights of citizens and their freedom of contract, the Court sat in judgment over the Legislature in the manner of an appellate Court.

But powerful protests against these views were often heard. In his famous dissent in *Baldwin* v. *Missouri*[1], Justice Holmes disapproved of the crusade waged by the Supreme Court against State Legislation. He said :

"I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the 14th Amendment in cutting down what I believe to be the constitutional rights of States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of these rights if they happen to strike a majority of this Court as, for any reason, unreasonable. I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions."

These observations were made with reference to legislative decisions in the sphere of economic activities. Legislation regulating the hours of labour, controlling the use of property, securing fair wages for workmen, and controlling commerce and industry in the interests of public welfare belong to this type.

In *Missouri Kansas and Texas Ry. Co.* v. *May*[2], Justice Holmes had said :

"It must be remembered that Legislatures are the ultimate guardians of the liberty and welfare of the people in quite as great a degree as the Court."

Justice Frankfurter referred to this statement as going "to the very essence of our constitutional system and the democratic conception of our society." He added the weight of his own observations :

"The Constitution does not give us greater veto power when dealing with one phase of 'liberty' than with another . . . . In neither situation is our function comparable to that of a Legislature or are we free to act as though we were a super-legislature. Judicial self-restraint is equally necessary whenever an exercise of political or legislative power is challenged . . . . . In no instance is the Court the primary protector of the particular liberty that is invoked." *West Virginia Board of Education* v. *Barnette*[3].

Where personal rights and liberties are concerned a wider coverage of judicial review has been accorded than in the case of the property rights including freedom of contracts. There is a heirarchy of constitutional values in which rights of personal liberty, freedom of speech, assembly and association are accorded the first place, rights of property being accorded a lower position. Different standards have been laid down in American cases for the exercise of legislative power in regard to rights of property and civil liberties such as freedom of speech and free assembly. *H. P. Hood and Sons* v. *U. S.*[4], *Yakus* v. *U.S.*[5]. The Holmes doctrine of "legislative supremacy and judicial self-limitation" has not been accepted without qualification. Where fundamental rights of free speech and assembly are alleged to have been invaded, it has been recognised that a person charged with infringement of the law can join issue on the question whether there did exist "a clear and present danger" to justify the law as enacted and whether the evil apprehended was so substantial as to justify the stringent restrictions imposed by the Legislature. In a dissenting judgment Justice Holmes himself said :

"If there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate." *U. S.* v. *Schwimmer*[6].

Again in his famous judgment in *Abrams* v. *United States*[7] he said :

"But when men have realised that time has upset many fighting faiths, they may have come to believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in

1. 281 U.S. 586.
2. 194 U.S. 267.
3. (1943) 319 U.S. 624.
4. 307 U.S. 588.
5. 321 U.S. 414.
6. 279 U.S. 644, 654-655.
7. 250 U.S. 616, 627-8.

the competition of the market and that truth is the only ground upon which their wishes safely can be carried out."

When civil liberties come up for consideration, the majority of Judges were of the view that the primacy of these rights required that there should be no presumption of the validity of legislation, which *ex facis* appeared to infringe these guarantees. Mr. Justice Stone speaking for the majority said :

"When confronted with legislation which stifles the freedom of helpless minorities, the Supreme Court should not hesitate to assume the role of protector, even if in doing so, it supplants the legislative judgment with its own conception of what is appropriate."

Justice Frankfurter, however, did not accept this dual approach to the "due process" clause and held that in all cases where the police power of the States is questioned, the only issue was "whether legislators could, in reason, have enacted such a law." In his view the principles of judicial review must be consistently applied, and whether it was a question of civil liberties or a question of economic regulation, the role of the Court was limited to enquiring whether there was reasonable justification for the legislative judgment.

Mr. Nambiar argued that there was no need or justification for a permanent and peace-time legislation of a drastic character like the impugned Act, and on this ground it should be held to be unreasonable. He referred to the "clear and present danger" or the "grave and imminent danger" test adopted in American decisions like *Whitney* v. *California*[1], *Thomas* v. *Collins*[2] and *West Virginia State Board of Education* v. *Barnette*[3] in order to invalidate the impugned Act. The phrase in question was freely used by Justice Holmes in assessing the propriety of legislation abridging fundamental rights during a period of war when the existence of State itself was imperilled. The expression is felicitous and attractive, but it cannot be applied as a touchstone of legislative propriety. It was a working principle that the "substantive evil must be extremely serious and the degree of imminence extremely high" before freedom of speech, assembly and association could be interfered with by legislation. It is not a legal doctrine or formula which can be applied to all cases. The necessity for legislation is a question of fact depending on the circumstances attending the legislation. I prefer to act on the following principles :

"If any state of facts reasonably can be conceived that would sustain the legislation, the existence of that state of facts at the time the law was enacted must be assumed." *Lindsay* v. *Natural Carbonic Gas Co.*[4]; *Flesy* v. *Ferguson*[5].

Even in America a distinction has been drawn between issues of fact and issues of law, the former being pre-eminently a matter for legislative decision. Judicial review must, in my opinion, proceed on the footing that the facts assumed or found by the Legislature do exist. The Court cannot determine when a public danger is near or clear and when it is remote or nascent. Nor can the Court measure in nice scales the amount of public danger. I therefore approach the impugned Act on the assumption that there was need and perhaps grave need, for such legislation. This Court, which is supposed to be blind and deaf for many purposes, cannot possibly assess the public need for a particular type of legislation. Nor is it in a position to assume responsibility for the maintenance of public peace and order throughout the State. If a State is bludgeoned by serious threats, it is not for the Court to say "Wait. No hurry." Representatives elected by the people to make laws must determine policies which ought to govern people, the Court's function being to consider the reasonableness of the restrictions imposed and to interpret the laws. I am unable to hold that there is no factual justification for the impugned Act.

Even so, we have to consider whether the restrictions on the exercise of fundamental rights imposed by the impugned Act are reasonable. In so doing we have to take into account substantive as well as procedural rights that are alleged to have been infringed, for both these matters are open to judicial review under

1. 274 U.S. 357.
2. 323 U.S. 516.
3. 319 U.S. 624.
4. 220 U.S. 61, 78.
5. 163 U.S. 537.

Article 19 (3) to (6) of our Constitution. *Dr. Khare* v. *State of New Delhi*[1]. The "reasonableness" has to be judged both from the point of view of the individual and the public. The standard of reasonableness will vary according as it occurs in a legislative enactment conceived in the interests of the general public or in a bye-law framed by a local or municipal body. It need hardly be said that the Court has a wider latitude of construction in the former case than in the latter.

First of all, we have to consider whether the end sought to be achieved by the legislation is legitimate and authorised by the Constitution. There must be a proper legislative purpose. If the Legislature passed a law ostensibly in the interests of public safety, but intended and applied for suppression of freedom of assembly and association for citizens belonging to a hostile political group, then the legislation is colourable and will have to be invalidated as being a cloak for illegitimate ends and as a violation of fundamental rights. That is not the case here. The essence of the offence denounced by the impugned Act is the combining with others in an association for the accomplishment of ends injurious to public order and the due administration of law, without which even the guarantees of civil rights will become farcical. It partakes of the nature of criminal conspiracy. The maintenance of public peace and public order has, from time immemorial, been one of the primary duties which the State has to perform in the interests of the public. Hence it is that "public order" is placed as the first item in the State List (II) in the Seventh Schedule of the Constitution. The end, object or purpose of the impugned Act is the preservation of public peace and public order and therefore legitimate.

Secondly we have to consider whether the impugned Act has a reasonable relation to a proper legislative purpose. The fundamental right with which we are primarily concerned in this case is the right to freedom of association dealt with in Article 19 (1) (*c*) and Article 19 (4). It is said that the rights recognised in Article 19 (1) (*a*) and (*f*) are also violated and I shall deal with this contention later on. Government by public opinion involves the right to create and organise opinion with a view to influence the conduct of Government or to bring about a change in government. Freedom to assemble and associate is necessary for the propagation of ideas and for combating social, economic and political evils and injustices. Hence Article 19 (1) (*c*) withdraws the right to freedom of association from the vicissitudes of political controversy, places it beyond the reach of "fleeting" legislative majorities and guarantees the right through Courts. But freedom to combine in order to cause injury or danger to other citizens or to disturb the public peace and order is not guaranteed by the Constitution. There is always the danger of free association being used not for creating public opinion or for turning out the Government by lawful means, but to coerce and intimidate by violence those who entertain different views. Hence Article 19 (4) subjects this right of free association to restrictions in the interests of public order or morality. But the restrictions must have a reasonable relation to the interests of public order or morality. Fairness of means must be united with fairness of the end in such a way that from both points of view the Court must be able to say that the restriction is reasonable. *Nebbia* v. *New York*[2].

The critical question is whether the particular limitations and restrictions on personal liberty imposed by the impugned Act have a reasonable relation to the maintenance of public order which is the purpose of the Act. *James* v. *The Commonwealth of Australia*[3], *Minersville School District* v. *Gobitis*[4], *Jones* v. *Opelika*[5] and *West Virginia Board of Education* v. *Barnette*[6]. The true character, object and effect of the legislation can only, as has been said, be ascertained from an examination of the Act in its entirety. The safety of security of the State is not the end or

1. (1950) S.C.J. 328 : (1950) M.W.N. 440 (S.C.).
2. 291 U.S. 502, 537.
3. (1936) A.C. 578, 613.
4. 310 U.S. 586.
5. 316 U.S. 584.
6. 319 U.S. 624.

purpose of the legislation. Its purpose is much more restricted, namely, the maintenance of public order inside the State of Madras. See *Romesh Thappar* v. *The State of Madras*[1]. It is not made in the exercise of the "war power" or the "defence power" of the State under Entry No. 1 of the Union List No. 1, Schedule VII. At the same time the grant of a legislative power with respect to public order must carry with it whatever is necessary to give effect to the power itself. It may be that in the interests of public order certain associations whose activities are prejudicial thereto, have to be put out of action for a time or from time to time. The wisdom of the legislative act or the policy which called it forth cannot be canvassed by the Court. In my opinion, however, the impugned Act has transgressed these permissible limits. The provisions relating to the forfeiture of moveable properties, monies, securities and bank credits of a prescribed association have little connection with the maintenance of public order. It is not merely a precautionary detention but a forfeiture to the state not merely of the properties of the association declared unlawful but of other person's properties as well, which, in the opinion of the Government, are intended to be used for the purposes of the association. Even creditors have no right to proceed against the properties forfeited to the State. It is not so much the declaration by Government that an association is unlawful as the direct and immediate consequences that might attend the declaration, that are serious and far reaching, reaching beyond the confines of "Public order". Such extreme penalties imposed in order that they may have not only a deterrent but a terrorising effect would make the legislation unreasonable.

A declaration by the Government, upheld by an Advisory Board, might remain operative and effective, for as long a time as the Government might think fit. Bodies corporate and incorporate might be put out of existence altogether and divested of their rights and their properties on a declaration by the executive. The declaration may be based only on the opinions or suspicions of the Government, on the tendencies and presumed opinions of the members of the prescribed association. It is not required to be based on overt acts or plain omissions demonstrable in a Court of law. In England and in Australia too where there is a written constitution, it has recently been held that a state of war justified many inroads on personal freedom and restriction on the use of property of an abnormal and temporary nature, which would not be considered legitimate in time of peace. *Liversidge* v. *Sir John Anderson*[2], *Adelaide Co. of Jehovah's—witnesses Incorporated* v. *The Commonwealth*[3]. The rights of freedom of speech, assembly and association are the rights of individual citizens under Article 19 (1) of the Constitution and not of artificial persons such as corporations or associations, though the right to hold property might be a right of artificial persons as well. The law as regards preventive detention effectively, though indirectly restrains the exercise of these rights by the citizen who is detained. The wide legislative powers conferred on Parliament under Article 22 of the Constitution and the power conferred by Entry No. 3 in the Concurrent List (No. III, Schedule VII) with reference to preventive detention in the interests of public order and the security of the State operate on natural persons. The Preventive Detention Act (IV of 1950) passed by Parliament has been declared to be validly enacted by the Supreme Court in *A. K. Gopalan* v. *The State of Madras*[4]. It is in this context that the provisions of the impugned Act must be considered. The State Legislature has purported to extend the provisions of the Preventive Detention legislation which applies to individual citizens to associations, and to enlarge the scope of that legislation so as to include forfeiture of property. Having regard to the limited legislative purpose and the limited extent of the legislative power conferred on the State, I find it difficult to uphold the provisions of the impugned Act relating to forfeiture of property as having a reasonable relation to the end in view, *viz.*, the maintenance of public order.

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1. (1950) 2 M.L.J. 390 : 1950 S.C.J. 418 (S.C.).
2. (1942) A.C. 206.
3. 67 Com. L.R. 116.
4. (1950) 2 M.L.J. 42 : (1950) S.C.R 88 (1950) S.C.J. 174 (S.C.).

Thirdly and lastly, the means adopted by the Legislature to secure its object must not be arbitrary, oppressive or unjust. It is a question of what has been called procedural "due process," a term which requires compliance with certain terms accepted and universally established by the jurisprudence of all civilised States. In America it has been held that a police measure may be unconstitutional because the remedy although effective as a means of protection is unduly harsh, oppressive or tyrannical. Unconstitutional means cannot be adopted to secure a constitutional end. The substance of justice and fair-dealing must be provided before a person is deprived of his freedom by action taken under a restrictive enactment and this requisite is an integral part of the "due process" doctrine of the American Constitution. It is also the core of the principle of "natural justice," a term widely employed in the discussion of this subject. The idea is that the substantial requirements of justice should not be violated; notice of the charge and of the enquiry into it should be given; adequate opportunity to rebut the charge and to be heard in defence should be given; the Tribunal must be impartial and disinterested; and any condemnation, conviction or deprivation of personal liberty or property must be imposed only as a result or by the force of the decision of the Tribunal. It is not necessary that the Tribunal should be one in the hierarchy of the ordinary criminal Courts. A right of appeal from the decision of the Tribunal is not essential. No set form or stereotyped procedure is necessary. It is not desirable to force "natural justice" a term lacking in precision, though not in content, into a procrustean bed.

It is in the light of these principles that the validity of the impugned Act (as amended) has to be determined. A question was mooted whether Article 19 (1) of the Constitution was at all applicable to the case, inasmuch as the right of free speech and freedom of association is lost only as the result of a conviction under the impugned Act and not directly under it. Reference was made to *A. K. Gopalan* v. *State of Madras*[1], where the learned Chief Justice of India pointed out that Article 19 of the Constitution declared the fundamental rights of free citizens only while they were free, and Article 19 (2) to (5) come into play only when the deprivation is of the rights of such persons and not of persons convicted of offences and who thereby become incapable of exercising such rights. In my opinion, the right to freedom of association was dealt with directly by the impugned Act and the imposition of restrictions on that right was its direct object and effect. Article 19 (1) (*a*) and Article 19 (4) govern the validity of the impugned Act. Indeed the Advocate-General did not contest this point. Equally untenable is the argument that Article 19 (1) (*c*) merely guarantees the right to "form" associations and not the right to continue to remain as members of an association. The guarantee in Article 19 (1) (*c*) will become illusory and farcical if this contention were to be upheld.

Mr. Nambiar for the applicant contends that the impugned Act does not "restrict" but destroys associations and the freedom to join such associations and, therefore, Article 19 (4) of the Constitution cannot save it. It is said that the effect of a declaration by the Government under section 15 (2) (*b*) of the Act is forthwith to make the notified association unlawful and thereby suppress it altogether. This, it is argued, is not restriction or regulation which implies the continued existence of the association with its activities limited or restricted. It has been observed in some American decisions that the power to regulate does not mean the power to destroy but this is not a rule of general application. "Restrictions in the interests of public morality" in Article 19 (4) must connote "suppression" and not mere regulation. "Restriction" in Article 19 (5) and (6) must include prohibition of dog-racing, gambling and the prevention of unqualified persons from practising as physicians or surgeons. It is not right to put a different interpretation on the word "restrictions" in Article 19 (4) when applied to public order. It all depends on the subject-matter whether regulation is prohibition or merely involves a partial restraint. The State may go on from regulation to prohibition

1. (1950) 2 M.L.J. 42 : (1950) S.C.R. 88 : (1950) S.C.J. 174 (S.C.).

according to the nature of the public evil that is sought to be eradicated or suppressed. Even in America the power to regulate intestate commerce or lotteries has been held to include a power to prohibit. *Mogler* v. *Kansas*[1], *Tyson & Bros.* v. *Banton*[2], *Kentucky Whip & Collar Co.* v. *Illinois Central Railroad Co.*[3]

The draftsman of the Amending Act has followed the model of Article 22 (4) to (7) of the Constitution and the Preventive Detention Act (IV of 1950) after the validity of the latter had been upheld by the Supreme Court in *A. K. Gopalan* v. *The State of Madras*[4]. It does not follow that what is expressly permitted by the Constitution itself and what is authorised to be done by Parliament under Article 22 (7) is also within the competence of the Legislature of the State of Madras. It is said that provision of a reference to the Advisory Board in the Amending Act saves it from the taint of unconstitutionality. The learned Advocate-General placed strong reliance on the two recent decisions of the Supreme Court in *A. K. Gopalan* v. *The State of Madras*[4] and *Dr. Khare* v. *State of New Delhi*[5]. The former decision was based on an interpretation of Article 22 (3) to (7) of the Constitution relating to preventive detention. The learned Chief Justice of India, with whom the majority of the Court agreed, pointed out that Article 19, with which alone we are here concerned, had no application to the case of a preventive detention. The Act whose validity was there questioned was enacted by Parliament under the enabling provisions of Article 22 (7) of the Constitution itself. That decision has no application to state legislation affecting the fundamental rights of free citizens guaranteed under Article 19.

The second case arose out of an order of externment from Delhi District served on Dr. Khare under section 4 of the East Punjab Public Safety Act. The learned Chief Justice of India delivering the judgment of the majority held that the Act in question did not violate Article 19 (1) (4) of the Constitution and was saved by Article 19 (5). The learned Advocate-General particularly relied upon the following sentence in that judgment :

"Abuse of the power given by a law sometimes occurs ; but the validity of the law cannot be contested because of such apprehension."

This argument assumes that there is a grant of plenary power unhampered by any restrictions or limitations. In cases relating to fixing of rates for services rendered by public utility concerns to citizens under the police power of the State, the Supreme Court of America acted on the principle that the fixing of rates was a matter of legislative discretion and not of judicial review.

"We know," the Court added, "this is a power which may be abused ; but that is no argument against its existence. For protection against abuses by legislation the people must resort to the polls, not to the Courts." *Munn* v. *Illinois*[6].

But in a later case decided 10 years thereafter, Waite, C.J., said with reference to this passage,

"From what has thus been said it is not to be inferred that this power of limitation or regulation is itself without limit." *Stone* v. *Farmers L. & T. Co.*[7]

The Court receded from the position taken in *Munn* v. *Illinois*[6], and held that the question whether a rate fixed by the Legislature was reasonable, was a judicial question. The result of the American decisions is that the "due process" clause protects personal and *private rights* of citizens from invasion except by a legitimate exercise of the "police power". If, however, the right is not personal to a citizen but in relation to an industry or enterprise affected with a public interest, it becomes subject to a public control as a public utility service and the discretionary authority of the Legislature to regulate rates and fees for services rendered to the public is wide. Indeed the Supreme Court divided on the question, the majority went to the other extreme and said :

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1. 123 U.S. 623.
2. 273 U.S. 413.
3. 299 U.S. 334.
4. (1950) 2 M.L.J. 42 : (1950) S.C.R. 88 : (1950) S.C.J. 174 (S.C.).
5. (1950) M.W.N. 440 : (1950) S.C.J. 328 (S.C.).
6. 94 U.S. 113.
7. 116 U.S. 307.

"The question of the reasonableness of a rate on charge for transportation by a railroad company involving as it does, the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination." *Chicago Milwaukee and St. Paul Ry. Co.* v. *Minnesota*[1].

I humbly venture to think that the learned Chief Justice of India could not have meant that in no case can the possibility of abuse of statutory power be taken into consideration in adjudging the reasonableness of legislative restrictions of fundamental rights. The case before His Lordship was an order of externment for three months in the conditions then prevailing in Delhi District. The impugned Act in that case had a life of one year only. It must, however, be admitted that *Dr. Khare's case*[2], is in point because it related to the interpretation of Article 19 (1) (*d*) and Article 19 (5) and to some extent supports the contention of the learned Advocate-General. Having given the two decisions of the Supreme Court my anxious and respectful consideration, I have come to the conclusion that they do not rule the present case. Preventive detention and externment orders, it must be admitted, involve interference with the freedom of a citizen to some extent, but they are not punitive but merely precautionary. The action is taken on suspicion. No crime is charged. A Court of law is not an appropriate Tribunal for inquiring whether circumstances of suspicion exist warranting a precautionary step by way of restraint. In any case the Constitution has incorporated "Preventive Detention" as part of the chapter on "Fundamental Rights" and made the exercise of fundamental rights expressly subject to Article 22. The same Constitution has given Parliament plenary power of legislation on preventive detention under Article 22 (7). It is, therefore, not proper in my opinion, to extend the principle of the two rulings of the Supreme Court to punitive legislation affecting the personal liberty and properties of citizens.

In my opinion, the Act exceeds the authority given to the Legislature by our Constitution. The Act is a permanent part of the statute-book and not a piece of emergency legislation. It is not a legislation passed in the exercise of the defence power of the State. The legislative power that is invoked is "public" order in Entry I or List II of Schedule VII. Constitutional rights and liberties guaranteed by the Constitution and which are of prime importance to the citizens of a free democracy have been considerably eclipsed. The Act creates and establishes a crime and provides drastic penalties by way of imprisonment, fine and forfeiture of property without a fair trial. It does not provide for proper and resonable notice to the persons penalised. It does not give them fair and reasonable opportunity to be heard before they are condemned. At the trial before a Magistrate for the offence of being a member of an unlawful association, the declaration by the Government is conclusive. In effect, it places sentence before trial and judgment. I do not think that the Constitution has made this colossal delegation of power to State Legislatures when they were authorised to legislate with respect to public order. Let me make good these observations.

A declaration by the Government published in the official Gazette that an association or body of persons is unlawful makes it an unlawful association. This initial declaration is made *ex parte* by the government on its own information. The selection of the Association is left to the discretion of the Government. The grounds for declaration together with reasons and such particulars as the Government may think it fit to give, are published in the Gazette. So soon as the declaration is published, the association becomes an unlawful association and its members are liable to be prosecuted and sentenced to imprisonment and fine under section 17. The movable properties, monies, securities and credits of the association as well as effects not belonging to it are liable to be forfeited by Government under sections 17-B and 17-E. On a prosecution under section 17 it will not be open to the members of the association to go behind the declaration and show that it is unjustified, that the grounds do not exist and the reasons are incorrect. Even strangers who take part in the meetings of such association after the declaration are liable

1. 134 U.S. 418.
2. (1950) S.C.J. 328.

to imprisonment and fine. All this might happen even before the persons affected had any opportunity to have their objections to the declaration by the Government considered by the Advisory Board. Punishment might automatically follow the declaration though the Government might be trusted to await the report of the Advisory Board before launching a prosecution. There is no provision in the Act for service of the notice of the declaration on the Association through its office-bearers or members at its place of business. Such a provision is common in other enactments. The suggestion that the members of the associations might be unknown to the Government does not carry weight, for it is unreasonable to penalise persons whom you do not even know, for an alleged transgression of the law. A time for making representations against the declaration of the Government is fixed in the notification, but in the absence of a service of the notice on the Association or its office-bearers or members, the time might pass by without their being aware of the notification at all. I am aware that in some cases, as for example in the Income-tax Act, statutory provision is made for the publication of a general notification so as to fix all citizens with notice. I am also aware that citizens who were in enemy country during war-time and who actively assisted the enemy have been condemned as war criminals without personal service of the proceedings but after publication in official Gazettes. But this rule of constructive service by publication is the exception rather than the rule. *Pennoyer* v. *Neff*[1]. The persons affected are not entitled to know on what evidence they are being declared to be members of an unlawful association. The Government is entitled to withhold communication of the evidence according to its discretion, even though it cannot claim privilege under the Evidence Act. It might be that during a state of war when the very existence of the State is threatened, or under the provisions of the Preventive Detention Act, the Government might not be required to disclose confidential information which it considers, it would be against public interest to disclose. But this is an exceptional procedure which does not admit of being made part of the ordinary Criminal Law and Procedure. The representation by the persons affected is presumably required to be in writing for it has to be placed by the Government before the Advisory Board. If there is no right to be heard in person on so grave an accusation it has been held to be a denial of due process. *Londoner* v. *Denver*[2]. The imposing facade of an Advisory Board is not an effective protection. There is no limit of time within which reference should be made to the Advisory Board or within which the Board should give its report. The persons affected are not entitled to be heard in person or by counsel before the Board though Article 22 (1) accords that right to persons charged with a crime. They have no right to test the evidence relied upon by the Government or to lead evidence *contra*. The Government is the sole judge of what evidence it will produce and what it will withhold from the scrutiny of the Advisory Board. The Board cannot compel the Government to produce all the evidence in its possession. The Board functions in secrecy and its report, except its final opinion or the opinion of the majority, is confidential. There is not even a provision that if the reference to the Board is not made or the decision of the Board is not given, say within 3 or 6 months, the declaration by the Government should stand cancelled. There is no provision that no prosecution or forfeiture shall be made till the Board has given its decision. There is no limit of time for the continuance of the declaration. A report by the Board that there is no justification for the notification is like a judgment of acquittal on an appeal from a conviction. But the trial itself is fundamentally opposed to principles of justice and fairplay. The safeguards are nothing compared with those given to a man charged with murder who must at once be produced before a Judicial Tribunal which investigates the case in public.

There is one other feature of the case that must be adverted to. A person who is accused of the offence of being a member of an unlawful association under

1. (1877) 95 U.S. 714. 2. (1908) 210 U.S. 373.

section 15 (2) (*a*) has a right to be tried before a Magistrate. He can be defended by counsel, cross-examine prosecution witnesses, lead evidence in defence, address arguments and establish that the association is not unlawful. By contrast a person charged as being a member of an unlawful association under section 15 (2) (*b*) cannot be heard to dispute the declaration by the Government that the association was unlawful. This brings out the unreasonableness of the restriction imposed by the impugned Act on the right of freedom of association declared by Article 19 (1) (*c*) of the Constitution. I do not however consider that this feature of the impugned Act in itself renders it obnoxious to the principle of " equal protection of the laws " in Article 14 of the Constitution. The mere juxtaposition of the two parts of the definition of " unlawful association " in section 15 (2) (*a*) and (*b*) of the Act is by no means decisive. Suppose section 15 (2) (*a*) had not been enacted and only clause (*b*) had been found in the impugned Act or again suppose that section 15 (2) (*a*) and 15 (2) (*b*) had been the subject of separate enactments. In such a case it could not be said that there was any discrimination or unequal treatment and it need not make any difference that the two categories are dealt with in one section. Further, it will be observed that the activities of associations dealt with by section 15 (2) (*b*) constitute a direct threat to the maintenance of public order or a danger to the public peace whereas the activities of associations falling under section 15 (2) (*a*) are injurious to individual citizens or citizens of a particular locality and indirectly to the public peace or public order. It cannot therefore be said that there is no reasonable basis for differentiating between the two types of associations whose activities differ in their technique and their consequences. But there is no justification for a radical difference in the procedure for trial of these categories of offences.

It was also contended by Mr. Nambiar that the impugned Act violated Articles 19 (1) (*a*) and (*f*) of the Constitution. The Act does not purport to deal directly with freedom of speech or expression by way of prohibition or restriction. It may be that if an association is declared unlawful its members cannot meet and speak and exchange ideas as such members, without incurring the penalty of imprisonment or fine or both. This however is an indirect consequence of the association being declared unlawful. A law may produce an indirect effect in relation to a subject-matter without being a law with reference to that subject-matter. As an individual citizen, each member of the association is free to speak though he is penalised for addressing meetings of an association, declared to be unlawful. Article 19 (1) (*a*) has no direct application to the present case. If it has, I must hold that the maintenance of public order does not come within the scope of the restrictions permitted by Article 19 (2) in view of the recent decision of the Supreme Court in *Romesh Thappar* v. *The State of Madras*[1]. The further contention of Mr. Nambiar that the impugned Act offends Article 19 (1) (*f*) and is not saved by 19 (5) of the Constitution must be accepted, for, the Act directly affects the right to " hold " property by permitting a forfeiture of the " monies, securities and credits " and " movable properties " of the association declared to be unlawful by the Government.

For the foregoing reasons I hold that the impugned Act (as amended) is in excess of the legislative power of the State conferred by the Constitution. It follows that the Act as it stood before its amendment was also opposed to the Constitution

It is unnecessary to consider the effect of section 6 of the Amending Act (XI of 1950). If the Act before its amendment becomes void under Article 13 of the Constitution, as I hold it did, a notification issued pursuant to it is also avoided automatically and cannot be resurrected by any subsequent legislative effort. Further, it cannot be treated as a valid notification under the Act (as amended) for it did not comply with the requirements of section 15 (2) (*b*) and 16 of the Act (as amended). If it is to be treated as a mere piece of paper, as my learned brother Satyanarayana Rao, J., holds it is, it does no harm to anybody for it has no legal

1. (1950) S.C.J. 418 : (1950) 2 M.L.J. 390 (S.C.).

effect unless followed up by a proper notification complying with the terms of section 15 (2) (*b*) of the Act as amended. Only the legislative effort has been barren of results. I need hardly add that this judgment affects the validity of the impugned Act only with reference to associations declared unlawful under section 15 (2) (*b*) of the Act.

I agree with the orders passed by my Lord, The Chief Justice.

Chief Justice.—I have had the advantage of going through the full and elaborate opinions prepared by my learned brothers. I agree with them in their conclusion, but having regard to the importance of the questions raised before us I shall deal with some of them though briefly.

At the outset, learned counsel for the petitioner raised a preliminary point which did not touch the merits of the case. His contention was that after the passing of the Amending Act, there was no valid order in existence which declared the society unlawful. His contention was based on the fact that the Amending Act repealed section 16 of the old Act and there was no other provision which gave power to the State Government to declare an association unlawful. No doubt section 6 (1) of the Amending Act enacted that all notifications issued in respect of associations by the State Government before the amendment of the Act under section 16 of the old Act shall have effect as if they had been issued under section 15 (2) (*b*) of the said Act as amended by the new Act. But it was contended that clause (*g*) of sub-section (2) of section 15 only defines an unlawful association and does not expressly confer any power on the Government to issue a notification. The learned Advocate-General met the contention by the argument that such a power should be implied necessarily from the language of section 15 (2) (*b*) as amended as well as from the subsequent provisions of the Amending Act. Section 16 (1) as amended opens with the words "A notification issued under clause (*b*) of sub-section (2) of section 15 in respect of any association". The Legislature must therefore be taken to have conferred the power to issue such a notification. Though the power was not expressly conferred, it must be deemed to have been conferred by necessary intendment. The Advocate-General cited to us numerous instances of legislative practice to show that it was always assumed that a reference in a definition clause to a declaration or notification by the Government impliedly gave the power to the Government to make such a declaration or issue such a notification. I need only refer to the following instances: Madras Salt Act (IV of 1899), section 3, clause (*k*); Rubber Production and Marketing Act (XXIV of 1947), section 3 (1), clause (*v*); the Indian Ports Act (XV of 1908), section 3, clause (8); Madras Act (XIV of 1947), section 2, clause (*b*). No case was cited to us in which the validity of the conferment of such an implied power was raised and decided, but the long practice does indicate a well-recognised method of a conferring power by implication.

There are some cases in the English reports in which learned Judges have inferred by implication the conferment of a power to do an act though there were no express words conferring such power. An enactment that at the elections of Poor Law Guardians, the votes should be taken and returned as the Commissioner should direct was held to impliedly authorise the appointment of a returning officer (See *Rex* v. *Oldham*[1]). In *Rex* v. *Green*[2], a power to appoint an Assistant Overseer was taken to have been impliedly conferred on the Poor Law Commissioners though there was no express provision giving them such power. This rule of construction has been applied even to cases relating to jurisdiction of Tribunals. In Maxwell on Interpretation of Statutes (9th Edition), at page 139, we find this:

"However, effect must of course be given to the intention where the Act without conferring jurisdiction in express terms does so by plain and necessary implication."

In *Cullen* v. *Trimble*[3], it was held that jurisdiction was impliedly given to Justices to summarily convict in a penalty a person guilty of an offence under section 57

1. 16 L.J. (M.C.) 110.
2. 21 L.J. (M.C.) 137.
3. (1872) 7 Q.B. 416.

of the Contagious Diseases (Animals) Act, 1870, though there was no provision conferring on Justices such summary jurisdiction.

As I have already stated, the intention of the Legislature is made abundantly clear by the several provisions of the Amended Act that the State Government has the power to declare by notification that an association is unlawful on the grounds stated in section 15 (2) (*b*) of the Act as amended. The preliminary objection of the petitioner must fail.

Learned Counsel for the petitioner attacked the validity of the original Act of 1908 as it stood on the date of the coming into force of the Constitution as well as the Act as it now stands after the recent amendment in 1950 (hereinafter referred to as the Amending Act) on the ground that both the Acts were inconsistent with and contravened the provisions of Part III of the Constitution, in particular, Articles 14 and 19 thereof.

I think it is convenient to first dispose of the contention based upon Article 14. That Article runs thus :

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India".

The two phrases "equality before the law" and "the equal protection of the laws" must be taken to denote two different conceptions because of the disjunctive. Otherwise we would be attributing the aim of tautology to the Constitution makers. These two phrases appear to have been taken from the constitutional doctrines of the two countries, Britain and the United States. It was Dicey who enunciated the doctrine of equality before the law as a part of the rule of law which according to the learned Professor forms the fundamental principle of the British Constitution. It has three meanings or may be regarded from three different points of view. It means in the first place the supremacy of the regular law of the land as opposed to arbitrary power. A man may be punished for a breach of law but he can be punished for nothing else.

"It means again equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law Courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary Tribunals;".

This aspect of the rule has been understood to imply that no man however well placed or powerful he be otherwise is above the law; that officials like private citizens are bound to obey the same law and for the same offence are tried by the same Judicial Tribunals, and that for the vindication of their civil rights or to obtain redress for wrongs done to them, they have to pursue the same remedies. (*See* Dicey, page 193). 'Equality before the law" does not mean that the powers and privileges of a private citizen are the same as the powers of a public official or an alien. To perform public duties, public officers may be given special powers. What the rule of Law requires is that any abuse of such power or any other wrongful act by a public officers should be subject to control by the Courts in the same way as any wrongful act committed by an ordinary citizen. The principle of equality before the law is not violated by the existence of special laws providing for particular groups in the State, *e.g.*, soldiers, doctors or lawyers. Such laws may not affect the rest of the people but apply only to the members of a particular calling. But in the enforcement of these laws as well as in the enforcement of the general law, no distinction is made between man and man. To give a concrete illustration of the principle, if the criminal law provides for the punishment of an offence any person who is guilty of the offence irrespective of his position in life or his wealth or influence will be liable to be punished in the same way as any other person guilty of the same offence. No doubt the punishment may vary according to the facts of each particular case, but the same set of facts, if they existed in another case, would also result in the same punishment. In my opinion, the principle of equality before the law does not come into play in any controversy as to the legality of a law enacted by the State. It comes into play really in the sphere of its enforcement. This is obvious from the fact that Professor Dicey who treats it as one of the fundamentals

of the British Constitution was well aware of the supremacy of the British Parliament in the making of laws. No question can arise in Britain of an Act of Parliament being invalid, because it contravenes the principles of equality before the law. So, when Professor Dicey speaks of the principle being an essential part of the Constitution, it only means that the laws of the land shall be enforced against all persons equally without any distinction being made on any ground whatsoever. In my opinion, it is in this sense that the phrase " equality before the law " is used in Article 14. The impugned Act does not offend this principle.

The other concept of " the equal protection of the laws " undoubtedly comes from the Fourteenth Amendment to the United States Constitution. Ordinarily, one should expect therefore a great deal of light to be thrown on the meaning of the phrase by the decisions of the Supreme Court of the United States. Unfortunately however, this phrase occurs along with another phrase " due process of law " and in pronouncing on the validity of State laws, Courts in America have referred to both provisions leaving it uncertain which provision was deemed " the most pertinent and potent in the premises." (*See* Willoughby, Students' Edition, page 823). In the famous passage from the judgment of Justice Field in *Barbier* v. *Connolly*[1], which is given *in extenso* in the judgment of one of my brothers, that learned Judge was expatiating on the Fourteenth Amendment which contains both the provisions of due process and equal protection. Chief Justice Taft, in his opinion in the leading case of *Truax* v. *Corrigan*[2], conceded that the two provisions overlapped and that a violation of one may involve at times the violation of the other, but pointed out that the spheres of the protection they offer are not conterminous. The due process clause might tend to secure equality of law in the sense that it makes a required minimum for every one's right of life, liberty and property which the Congress or the Legislature may not withhold. The learned Chief Justice then observed :—

" But the framers and adopters of this Amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guarantee. The guarantee was aimed at undue favour and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process . . . . . Thus the guarantee was intended to secure equality of protection not only for all but against all similarly situated ".

In short the equal protection clause embodies a prohibition against discrimination, discrimination in favour of any person or class as such as discrimination against any person or class.

" Equal protection of the laws is a pledge of the protection of equal laws. *Yick Wo* v. *Hopkins*[3].

It requires that persons subjected to a piece of legislation

" shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed ". *Hayes* v. *Missouri*[4].

It prevents

" any person or class of persons from being singled out as a special subject for discriminating and hostile legislation." *Pembina Mining Co.* v. *Pennsylvania*[5].

It is well established that this clause does not forbid classification for purposes of the exercise by the State of police power or taxation rights. It is in this sense I understand the phrase as incorporated in Article 14.

Is there anything in the Act as it stood before or after the amendment which offends against this provision ? Mr. Nambiyar attempted to bring his case within this clause by referring to the provisions of the Act under which a declaration by the Government that an association in unlawful cannot be challenged in a Criminal Court in a prosecution under section 17 of the Act. It is common ground that when a person is charged with an offence under section 17 of the Act, he cannot be heard to say that the association in question is not unlawful, because none of the grounds on which the Government can make such declaration exists in

1. 113 U.S. 27.
2. 257 U.S. 312.
3. 118 U.S. 356.
4. 120 U.S. 68.
5. 125 U.S. 181.

the case of that association. The declaration of the Government is conclusive that the association is unlawful. Now Mr. Nambiyar says that this law discriminates against certain persons and denies them the elementary right which an ordinary accused has of establishing his innocence and disproving the case of the prosecution. While a person charged with an offence under any of the provisions of the Indian Penal Code is given the right to show that the offence has not been established, a person charged with an offence under section 17 of the impugned Act is denied that right. Though I was at first impressed to some extent with this argument, on further consideration I think I must reject it. The act by itself does not discriminate between persons. It does not specify any class or group by a political or religious or linguistic or territorial denomination and declare that they alone are unlawful associations. Provided the conditions are satisfied, namely, that an association is dangerous to public peace or has interfered with the maintenance of law and order or the administration of law, the Government declares it unlawful whichever such association may be. No doubt the procedure laid down in the Amended Act is different from the procedure which obtains in the case of other offences. This would amount to a classification and it cannot be said that this classification is discriminatory. We are familiar with the classification in the Code of Criminal Procedure of offences for the purposes of being tried by officers of different grades according to the nature of the offence. It may be that for very good reasons certain crimes and offences should be tried by Special Judicial Tribunals and not by the ordinary Courts of the land. On this ground alone it cannot be said that there has been a denial of the equal protection of the laws. The contention of the petitioner's counsel based on Article 14 of the Constitution must fail.

The main part of Mr. Nambiyar's argument on behalf of the petitioner rested on Article 19 (1), in particular on 19 (1) (*c*) read with Article 19 (4). Article 19 (1) embodies the several rights which a free citizen of India is entitled to enjoy. Liberty for its citizen is one of the proclaimed objectives of the Republic of India. The basic freedoms categorically enumerated in Article 19 (1) are commonly recognised in all the democratic constitutions of the world, though in some cases they are not contained in a written constitution. The liberty of the individual is inherent in the conception of democracy. At the same time it has always been recognised that freedom or liberty can never be absolute and uncontrolled in an organised society. The very idea of a society consisting of several individuals necessarily leads to a curtailment to some extent of the rights of each individual in so far as it conflicts with the rights of others. Otherwise there would be a state of anarchy.

> "The conflict between man and the State is as old as human history. For this reason some compromise must be struck between private liberty and public authority. There is some need of protecting personal liberty against governmental power and also some need of limiting personal liberty by governmental power. The ideal situation is a matter of balancing one against the other, or adjusting conflicting interests". (Willis' Constitutional Law of the United States, page 477).

This problem of balancing the two conflicting interests has been attempted to be solved in different ways by different countries at different times. In England it is solved by making the Parliament supreme and relying on the good sense of the people, their political tradition and the system of representative and responsible Government which has been evolved. In the well-known *Liversidge's case*[1] Lord Wright said—

> "All the Courts today and not least this House, are as jealous as they have ever been in upholding the liberty of the subject. But that liberty is a liberty confined and controlled by law, whether common law or statute. It is, in Burke's words, a regulated freedom. It is not an abstract or absolute freedom. Parliament is supreme. It can enact extraordinary powers of interfering with personal liberty. . . . . I have ventured on these elementary and obvious observations because it seems to have been suggested on behalf of the appellant that this house was being asked to countenance arbitrary, despotic or tyrannous conduct. But in the constitution of this country there are no guaranteed or absolute rights. The safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved".

In the United States of America on the other hand, to a very great extent, the solution of the problem is left ultimately to the Supreme Court. The task of pro-

1. (1942) A.C. 206.

tecting social interests and individual interests is entrusted really to the Supreme Court. When the Constitution of the United States was framed, there was an impression that Legislatures tend to become tyrannical and " an elective despotism " was as bad as any other kind of despotism. It was not safe always to rely upon public opinion to keep Legislatures from overstepping their bounds. If there was no supreme authority which could act as a check on the high-handedness of the Legislatures, the conflict between the State and the individual would almost always end adversely to the individual. The principle of judicial supremacy is now a well accepted feature of the American Constitution. In the words of Woodrow Wilson,

" The constitutional powers of the Courts constitute the ultimate safeguard alike of individual privileges and of governmental prerogative. It is in this sense that our judiciary is the balance-wheel of our whole system ".

Most of the work of the Supreme Court in drawing the line between personal liberty and governmental control has been done in connection with the due process clause. In the early years of its history, the Court definitely favoured personal liberty and extended the scope of the due process clause to such an extent that Mr. Justice Holmes exclaimed in his dissenting opinion in *Baldwin* v. *Missouri*[1].

" I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the Constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable ".

But the Supreme Court has not remained static. It has changed with the social and economic conditions, and it has recognised the existence of what is called " police power " in the States in exercise of which personal liberty could be curtailed in the general interests of the State.

The Indian Constitution has not adopted in its entirety either the British example or the American. The Legislatures of the Union and of the States are not supreme as the British Parliament is. Equally the judicial supremacy which is a part of the American Constitutional practice does not exist under our Constitution. Neither the Supreme Court nor this Court can declare void any State law on the ground that the Court or majority of the Judges composing the Court think it unreasonable. The Legislatures are expressly given the power to restrict or curtail the fundamental rights conferred by Article 19 (1), but the conditions for and the limits of such a power are more or less definitely formulated. The Courts can set aside a State law only if it is in excess of such power. The freedoms vouchsafed to every citizen under Article 19 (1) are not absolute freedoms, but are regulated by the provisions in clause 2 to 6 of that Article.

Bearing this special feature of our Constitution in mind, let me approach the main issue in this case. Acticle 19 (1), clause (*c*) declares that all citizens shall have the right to form associations or unions. There can be no doubt—and it was fairly conceded by the learned Advocate-General—that the impugned Act, before and after the amendment, directly interferes with the rights so declared.

" The right of association pre-supposes organisation and a relation of some permanence between these persons " (Wills).

The word " form " therefore must refer not only to the initial commencement of the association, but also to the continuance of the association as such. This was not seriously disputed by the learned Advocate-General.

I do not agree with the learned counsel for the petitioner that the Act totally destroys the right. The Act does not say that no one shall form associations or unions of any sort. Such a law would of course be a total negation of the right. What the Act prohibits is certain types of associations. Such an Act can only be described as an Act restricting the right and not totally negativing it. Restriction is a limitation imposed upon a person or thing. It may be that even a total suspension of the right for a temporary period would also come within the meaning

1. 281 U.S. 586.

of restriction. Clause (4) defines the restrictions which are permissible. It runs thus—

"Nothing in sub-clause (*c*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order or morality reasonable restrictions on the exercise of the right conferred by the said sub-clause".

The restrictions must be (1) in the interests of public order or morality and (2) reasonable. There can be no doubt whatever that the restrictions imposed by the Act are in the interests of public order. The grounds on which the State Government can declare an association to be unlawful under the Amending Act are (1) that it constituted a danger to public peace, (2) that it has interfered or interferes with the maintenance of public order or has such interference for its object, and (3) that it has interfered or interferes with the administration of the law or has such interference for its object. Even under the original Act the grounds are similar. A point was raised by Mr. Nambiar for the petitioner that administration of the law is not covered by public order. He would make a difference between law and order, maintenance of order and the administration of the law. But, law and order cannot be really separated.

"The conjunction of law and order in common parlance is not fortuitous. It embodies a fundamental truth. The purpose of the law is the creation and maintenance of order". (Per Lord Macmillan).

Without proper administration of the law, there can be no maintenance of public order. As Chief Justice Hughes said in the case of *Cox* v. *New Hampshire*[1].

"Civil liberties, as guaranteed by the Constitution, imply the existence of an organised society maintaining public order without which liberty itself could be lost in the excesses of unrestrained abuses."

It remains to consider whether the restrictions imposed by the Act are reasonable. What restrictions are reasonable is certainly for the Court to decide. There can of course be no absolute standard of reasonableness.

"It would be unreasonable to expect an exact definition of the word "reasonable". Reason varies in its conclusions according to the idiosyncracy of the individual and the times and circumstances in which he thinks. . . . . Mankind must be satisfied with the reasonableness within reach." (Stroud Judicial Dictionary).

Even ideas of what is just differs from age to age. What may seem to be just to one man in one age may appear to another man in another age as the very quintessence of injustice. In deciding on the reasonableness of the restrictions, it is not possible to think only in the abstract. Several circumstances must be taken into consideration, in particular, the purpose of the Act, the condition prevailing in the country at the time, the duration of the restriction, its extent and nature. What may undoubtedly be a reasonable restriction in a state of war or revolution may be utterly unreasonable in normal times. What may be a reasonable restriction if it is for a short period may be unreasonable for a much longer period.

The decision of the Supreme Court in *Dr. Khare* v. *The State of Delhi*[2] is authority for the proposition that in deciding on the reasonableness or otherwise of the restrictions imposed by law, the substantive as well the procedural provisions of the law should be examined. The learned Chief Justice of India observes thus :

"The law providing reasonable restrictions on the exercise of the right conferred by Article 19 may contain substantive provisions as well as procedural provisions. While the reasonableness of the restrictions has to be considered with regard to the exercise of the right, it does not necessarily exclude from the consideration of the Court the question of reasonableness of the procedural part of the law. . . . . It seems that the narrow construction sought to be put on the expression to restrict the Court's power to consider only the substantive law on the point is not correct."

Mukherjea, J., who wrote a dissenting judgment also agrees with the learned Chief Justice on this point.

In considering whether the procedural provisions of the impugned law are reasonable, I think it is necessary to bear in mind that the Act is not a temporary

1. 312 U.S. 569. 2. (1950) S.C.J. 328 (S.C.).

measure. The original Act has been on the statute book since 1908 and there is nothing in the Amending Act to show that it is for a limited period. The learned Chief Justice of India in *Dr. Khare's case*[1] dealing with the Punjab Public Safety Act said :

> "The further extension of the externment order beyond three months may be for an indefinite period, but in that connection the fact that the whole Act is to remain in force only up to the 14th August, 1951, cannot be overlooked."

It is also necessary to bear in mind that the Act is punitive in several respects, though it may also have a preventive aspect. Section 17 provides for punishment with imprisonment for terms ranging between six months and three years with or without fine. Section 17-B enables the Government to forfeit moveable property and section 17-E moneys, securities and credits belonging to the association which has been declared unlawful by the Government.

The first and, in my opinion, the most important defect in the procedural part of the Act which renders the restriction unreasonable is the absence of any provision for the communication of the order of the Government declaring an association to be unlawful to the association and its members. The Act provides only for a notification in the official gazette. Though it is true such a notification may in certain cases be treated as amounting to constructive notice of the order of the Government, yet in a case where drastic consequences ensue by reason of the order, the interest of the citizens requires a more direct notice. Section 16 (1) (*b*) provides that the notification shall fix a reasonable period for any office-bearer or member of the association or any other person interested to make a representation to the State Government in respect of the issue of the notification. Presumably after the lapse of the period so fixed, there will be no right of representation. It is easily conceivable that the members of an association may not have the knowledge of the notification declaring it to be unlawful till after the lapse of the period. Though all persons in a State are presumed to know the law of the land and ignorance of law is no excuse. I do not think there is anything which makes it incumbent on every citizen to peruse regularly the official gazette. In the case of preventive detention or internment or externment, the order is served on the person concerned. I do not mean to say that personal service is the only mode of service. In cases of evasion or absconding or in other cases where it is impracticable to have personal notice, other modes of service may be resorted to. We are familiar with the alternative modes of notice provided under the Code of Civil Procedure. In the case of an association which is registered or has a distinctive name and a definite place set apart for its use, the notification can be served on any office-bearer of the association, or if no such office-bearer is available for service by affixture at the reputed place of the association. Without some such notice, it appears to me to be unreasonable to say that the association and its members would be precluded from making a representation to the Government against the issue of the notification after a fixed time. Section 15 (1) of the Act defines an association, as

> "any combination or body of persons, whether the same be known by any distinctive name or not."

The learned Advocate-General contended that it would be open to the Government to issue a notification declaring "*A*, *B* and others" an unlawful association when the association is not known by a distinctive name, and it would be open to the Government to launch a prosecution against *C*, a person other than *A* and *B*, provided they can prove at the hearing of the case that *C* was associated with *A* and *B*. The necessity of a personal notice in such a case on the members alleged to form an association becomes all the more apparent, when in addition to the lack of a distinctive name, the association has no definite place. The opportunity evidently intended to be given to the association and its numbers to show cause against the issue of the notification will be illusory in the absence of a direct communication.

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1. (1950) S.C.J. 328 (S.C.).

The next procedural provision which I think makes the restriction not reasonable is the prohibition against any person making a representation in respect of the notification from taking any part in the proceedings of the Advisory Board. I see no objection in making the proceedings of the Board and its report confidential in the public interest. But so long as the proceedings are not made public, I can see no valid objection to the person aggrieved being given an opportunity of establishing his case by relevant evidence. Article 22 (1) of the Constitution provides that a person who is arrested shall not be denied the right to consult and to be defended by a legal practitioner of his choice. Clause (3) of the Article expressly declares that the provision will not apply to any person who for the time being is an enemy alien or to any person who is arrested or detained under any law providing for preventive detention. It is true that before a prosecution is launched under section 17 of the Act, a member of an unlawful association is not arrested, but once a prosecution is launched, the Criminal Court is powerless to decide as to the validity of the declaration by the Government. The fact that he may be entitled to be defended by a practitioner in the Criminal Court will not be really of much use to him when penal consequence result from a declaration under section 15 (2) (*b*). I think it is reasonable that there should be provision for the aggrieved person to defend himself. I must also mention the fact to which reference has been made by my learned brothers, namely, that when a person is charged under section 17 as being a member of an unlawful association within the meaning of section 15 (2) (*b*), the established procedure of the Criminal Courts of the land will apply. The onus will be on the prosecution to affirmatively establish that the association encourages all its persons to commit acts of violence or intimidation or that the members of the association habitually commit such acts. The accused will be entitled to an adjudication on the issue whether the association is unlawful within the meaning of the enactment. I can understand in the case of a declaration by Government the onus shifting on to the accused who may be called upon to establish that the declaration of the Government is unwarranted and illegal. But to say that an association shall be deemed to be unlawful once and for ever by a declaration by the Government subject only to the opinion of an Advisory Board which merely considers the material placed before it by the Government and may or may not call for further information from the association or its members and which does not conduct its proceedings in the presence of the aggrieved party or one representing him appears to me to unreasonably restrict the right conferred by Article 19 (1) (*c*) of the Constitution. I may also add that there is nothing making it incumbent on the Government to refer the notification to the Advisory Board within a definite time and there is nothing to compel the Advisory Board to make its report within a particular time, circumstances to which my learned brothers have alluded. Personally, these later defects alone would not, in my opinion, render the Act repugnant to the Constitution though I entirely agree that it is desirable in the interests of the rights of the citizens that there should be provision for expeditious disposal of the matter by the Government and the Advisory Board.

I have therefore come to the same conclusion as my learned brothers that the Amending Act is void as it is inconsistent with the provisions of Part III of the Constitution, in particular with the provisions of Article 19.

It follows that the original Act before its amendment became void in the coming into force of the Constitution. In fact the learned Advocate-General found it very difficult to sustain the validity of the original Act which did not provide any opportunity for the declaration by the Government to be challenged in any manner. One could not find a better illustration of the exercise of naked arbitrary power than the original Criminal Law Amendment Act. The Government had only to issue a notification on a subjective satisfaction that an association was unlawful and it was infallible and conclusive. It is impossible to say that the restriction imposed by the original Act is any sense reasonable within the meaning of Article 19 (4) of the Constitution.

In the view I have taken of the validity of the Amending Act, it is not necessary to deal at length with the argument which arises only if the original Act is held to have become void but the Amending Act is valid, namely, the effect of section 6 of the Amending Act. Under sub-section (1) of that section, all notifications issued by the Government before the commencement of the Amending Act under section 16 of the original Act and not cancelled shall as from the commencement of the Amending Act have effect as if they had been issued under section 15 (2) (*b*) of the said Act as amended by the Amending Act. If on the coming into force of the Constitution section 16 of the original Act became void, any notification issued under that section would obviously also become void. It is therefore arguable that such a notification cannot be validated by retrospective legislation. But that is not what has been done by section 6 (1) of the Amending Act. It does not purport to render the notification already issued valid from the date of its issue It is only deemed to have been issued on the date of the Amending Act and deemed to have been issued under section 15 (2) (*b*) of the Amending Act. This provision was obviously intended to avoid re-issue of all the notifications originally issued under section 16 of the unamended Act. I fail to see why this should not be done as a matter of convenience. If it should be held that the Amending Act is valid, then I would hold that the application is premature, because the supplementary notification contemplated by the proviso to section 6 (1) of the Amending Act had not been issued by the date of the hearing of the application.

In the result, the order of the State of Madras in G.O. Ms. No. 1517, Public (General) Department, dated 10th March, 1950, is hereby quashed and the *rule nisi* already issued will be made absolute. As a consequence the Government Order No. 1733 (Public), dated 31st March, 1950, will also be quashed.

As we were about to deliver our judgments, the learned Advocate-General brought to our notice the decision of a Full Bench of the Madhya Bharat High Court (*Anant Bhasker* v. *State*[1]) in which Chief Justice Kaul and Bhinde, J., held (Mehta, J., dissenting) that Article 226 does not provide for any remedy which apart from the existing law would be available to a person for enforcement of any of the rights dealt with in Part III of the Constitution and therefore the High Court could not entertain an application under Article 226 for the issue of a direction in the nature of a *habeas corpus* apart from the provision of section 491 of the Code of Criminal Procedure. Assuming that the decision in that case is correct—and we have grave doubts as to its correctness—this Court which undoubtedly possesses the jurisdiction and power to issue prerogative writs like *certiorari*, prohibition, etc., must be held to have the jurisdiction and power to grant those writs for the enforcement of the rights mentioned in Part III of the Constitution as well. It is not denied by the learned Advocate-General that this Court had at the commencement of the Constitution the jurisdiction and power to issue a writ of *certiorari* within the limits of its original jurisdiction at least. It follows therefore that this jurisdiction which is continued to us under Article 225 would enable this Court to issue a writ of *certiorari* in the present case. It is therefore unnecessary to canvass the correctness of the decision cited to us in this case.

The petitioner will have his costs fixed at Rs. 250. A certificate will issue under Article 132 that this case involves a substantial question or law as to the interpretation of the Constitution, in particular Articles 14 and 19 thereof.

V.P.S. *Order of the State of Madras quashed.*

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1 A.I.R. 1950 Madhya Bharat, page 60 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE SOMASUNDARAM.

R. Krishnaswami Reddiar .. *Petitioner.**

Certiorari—*Order of suspension of permit to run a bus by the Regional Transport Authority on the ground of overloading—Presence during the proceedings before the Board of the Secretary of the Transport Authority who detected the overloading and suggested action being taken—If vitiates proceedings.*

A suspension order issued by the Regional Transport Authority was sought to be quashed on the ground that the presence of the Secretary of the Transport Board at the meeting of the Board vitiated the whole proceedings as it was the Secretary himself who put up the note that action should be taken against the petitioner for overloading and he also happened to be the person who actually detected the overloading.

Held, that as there was no decision of the Secretary which was the subject-matter of an appeal before the Transport Authority nor had he any personal interest in the matter, his presence cannot be a ground for quashing the order.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the proceedings of the Regional Transport Authority of Tiruchirapalli, dated 24th October, 1950, in C. No. 3793/A-2 of 1950 and to the proceedings of the Central Road Traffic Board, Madras, dated 20th November, 1950, in R. No. 38260-A-1 of 1950 and to quash the said proceedings.

M. K. Nambiar and *N. G. Krishna Aiyangar* for Petitioner.

The Order of the Court was made by

The Chief Justice.—This is an application to quash the proceedings of the Regional Transport Authority, Trichinopoly, dated 24th October, 1950 and the proceedings of the Central Road Traffic Board, Madras, dated 20th November, 1950. The petitioner was granted a permit to run a bus on the route Turaiyur to Mohanur *via* Musiri and Kattuputtur. That route lies partly in the Tiruchirapalli district and partly in the Salem district. As provided by section 63 of the Motor Vehicles Act the permit was granted by the Tiruchirapalli Regional Transport Authority and it was counter-signed by the Regional Transport Authority, Salem, for that portion of the route lying in the Salem district. The permit granted to the petitioner was suspended for one month by the Regional Transport Authority, Tiruchirapalli, on 24th October, 1950, on the ground that there had been an overload on the bus on 9th September 1950. It is not denied that the petitioner was given notice of the ground on which this suspension was ordered, and according to the affidavit, he was also given an opportunity of appearing before the Authority along with his advocate.

The first contention of the petitioner's counsel was that the proceedings of the Regional Transport Authority were vitiated by the presence of the Secretary of that Authority at the meeting of the Board, because it was the Secretary who had put up a note that action might be taken against the petitioner and that it was the Secretary who purported to have found out this overloading. The Chairman asked the Secretary whether the checking of the bus had been done and the overloading detected by himself and the Secretary replied in the affirmative. The Chairman thereupon announced the decision of the Board that the permit would be suspended for one month. It was strongly urged by Mr. Nambiar, the learned counsel for the petitioner, that this procedure was opposed to well-known principles of natural justice and the presence of the Secretary and his participation in the proceedings of the Regional Transport Authority would give an impression that justice was not being done. Reliance was placed on the ruling of the Court of Appeal in *Cooper* v. *Wilson*[1]. In that case the Chief Constable of Liverpool under powers granted to him purported to dismiss a sergeant in the Liverpool police force. Against his decision of dismissal, there was an appeal to the Watch Committee of Liverpool. At the meeting of the Watch Committee before whom the appeal was heard, the

* C.M.P. No. 1656 of 1951. 29th January, 1951.

1. (1937) 2 K.B. 309.

Chief Constable was present during the deliberations. The Watch Committee eventually dismissed the appeal. The learned Judges held that the proceedings before the Watch Committee were contrary to natural justice owing to the presence of the Chief Constable during the Committee's deliberation on the appeal. Greer, L.J., pointed out that the Chief Constable whose decision was being attacked and who was therefore interested in the result of the appeal had treated himself as one of the parties in the proceedings before the Committee and his presence on the Bench when the Watch Committee were deliberating would certainly give room for complaint by the dismissed sergeant who was the appellant. We fail to see how this decision has any bearing on what has happened in the present case. In this case the Secretary was a subordinate officer of the Regional Transport Authority and was bound to be present at the meeting of the Board and to put up the papers concerning the business to be transacted at the meeting. It was also incumbent on him to carry out the decisions and the resolutions of the Board. No doubt it was on his information that proceedings were commenced against the petitioner and the decision of the Regional Transport Authority was based on his testimony. The position of the Secretary was therefore that of a prosecution witness, so to say. It is impossible to hold that the verdict of a magistrate is contrary to natural justice because of the presence of the main prosecution witness in the Court even if that prosecution witness happens to be his own clerk. The Secretary was practically the clerk and executive officer of the Transport Authority, but in the petitioner's case he also happened to be a witness. There was no decision of his which was the subject-matter of an appeal before the Transport Authority ; nor had the Secretary any personal interest in the matter. For these reasons, we do not think even the other decisions to which Mr. Nambiar drew our attention apply to this case.

It was next contended that as the route lies over two districts (Tiruchirapalli and Salem) the Regional Transport Authority, Tiruchirapalli, could not himself cancel the permit in so far as that portion of the route in Salem district was concerned. Section 63 of the Motor Vehicles Act provides for the counter-signature of a permit by the Regional Transport Authority of a region other than the region in respect of which the Regional Transport Authority granting the permit had jurisdiction. It is obvious that what the Regional Transport Authority of Tiruchirapalli can suspend or cancel is the permit which he has granted. Whether as a consequence of this, the counter-signature of the permit by the Regional Transport Authority, Salem, must also be deemed to have been suspended or cancelled is not for us to say on this application which seeks only to quash the order of the Regional Transport Authority, Trichinopoly.

The application is therefore dismissed.

K.C. ——— *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRA REDDI.

Muthuvedi Ammal and another .. *Petitioners.**

Criminal Procedure Code (V of 1898), sections 198 and 199 and Penal Code (XLV of 1860), section 426—Offence under section 426, Penal Code—Complaint of aggrieved person, if essential.

An offence under section 426, Penal Code, is not one that is covered either by section 198 or section 199 of the Criminal Procedure Code and therefore in respect of an offence under that section a complaint by the aggrieved person is not essential.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Sub-Divisional Magistrate, Dharmapuri, dated 31st August, 1949, in C.A. No. 44 of 1949 preferred against the judgment of the Court of the Sub-Magistrate, Uttangarai, in C.C. No. 349 of 1948.

V. V. Raghavan for Petitioners.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

* Cr.R.C. No. 56 of 1950. (Cr.R.P. No. 54 of 1950). 21st February, 1951.

The Court made the following

ORDER.—The petitioners were convicted for an offence under section 426, Indian Penal Code and sentenced to pay a fine of Rs. 25 each which was reduced in appeal to Rs. 15.

The case against the petitioners was as follows. There was a quarrel on the 11th of September, 1948, between the first petitioner and the daughter-in-law of P.W. 1. In order to wreak vengeance on P.W. 1's family, the first petitioner asked the second petitioner to demolish the compound wall of the house belonging to P.W. 1's son and the latter accordingly demolished the same to a height of 3 feet and to a length of 24 feet, causing thereby damage to the extent of Rs. 10 or 15. The guilt of the petitioners was proved beyond all reasonable doubt by the evidence of P.Ws. 1, 2 and 3. The trial Court has accepted their evidence and convicted the petitioners as stated above.

In this revision petition the correctness of this conviction could not be challenged. The only point that was raised by Mr. Raghavan, the learned counsel for the petitioner, is that the conviction of the petitioners is unsustainable, as it is based on a complaint by P.W. 1, who is not the owner of the house to the compound wall of which damage was caused but the father of the owner. According to him, a prosecution under section 426, Indian Penal Code, can only be launched on the complaint of a person, who is the owner of the property concerned or any other person who is beneficially entitled thereto.

In support of this submission he relied on a decision of Yahya Ali, J., in *Kolathukara Vaiyapuri Goundan* v. *Kuppuswami Goundan*[1]. In that case, the accused and the complainant were attempting to get a communal land in a village on assignment and each of them was trying to use it in his own way. One year the complainant—P.W. 6—raised some crops on that land and according to the prosecution, the cattle belonging to the accused were driven into the crops on the land with the result that the crop was damaged. Prosecution having been launched against him under section 427, Indian Penal Code, the accused raised the plea that he could not be guilty of the offence of mischief, assuming the prosecution case to be true, because the land did not belong to P.W. 6, and it could not therefore be said that when these crops were damaged, any wrongful loss or damage was caused to the latter. This plea did not find favour with the Court below. But when it came up finally in revision to this Court, the learned Judge who heard it agreed with the contention raised on behalf of the accused and held that P.W. 6 could not be said to have sustained wrongful loss within the meaning of section 23, Indian Penal Code, not being the owner of the land and the offence said to have been committed by the accused did not amount to an offence under section 425, Indian Penal Code. It is manifest that this decision has no bearing on the question to be decided by me.

No other case has been cited to me as substantiating Mr. Raghavan's proposition. On the other hand, an examination of the relevant provisions of law shows that there is no basis for this contention. My attention has not been drawn to any rule of law which lays down that the complaint of the aggrieved person is the *sine quo non* of the prosecution for an offence under section 426, Indian Penal Code. Chapter XV-B, Criminal Procedure Code, deals with the conditions requisite for the initiation of proceedings. While sections 195 and 196, Criminal Procedure Code, provide for the mode in which prosecution can be launched for offences against public justice and against the State, etc., sections 198 and 199 of the Code concern themselves with offences against individuals. The two latter sections require the complaint of the aggrieved person for starting prosecution against the offender in respect of offences mentioned therein. An offence under section 426, Indian Penal Code, is not one that is covered either by section 198 or by section 199, Criminal Procedure Code, and that being so it appears to me, that in respect of an offence under that section the complaint of the person aggrieved is not essential. There does not seem to be any warrant for enlarging the scope

1. (1948) 1 M.L.J. 330.

of the above-mentioned provisions of the Criminal Procedure Code. If the contention of Mr. Raghavan were to be accepted, it would lead to disastrous consequences. Suppose the owner of a house has gone abroad ; any person with intent to cause damage to the owner may set fire to the house with impunity, because the person aggrieved is not there to file a complaint against the miscreants. I do not think that such a result was ever contemplated by the Legislature. The offence referred to in sections 198 and 199 stand altogether on a different footing and the reason for requiring the complaint of the person aggrieved by such an offence is obvious.

It looks to me that there is no substance in the contention urged by Mr. Raghavan. The convictions and sentences are, therefore, confirmed.

Another argument advanced by Mr. Raghavan is that the trial Court erred in awarding compensation to P. W. 1, who is not the owner of the house. It looks to me that this does not make any difference so far as he is concerned whether the compensation is payable to P. W. 1 or to his son, who, according to him, is the owner of the house. I, therefore, reject this argument also.

In the result, this revision petition fails and is dismissed.

V. P. S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AYYAR.

Bysani Kamalamma .. *Appellant**

v.

Syed Ismail Ispahani E. Venkata Sastri .. *Respondent.*

Civil Procedure Code (V of 1908), Order 37, rule 4 and Original Side Rules, Order VII—Suit on Negotiable Instrument—Whether Order VII of Original Side Rules supersedes application of the Code.

With regard to suits coming within the scope of Order VII of the Original Side Rules, Order 34, rule 4 of the Civil Procedure Code can have no application. Order 37 of the Code lays down a summary procedure for suits on negotiable instruments which may be availed of by the plaintiff. Order VII of the Original Side Rules deals with the same topic though differing in material particulars from Order 37 of the Code in its scope. Whereas Order 37 deals only with suits on negotiable instruments, Order VII of the Original Side Rules applies to suits other than those on negotiable instruments such as on debt and liquidated demands. Again, while Order 37 of the Code gives the plaintiff an option, Order VII of the Original Side Rules compels a plaintiff to resort to summary procedure prescribed therein. Again, while there is no provision in Order 37, for enlargement of time over and above ten days for obtaining leave to defend, there is provision for enlargement of the time in Order VII. Even in the matter of obtaining leave to defend there is difference. Whereas even after the decree, under Order 37 of the Code under special circumstance leave can be obtained, Order VII of the Original Side Rules does not provide for such a case. In view of these vital differences it is clear that Order VII of the Original Side Rules supersedes and stands in lieu of Order 37 of the Code.

Appeal from the Judgment and Order of Yahya Ali, J., dated 1st March, 1949, passed in the exercise of the ordinary original civil jurisdiction of the High Court in Application No. 510 of 1949, in C. S. No. 260 of 1948.

K. Kuppuswami for Appellant.

M. S. Venkatarama Aiyar and *M. S. Mahadeva Aiyar* for 1st Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The only question which arises in this appeal is whether Order 37, rule 4, Civil Procedure Code (hereinafter referred to as the Code) applies to the Original Side of this Court. The respondent filed the suit (C. S. No. 260 of 1948) for the recovery of a sum of Rs. 15,050 alleged to be due for principal and interest in respect of a cheque, dated 9th March, 1948, drawn by the second defendant in favour of the first defendant and endorsed over by her in favour of the plaintiff and which was dishonoured on 18th March, 1948. The suit was filed under the provisions of Order VII, Original Side Rules. No application for leave to defend

* O.S.A. No. 57 of 1949. 16th February, 1951.

was made by the defendants within the prescribed time and therefore the Master passed a decree on 22nd September, 1948, for the sum of Rs. 15,462-8-0 with interest thereon at the rate of six per cent. per annum from the date of the decree till date of payment and for the costs of the suit. On 12th January, 1949, the first defendant took out an application purporting to be under section 151, and Order 37, rule 4 of the Code praying that the decree drawn up by the Master on 22nd September, 1948, may in the special circumstances of the case be set aside and leave may be granted to the applicant to appear and to defend the suit on such terms as may be deemed reasonable and just. Yahya Ali, J., dismissed the application *in limine* on the ground that Order 37, rule 4 of the Code had no application to the Original Side of this Court. The first defendant appeals against this decision.

Learned counsel who appeared before us conceded that the matter was bereft of direct authority and our decision must therefore rest almost entirely on the material provisions in the Original Side Rules and of the Code. It becomes therefore necessary to examine the scope of the application of these two sets of provisions to the Original Side. Clause 37 of the Letters Patent conferred power on this High Court to make rules and orders from time to time

"for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court, including proceedings in its admiralty, vice-admiralty, testamentary, intestate and matrimonial jurisdiction respectively provided always that the said High Court should be guided in making such rules and orders as far as possible by the provisions of the Civil Procedure Code."

Part IX of the Code contains special provisions relating to the Chartered High Courts of which this Court is one. Section 117 declares that

"Save as provided in this Part or in Part X or in rules, the provisions of this Code shall apply to such High Courts."

An exception is contained in section 120 which enacts that sections 16, 17 and 20 of the Code shall not apply to the High Court in the exercise of its original civil jurisdiction. Under section 122 any of the High Courts may, from time to time, make rules regulating its own procedure and the procedure of the civil Courts subject to its superintendence and may by such rules annul, alter or add to all or any of the rules in the first schedule. Section 129 specially provides for Chartered High Courts. It runs thus:

"Notwithstanding anything in this Code, any High Court constituted by His Majesty by Letters Patent may make such rules not inconsistent with the Letters Patent establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code."

Order 49, rule 3 of the Code mentions the rules which shall not apply to any Chartered High Courts in the exercise of its ordinary or extraordinary original civil jurisdiction.

Order 1, rule 3 of the Original Side Rules now in force is as follows:

"The rules and forms mentioned in Appendix III hereto and all previous rules and forms, and the provisions of the Code, so far as such provisions are inconsistent with these rules and forms, are hereby repealed and superseded and the following rules, orders and forms shall stand in lieu thereof." (The Code must mean the Civil Procedure Code).

Order 37 of the Code relates to summary procedure, applicable to suits on negotiable instruments such as bills of exchange, hundies or promissory notes. All suits upon such documents may in case the plaintiff desires to proceed under the provisions of that order be instituted by presenting a plaint in a particular prescribed form. Under Order 37, rule 2, sub-rule (2), in any case in which the plaint is filed under that order, the defendant shall not appear or defend the suit unless he obtains leave from a Judge as provided in that order so to appear and defend. In default of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree.

Rule 4 of that order runs thus,

"After decree the Court may, under special circumstances, set aside the decree, and if necessary, stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit."

Rule 7 provides that save as provided by that Order, the procedure in suits filed under the provisions of that Order shall be the same as the procedure in suits instituted in the ordinary manner.

The rules made by this Court which are in force immediately before the Rules now in force contained a separate Order, Order VI-A dealing with procedure on negotiable instruments, corresponding to Order 37 of the Code. One rule in that order expressly laid down that the procedure prescribed by Order 37 of the Code shall be followed in all suits on negotiable instruments with the modification mentioned in that Order. But in 1932, a new Order, Order VII was substituted in place of Order VI-A. This Order considerably enlarged the scope of the application of the summary procedure. It was made applicable not only to a suit on a negotiable instrument but also to a suit to recover a debt or liquidated demand in money payable by the defendant with or without interest arising on a contract or a bond or a guarantee. Rule 2 expressly excludes the ordinary procedure in regard to suits specified in rule 1 of that Order. Suits falling under rule 1 have to be instituted under that Order. There is no option to the plaintiff in such suits. Rule 4 confers power on the Registrar to extend the period of ten days for applying to obtain leave to appear and defend. If leave to appear and defend is not granted, the Master shall on proof by affidavit of service of the summons on the defendant pass a decree for the amount claimed and costs. There is no provision in that Order corresponding to Order 37, rule 4 of the Code.

The main contention of the learned counsel for the appellant was that all the provisions in the body of the Code and in the rules in the first schedule of the Code apply to the Original Side of this Court unless they are excluded from application or unless they are superseded by rules made by this Court. He conceded that if in respect of the same subject-matter there were two rules, one in the Code and another in the Original Side Rules, inconsistent with each other, then the rule made by this Court on the Original Side would apply. But he argued that where the Original Side Rules were silent in respect of any matter, then the rule in the Code relating to it would apply to the Original Side. In support of this contention he relied upon the decision of Venkatasubba Rao, J., in *Yelumalai* v. *Kuppammal*[1]. The learned Judge held that rules 10 and 11 of Order 33 of the Code were applicable to suits by paupers filed on the Original Side of the High Court. After a consideration of the various relevant provisions he observed :

"The result of these various provisions is that the Code of Civil Procedure is generally applicable to the High Court in the exercise of its ordinary original civil jurisdiction, except where it is specifically excluded or unless the High Court itself has made rules superseding any particular provisions of the Code."

Now, the application of Order 37, rule 4 has not been specifically excluded by the Code itself. Order 49, rule 3 of the Code does not mention Order 37, rule 4 among the rules declared not applicable to the Original Side. The argument is that it follows that it is applicable to the Original Side. For a general application of the provisions of the Code to the Original Side reliance was placed on the decision in *Ashutosh Basu* v. *Sudhangshubhushan Mukherji*[2], which held that Order 21, rule 89 of the Code applied to a sale under a mortgage in a suit filed on the Original Side of the Calcutta High Court. (Vide also *Virjiban Das Mooljee* v. *Biseswar Lal Hargovind*[3].) Appellant's counsel referred us to the decision in *Behram Jung (Nawab)* v. *Haji Sultan Ali Shustry*[4], as dealing with a rule made by the Bombay High Court which was inconsistent with the provisions of the Code and therefore prevailed over the latter. This decision was explained by Beaumont, C.J., in *Pratapgir Narsingii* v. *The Official Liquidator of the Prahlad Mills, Ltd.*[5], in which it was held that Order 41, rule 10 did apply to appeals on the Original Side.

1. (1927) 54 M.L.J. 263.
2. (1930) I.L.R. 58 Cal. 510.
3. (1920) I.L.R. 48 Cal. 69.
4. (1912) I.L.R. 37 Bom. 572.
5. I.L.R. (1938) Bom. 399.

There is no doubt that there is neither specific exclusion nor repeal of Order 37, rule 4 so far as the Original Side is concerned to be found either in the Code or in the Original Side Rules. Yahya Ali, J., was inclined to hold that the adoption of a few of the rules under Order 37 and a deliberate avoiding the adoption of the rules including Order 37, rule 4 by compelling implication amounts to a repeal of the portions not adopted. After a careful consideration we have arrived at more or less the same conclusion. We may describe the result thus: Order 37 of the Code lays down a summary procedure for suits on negotiable instruments which may be availed of by a plaintiff. Order VII of the Original Side Rules deals with the same topic generally but differs in material particulars from Order 37 of the Code in its scope. As we have already mentioned, Order 37 of the Code deals only with suits on negotiable instruments, whereas Order VII, Original Side Rules applies to other suits also on debt and liquidated demands. While Order 37 of the Code gives the plaintiff an option, Order VIII of the Original Side Rules compels the plaintiff to resort to the procedure prescribed therein. While there is no provision in Order 37 of the Code for enlargement of time over and above ten days for applying and obtaining leave to defend, there is provision in Order VII of the Original Side Rules for extension of time by the Registrar. Having regard to all these vital differences, it is clear that Order VII of the Original Side Rules supersedes and stands in lieu of Order 37 of the Code.

Yahya Ali, J., discovered a plausible reason for the absence of a provision like Order 37, rule 4 of the Code in the Original Side Rules. We do not think we are called upon to find any justification for the omission. We can imagine cases in which the power of the Registrar to extend time under Order VII, rule 4, read with Order IV, rule 6 of the Original Side Rules may not be sufficient to give adequate relief. We are however not concerned with the hardship that might occur in special cases. We do not see why if this Court chooses a provision corresponding to Order 37, rule 4 of the Code should not be included in Order VII of the Original Side Rules. But as Order VII now stands, we think that in regard to suits coming within the scope of that Order, Order 37, rule 4 of the Code can have no application.

The learned counsel for the appellant pointed to the fact that Order VII of the Original Side Rules was only concerned with the procedure upto the passing of the decree but was silent as to what happened after that stage and he contended therefore that Order 37, rule 4 of the Code could not be deemed to have been repealed or superseded. We are of opinion that though the argument appears plausible, it is not sound. Order 37, rule 4 of the Code relates to the summary procedure laid down under that Order just as any other rule in that order. Whether before or after the decree, the peculiar features of this procedure is obtaining leave of the Court to appear and defend. While Order 37 of the Code permits the defendant to obtain such leave even after the decree in special circumstances, Order VII of the Original Side Rules does not so permit him.

The appeal fails and is dismissed with costs.

K. G. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

K. Palani Moopan .. *Appellant.**

Madras Borstal Schools Act (V of 1926), section 8 and Penal Code (XLV of 1860), section 304—Criminal tendency—If can be inferred in cases of causing death for a petty reason—Powers of appellate Court in regard to accepting or otherwise of the opinion of the trial Court as to the credibility of witnesses.

'Criminal tendency' does not manifest itself only in acts involving dishonesty such as theft or cheating. It can be inferred also in an adolescent person who owing to lack of self-control or as a result of his environment or association is unable to control himself and commits an offence of either grievous hurt or homicide with a deadly weapon, without regard to the consequence for a very petty reason, and section 8 of the Borstal Schools Act would be applicable to such an accused.

* Cr.A. No. 573 of 1950. 15th March, 1951.

Where a fatal injury is inflicted by the accused on a vital portion of the deceased's body with a deadly weapon, in the course of a sudden and unexpected quarrel, a conviction under section 304, paragraph 2 of the Penal Code is justified.

The appellate Court has full seisin of the matter in appeal and is not bound to accept every remark of the lower Court regarding the credibility or otherwise of witnesses though naturally it will not distrust a finding of fact arrived at by the lower Court which saw the witnesses and observed their demeanour. The fact that on much the same evidence the lower Court has acquitted other accused, would not be a ground for holding that the lower Court ought to have acquitted others also, with respect to whom however, the lower Court was satisfied with the evidence.

Appeal against the Order of the Additional Sessions Judge's Court, Court of Session, Coimbatore division, in C. C. No. 64 of 1950, dated 19th July, 1950.

K. V. Ramaseshan for Appellant.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

The Court delivered the following

JUDGMENT.—This is an appeal filed by Palani Moopan, the fourth accused in S. C. No. 64 of 1950, on the file of the Additional Sessions Judge, Coimbatore. He is a boy aged 19 years and has been convicted by the learned Additional Sessions Judge under section 304, paragraph 2, Indian Penal Code, while acquitting him of the offence under section 302, Indian Penal Code, and sentenced to undergo rigorous imprisonment for ten years. There were four other accused in the case. They have all been acquitted.

The facts are briefly these. The appellant and the deceased Palani Moopan were agnates and *pangalis*. Owing to misunderstandings over a lease of land and a manure pit there was a sudden and unexpected quarrel just at sunset time on 1st February, 1950, between the five accused on one side and the deceased and P. W. 5 on the other and all the five accused are said to have fallen upon P. W. 5 and the deceased. According to the first information report, the dying declaration and the evidence of P. Ws. 1, 2, 3, 5 and 7, this appellant stabbed the deceased in the course of the quarrel, on the right side of his abdomen with a spear. The deceased did not die at once but survived to state that it was this appellant that stabbed him thus and to give a dying declaration to that effect. He died on the next day (2nd February, 1950). The lower Court, after discussing the evidence, found the evidence not to be satisfactory as regards the other four accused and to be satisfactory regarding the offence under section 304, paragraph 2, Indian Penal Code, regarding this appellant, and so convicted and sentenced him. It did not consider it fit to apply section 562, Criminal Procedure Code, to this appellant and does not seem to have considered the applicability of section 8 of the Borstal Schools Act.

I have perused the entire records and heard the learned counsel for the appellant and the learned Public Prosecutor *contra*. The learned counsel for the appellant raised three main contentions. The first was that on much the same evidence the lower Court has acquitted the other four accused and so should have acquitted this appellant also, at least by giving him the benefit of the doubt. But, after perusing the evidence, I am of opinion that the evidence against this appellant was far more consistent and satisfactory, and, indeed, proved conclusively that it was the appellant who gave that fatal stab to the deceased, whereas the evidence regarding the other four accused was not at all consistent. I cannot accept the argument of the learned counsel for the appellant that simply because there are some minor discrepancies in the evidence as to whether the beatings by the other accused preceded the stabbing by this appellant or the stabbing by this appellant preceded the beatings by the other accused, and, because of the observation of the lower Court that it was not satisfied with the evidence of some of the prosecution witnesses who implicated this appellant, but was satisfied with the evidence of other prosecution witnesses who implicated him, the appellant should be given the benefit of the doubt and acquitted. Such minor discrepancies on immaterial *collateral* matters exist in almost every criminal case of this description. When they do not go to the root of the case, as here, and do not affect the credibility of the evidence regarding the fatal stab administered to the deceased by this appellant, there is no need to worry overmuch

with those minor discrepancies. Nor can the learned counsel for the appellant rely on the remarks of the lower Court regarding the credibility of some of the prosecution witnesses and attack the remarks of the lower Court regarding the reliability of the other prosecution witnesses without proving, from the original records, that the prosecution witnesses attacked by him and believed in by the lower Court are really persons unworthy of credence. This Court has got full seisin of the matter, in the appeal, and is not bound to accept every remark of the lower Court regarding the credibility or otherwise of the witnesses, though, naturally, it will not distrust a finding of *fact* arrived at by the lower Court which saw the witnesses and observed their demeanour. In this case, I see no reason whatever to disbelieve the evidence of P. Ws. 1, 2, 3, 5 and 7 who implicate the appellant regarding this fatal stab on the deceased with a spear. That evidence is corroborated by the statement of the deceased, who had no motive to implicate the appellant falsely in his complaint, and also by his dying declaration, and the medical evidence. That the deceased spoke to some spear injury inflicted on his son by the fifth accused is no ground for disbelieving his statement regarding this appellant. It is obvious that a man attacked by five people, and fatally stabbed, and suffering terribly, may observe closely the person who stabs him, and be correct about it, while his observation of a stabbing at about the same time of another individual may be defective and inaccurate. He might have seen the fifth accused aim with his spear at his son and might have thought that his son had also been injured, whereas, the blow might have escaped the son. The important fact to remember is that the deceased had no enmity towards the appellant, and that his condition, after receiving the fatal injury, would have been so precarious that his memory cannot be expected to be precise regarding all the details he has observed about the occurrences that day. That will account for the discrepancies mentioned above.

P. W. 1 is the wife of the deceased. P. W. 2 is the son of the deceased. P. W. 3 is the daughter of the deceased. None of these three also was alleged to have any motive to perjure against the appellant. P. W. 5 alone was said to have some enmity. P. W. 7 was the servant of P. W. 3's husband, and not of P. W. 5, and so must be held to have no motive himself to implicate the appellant falsely. What is more, there was no particular motive for any one to implicate this appellant a young boy, unnecessarily, leaving out the real culprit, when there was sufficient daylight to observe the real culprit. It was not also a case of rioting by a huge mob, there being only five persons involved in the entire attack on 2 or 3 persons. The story regarding the appellant's dealing the fatal stab on the deceased has been consistent from the very start to the very last, and has not been shaken in the least in cross-examination. We are not concerned here with the discrepancies regarding the beatings administered to the deceased by the other four accused who have been acquitted, or regarding the injuries received by some of the accused and some of the prosecution witnesses.

The next contention of the learned counsel was that the conviction under section 304, paragraph 2, Indian Penal Code, would not be justified, in the circumstances of the case, even if this appellant had caused the fatal injury, as there is nothing to show that he had a motive or intention to *kill* the deceased, and that it may be that he wanted to deal a simple injury but that it resulted in a fatal injury like this. I cannot agree. Every man must be presumed to intend the natural consequences of his act. So, while there is no need to infer an intention on the part of the appellant to *murder* the deceased, an offence under section 304, paragraph 2, Indian Penal Code, would be clearly proved against him, in these circumstances, where a fatal injury was inflicted by this appellant on a vital portion of the deceased's body, the abdomen, with a deadly weapon, a spear, and the blow must have been dealt with terrific force, judging from the nature of the injury. The exceptional case referred to by the learned counsel for the appellant will not apply here. That will be the case where a man intends to inflict a stab on the leg of another, but by *misfortune*, the stab falls on the stomach or other vital spot of the other by the other turning a somersault or making an unexpected movement at the psychological moment and getting the stab in that vital spot. In this case, no such circumstance exists,

So, the conviction must only be under section 304, paragraph 2, Indian Penal Code. I confirm the conviction of the appellant by the lower Court.

The learned counsel for the appellant next urged that this was a fit case for applying section 8 of the Borstal Schools Act to this appellant, who was only 18 or 19 years old, and who was proved by his act itself to be of criminal tendencies and to have been associated with cantankerous persons. I agree. In two cases decided by Benches of this Court, *viz.*, the *Public Prosecutor* v. *Nagappa Pujary*[1] and In re *Chelliah*[2], to which latter case I too was a party, it has been held that the words "criminal tendencies" occurring in section 8 of the Madras Borstal Schools Act should not be given a narrow interpretation, and that section 8 should be interpreted to mean that whenever an adolescent offender has been convicted of an offence he should ordinarily be given the advantage of being put in the Borstal School so that by the training therein he should become a useful citizen of the country, and that a "criminal tendency" does not manifest itself only in acts involving dishonesty, such as theft or cheating, and that it can be inferred also in a person who, owing to lack of self-control or as a result of his environment or association, is unable to control himself and commits an offence of either grievous hurt or homicide, by using a deadly weapon without regard to the consequences, for *a very petty reason* as in this case.

In the result, I set aside the sentence of imprisonment for ten years awarded on this appellant by the lower Court, and substitute, instead, an order of detention in the Borstal School, Palamcottah, for a period of three years from the date of this order, and, for this purpose declare the age of this appellant to be exactly 19 to-day.

V. P. S. ——— *Detention in Borstal School ordered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Goli Ammiraju *alias* Ammanna .. *Petitioner**

v.

Goli Kondalrayudu and others .. *Respondents.*

Civil Procedure Code (V of 1908), sections 151 to 153—Scope of—Suit for partition—Partition by metes and bounds—Two items in possession of third parties not on record left out of partition—Possession for more than 12 years—Petition under sections 151 to 153 of the Civil Procedure Code to rectify decree and adjust equities—Maintainability.

Where the petitioner who was given a one-fourth share in vast joint family properties found after division by metes and bounds by a commissioner appointed for the purposes that two items left out of partition was in the possession of parties not on record in the suit and so filed a petition to correct errors under sections 151 to 153 of the Code.

Held, that a petition under sections 151 to 153, Civil Procedure Code, will not lie in the circumstances of the case whether to rectify an alleged error or for readjusting equities because of the fact that the possession for more than the normal statutory period of 12 years had been with other unknown parties. The only course would be for the petitioner to file a separate suit in respect of his share in the two items against persons in possession. Sections 151 to 153, Civil Procedure Code, are not certainly intended for such enquiries into titles of parties to properties.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Peddapuram, dated 13th August, 1948, in I. A. No. 2091 of 1947, in O. S. No. 292 of 1923.

G. Balaparameswari Rao for Petitioner.

C. Rama Rao for Respondents.

The Court delivered the following

JUDGMENT.—This is a rather interesting petition. The petitioner was decreed a one-fourth share of vast joint family properties in O. S. No. 292 of 1923, and a Commissioner, who was appointed for that purpose, went and divided the items

1. (1948) 2 M.L.J. 630.
2. (1949) 1 M.L.J. 282.

*C.R.P. No. 376 of 1949.

1st February, 1951.

belonging the joint family into four shares and delivered to the petitioner his one-fourth share, and to the respondents, their one-fourth share, and to certain other persons, against whom I. A. No. 2091 of 1947 was dismissed, the remaining two one-fourth shares. The decree in the suit was taken in appeal and second appeal, and got finally settled. But the petitioner, to his horror, in 1944, nearly 20 years after the decree and delivery of his one-fourth share to him, found that two small items of land, namely, S. No. 181/1, measuring 82 cents, and S. No. 84/3, measuring 31 cents, had been *omitted by the commissioner to be divided* in spite of their having been included among the properties in the plaint schedule and not disputed by the other parties as not belonging to the family or held by the judgment as not belonging to the family. So, he put in I. A. No. 2091 of 1947 against 16 respondents, representing the other three one-fourth shares, under section 151 to section 153, Civil Procedure Code, praying the Court to appoint a commissioner either to divide the omitted two items into four shares and deliver to him his one-fourth share, or to re-value the shares in the B schedule properties of the plaint in O. S. No. 292 of 1923 and work out again the equities and pay him compensation from the other sharers regarding his one-fourth share in those two items omitted to be given to him. The District Munsiff of Peddapuram, in whose Court the I. A. was filed, held that he had no power to do either of the things prayed for in the I.A., and that, if he chose to do so, the petitioner might move the High Court, which had finally settled the matter of partition in the second appeal. Of course, he found that these two items of land were not actually divided by the commissioner, and the one-fourth share in them given to the petitioner. But he was of opinion that during the course of 22 years, from 1923 to 1945, it was not probable that the petitioner, who was an agriculturist, and the other sharers, who were also agriculturists, would not have discovered the *alleged mistake* with reasonable diligence, if there was a mistake. He, therefore, rather curiously held that their negligence would not save limitation for the purpose of the I. A., though no question of limitation would arise in the case of a *bona fide* error which the commissioner and the Court and the parties discovered only after the petitioner discovered it, provided there was no damage to the vested rights of any person, party or not party to the suit. In the lower Court, the petitioner, as stated above, gave up the respondents representing the other two one-fourth shares, leaving only the present respondents having a one-fourth share. As the lower Court dismissed the I. A., this petition has been brought to revise this order on the ground that the lower Court failed to exercise a jurisdiction lawfully vested in it by correcting a *bona fide* error of the commissioner and the Court and the parties in not dividing the above two plots of 82 and 31 cents.

One curious thing in this case is that neither the counsel for the petitioner nor the counsel for the respondents was able to tell me as to who was in possession of those two items of land from 1923 to 1945 and as to who is in possession of them now. I agree with Mr. Balaparameswari Rao, for the petitioner, that a *bona fide* error of the parties, commissioner and Court, in failing to divide two undoubted items of family properties, can be rectified by a Court, and the decree amended, even after appeal and second appeal, without any danger of limitation, provided the vested interests of other persons, whether parties to the suit or not, are not affected. The mere fact that there has been a first appeal and a second appeal will not stratify the error and make it unrectifiable, without limitation operating in law nor will it take away the jurisdiction of the trial Court to rectify the error where it is rectifiable within the period of limitation. When a matter is finally settled in first appeal and second appeal, the appellate Courts become *functus officio*, and the trial Court is the residuary legatee for all future I.As. and other matters of litigation connected with the suit, provided such matters do not seek to modify the decrees in appeal. So, the trial Court (lower Court) had undoubtedly the power to rectify any *bona fide* error not affecting the vested interests of others, like limitation, adverse possession, etc. But, in the present case, it is clear to me, as to the lower Court, that neither the petitioner nor the respondents are in possession of any portion of the two items from 1923 onwards. The learned counsel for both sides also say that

these parties are not in possession. The other respondents, owning the other two one-fourth shares and given up in the lower Court, may or may not have possession of these items or any portion thereof. I do not want to give a finding about the *title* to these items, or possession of them, since more than 22 years have elapsed and the normal period of limitation is only 12 years, and nobody knows who are the person or persons in actual possession of these items and what their rights and contentions are, and it will be ludicrous to adjudicate on their rights without bringing them on record and hearing them. I am of opinion, therefore, that a petition under sections 151 to 153, Civil Procedure Code, would not lie, in the circumstances of the case, either to rectify an alleged error, or for readjusting the equities, which latter relief was wisely given up by Mr. Balaparameswari Rao as too stale to be pursued further.

In the end, therefore, I am of opinion that the only course which the petitioner can be allowed to take is *to file a separate suit*, if he is so advised, in respect of his alleged one-fourth share in these two items against any persons in possession of these items now, or claiming them, and to abide by the result of such a suit. Sections 151 to 153, Civil Procedure Code, are certainly not intended for such enquiries into titles of parties to properties.

In the end, therefore, the civil revision petition deserves to be and is hereby dismissed, but, in the peculiar circumstances of the case, without costs.

K. C. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE VISWANATHA SASTRI.

The Commissioner of Income-tax Madras .. *Applicant**

v.

Raman and Raman, Ltd., Kumbakonam .. *Respondent.*

Income-tax Act (XI of 1922), section 10 (2) (xv)—Expenses incurred in litigation—When allowable deduction—Test whether it is revenue or capital expense.

Litigation is often conducted by businessmen in order to maintain, preserve or defend an existing right or title to property or to prevent the invasion of such right in future. Legal expenses incurred in such litigation do not create a new capital asset or stock-in-trade but are incurred in the ordinary course of preserving or maintaining the assets or stock-in-trade of the business. Such expenses are part of the revenue expenditure of the business and their deduction is permissible under section 10 (2) (*xv*) of the Income-tax Act.

Expenses incurred in connection with the defence of a litigation threatening the title of the assets of the assessee (to certain buses purchased by them) would properly be attributable to the revenue.

Case referred to the High Court by the Income-tax Appellate Tribunal, Madras Bench, under section 66 (1), Indian Income-tax Act, 1922 (XI of 1922) as amended by section 92, Indian Income-tax (Amendment) Act, 1939 (VII of 1939), in R.A. No. 170 Madras 1947-48 (I.T.A. No. 2443 of 1946-47) on its file.

C. S. Rama Rao Sahib for Applicant.

T. V. Viswanatha Aiyar and *S. Narayanaswami* for Respondent.

The Judgment of the Court was delivered by

Viswanatha Sastri, J.—The following question has been referred to us by the Income-tax Appellate Tribunal at the instance of the Commissioner of Income-tax :

"Whether on the facts and in the circumstances of the case, the litigation expenses of Rs. 1,392 incurred by the assessee company are allowable as business expenditure under section 10 (2) (xv) of the Income-tax Act ?"

The assessee is Raman and Raman, Ltd., a private limited company carrying on business at Kumbakonam in the Tanjore district and will hereafter be referred to

* Case Referred No. 16 of 1948. 12th March, 1951.

as "the company". The company owns a number of motor buses plying for hire in specific routes in the Tanjore district. Another bus service run under the name of Chamundeswari Bus Service had five buses plying between Kumbakonam in the Tanjore district and Karaikkal in the French territory. On 9th March, 1944, the company through its Managing Director entered into an agreement for the purchase of the five buses of the Chamundeswari Bus Service with one T. D. Balasubramania Pillai in whose name the buses were registered and the permits for running the buses on the routes specified therein stood. The material portion of the agreement was in these terms :

"The five buses owned by T. D. Balasubramania Pillai and detailed below have been purchased by Raman and Raman, Limited, for Rs. 31,001 ; on this date Raman and Raman, Limited, have paid Rs. 1,001 to T. D. Balasubramania Pillai. The Managing Director, P. S. Narayanan has agreed to pay the balance of Rs. 30,000, by giving on 15th March, 1944, a sum of Rs. 10,000 the remaining Rs. 20,000 to be paid by him within a week after the transfer of ownership of the said five buses and the relative route permits in his name. These five buses belong solely to T. D. Balasubramania Pillai and nobody else has absolutely any right whatever to these buses . . . . . The tin shed in the Post Office Road where the five buses are now parked and which belongs to T. D. Balasubramania Pillai has now been sold for Rs. 700 to Raman and Raman, Limited . . . . . The spare parts, accessories, lubricating oils, greases, batteries, tools, charcoal, etc., relating to the buses of T. D. Balasubramania Pillai will be listed and evaluated according to the current prices and taken over within three days by Raman and Raman, Limited, after paying their value. The undermentioned five buses have already been on this date handed over by T. D. Balasubramania Pillai to P. S. Narayanan, the Managing Director of Raman and Raman, Limited."

Then follows a detailed description of the five buses with their registration numbers and other particulars.

Pursuant to this agreement, the five buses were handed over to the company and they were plying for hire, on the Kumbakonam-Karaikkal route for about ten days. On the day following the agreement, that is, on 10th March, 1944, the Managing Director of the company and Balasubramania Pillai signed a joint application to the Secretary, Road Traffic Board, Tanjore, for the transfer of G. permits of the five buses to the name of the Company. The previous G permit for the buses standing in the name of the third defendant were delivered over to the company and they ran the bus service in the name of T. D. Balasubramania Pillai pending recognition of the transfer. The company made the necessary payments for the issue of fitness certificates in respect of these buses and by way of taxes. When the sum of Rs. 10,000 the first instalment of the price payable on 15th March, 1944, was tendered by the company to Balasubramania Pillai, the latter refused to accept the cheque tendered and put forward the plea that he had been cheated by the company into entering into the bargain. Moreover, one Veerappa Pillai filed a suit on the 3rd October, 1944, on the file of the Court of the Subordinate Judge of Kumbakonam claiming title to these five buses and seeking to recover possession of them on the ground that on 10th April, 1944, they had been sold to him by Balasubramania Pillai with the consent and express authority of Gnanasundaram Pillai who, according to the plaintiff, was the real owner of these buses but who was undergoing imprisonment in jail at Karaikkal. The plaintiff in the suit impugned the contract for the sale of the buses to the company entered into by T. D. Balasubramania Pillai as not having been authorised by Gnanasundaram Pillai the real owner of the buses. The buses were run by the company from 10th March, 1944, till 19th March, 1944. Thereafter, the buses remained idle in the possession of the company. From 14th August, 1945, the buses were run by Veerappa Pillai as receiver appointed by the Court. The buses therefore were in *custodia legis* till the end of the litigation. The Subordinate Judge found that the five buses belonged both to Balasubramania Pillai and Gnanasundaram Pillai as joint owners and the plaintiff Veerappa Pillai was entitled to a decree for possession of the buses. On appeal the decision of the Subordinate Judge was reversed and this Court held that the plaintiff had not established that T. D. Balasubramania Pillai was a benamidar or agent for Gnanasundaram Pillai or that he was not the real owner of the buses. This Court, therefore, dismissed the suit of the plaintiff on the ground that he was attempting in concert with Balasubramania Pillai to sabotage the contract entered into between the company and Balasubramania Pillai.

Further into the merits of the dispute it is unnecessary for us to enter as the litigation has now been carried to the Supreme Court. In defending the above suit and other proceedings in Courts connected with the transfer of the buses, the company incurred an expenditure of Rs. 1,392-2-0 during the year of account and claimed this sum as revenue expenditure in the course of its assessment of income-tax. The claim of the company for treating this expenditure as revenue expenditure was upheld by the Appellate Tribunal differing from the Income-tax Officer and the Appellate Assistant Commissioner. Hence this reference at the instance of the Commissioner of Income-tax.

Mr. C. S. Rama Rao Sahib for the Commissioner of Income-tax argued that this sum of Rs. 1,392-2-0 was a capital expenditure, and therefore not allowable as a deduction under section 10 (2) (xv) of the Income-tax Act. He put his case this way : The company sought to acquire capital asset in the shape of five buses, and what was more valuable than the buses themselves, the right to ply these buses for hire along the routes already assigned to them by the Road Traffic Board. The right to ply these buses in the routes designated by the Road Transport Authority is a valuable right and in the nature of a monopoly. For the acquisition of the buses along with this right the company agreed to pay a sum of Rs. 31,001. The company purchased not only the buses but also the garage where they were parked and the accessories, tools, and implements. What was sought to be purchased was substantially a new asset for the benefit of the assessee's trade in the way of fixed capital. The contract for sale did not pass the property in the buses to the company, and many things had to be done before the company could acquire an effective title to these buses, namely, the payment of the balance of the consideration, the transfer of permits and so on. In order to acquire a true and clear title to this asset, the company had to spend a sum of Rs. 1,392-2-0 and this sum must be deemed to be a part of the total cost of the acquisition of the capital asset. Even if it was an extension of the existing business of the company by the acquisition of new buses and the right to new routes the same principle would apply. He maintained that the five buses had not become the property of the company under the contract of sale and that it had only an inchoate or imperfect title which had to be perfected by having it established in a Court of law in the suit already referred to. He argued that this was not a case where money had to be spent for the protection of the assessee's title to an existing business asset against hostile litigous attacks but a case where money was spent in the process of acquiring title to a capital asset and it was therefore part of the cost of the acquisition of that asset itself. He compared the expenditure in this case to the preliminary expenses in connection with the floatation of a company which are regarded as capital expenditure incurred not in earning profits, but in bringing into existence the profit-earning machinery. He also referred to some English and Indian decisions which will be noticed presently.

In our view, it is important to consider the rights of the company which flow from the contract. The contention of Mr. Rama Rao Sahib was that the property in the buses would pass to the company only on payment of the remaining consideration of Rs. 30,000 on the due dates. He also maintained that having regard to the object of the contract, namely, the acquisition of the right to ply the buses along the routes assigned to them, the transfer of registry of these buses in the name of the company and the issue of fresh permits to the company for plying on the routes would be necessary to implement its title to the property agreed to be sold under the contract. We cannot accept this contention. Under section 32 of the Sale of Goods Act, in the absence of a contract to the contrary, delivery of the goods and payment of the price are concurrent conditions. But here we have got a definite contract to the contrary, namely, that the price was to be paid in specified instalments. Under section 20 of the Sale of Goods Act where, as in this case, there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price is postponed. In our opinion, there was here an unconditional contract for the sale of the five specified buses for Rs. 31,001 and the contract itself recited, what indeed was a fact, that the buses

had been delivered into the possession of the buyer on that date. Mr. Rama Rao Sahib refers to the clause in the contract relating to the payment of Rs. 20,000 within a week after the transfer of ownership of the said five buses and the relative route permits in the name of the company as indicating that the title to the buses was not to pass to the purchaser until the payment of Rs. 20,000 was made, the registry was changed and the route permits also issued in the name of the purchaser. In our opinion, this is not a proper reading of the clause in the contract. All that is indicated by this clause is that the balance of the price, namely, Rs. 20,000 was to be paid by the purchaser to the seller within a week after the transfer of the registry of the buses in the name of the purchaser and the issue of permits in the name of the purchaser for plying these buses along the routes assigned to them. It has to be remembered in this connection that the transfer of registry and the issue of permits in the name of the purchaser require the co-operation and the joint endeavour of the seller and in order to ensure that the seller would perform his part of the contract, the balance of Rs. 20,000 out of the purchase price was agreed to be paid after the registry had been transferred and the route permits also issued in the name of the purchaser. We hold, therefore, on a construction of the contract that the title to the five buses passed to the purchaser on the date of the contract itself and thereafter the property in the buses was in the company. It is no doubt true that for about ten days after the contract the buses plied for hire on the routes assigned to them as if Balasubramania Pillai, the seller, was entitled to ply them for hire. That was because the registry of the buses had not been transferred and the permits for running the buses on the specified routes had not been issued to the purchaser. It was merely in order to avoid a transgression of the Motor Vehicle Rules that this procedure was adopted. But that had nothing to do with the passing of the title in the buses to the purchaser. Thereafter when the vendor himself started criminal proceedings and purported to enter into an agreement for sale of these five buses to Veerappa Pillai, the plaintiff in the suit in the Sub-Court, the company had no option but to defend its title to the valuable property which it had acquired under the contract. Not only the buses but also the routes which had been assigned to the buses and which were usually recognised by the Road Transport Authority, not as a matter of law, but in practice, as entitling the purchasers to ply along the routes assigned to the buses, were sought to be taken away from the company by Veerappa Pillai. The company's possession of the buses was not unlawful and it had a right therefore to defend its title as well as possession. As we already stated it is unnecessary now to determine whether Balasubramania Pillai or Gnanasundaram Pillai or both were the real owners of the buses. Suffice it to say that the vendor Balasubramania Pillai was in possession of the buses which had been registered in his name. The permits for plying these buses also stood in his name. The company dealt with him as a person entitled to dispose of the buses, paid valuable consideration and also took possession of the buses and plied them for some time on the routes assigned to these buses. It was in order to defend this right of the company both to the buses and the routes which usually followed the ownership of the buses as a matter of practice, that the company had spent the money.

It is clear that the sum of Rs. 31,901 paid by the company to the seller for the five buses together with the prospective advantage of plying these buses on the routes assigned to them was an expenditure incurred in connection with the trade or business of the company. It was clearly a capital expenditure and its deduction is not permitted under section 10 (2) (xv) of the Income-tax Act. The position is, in our opinion, different with regard to the sum of Rs. 1,392-2-0 expended in connection with the litigation. It is conceded that the expenditure was incurred in the course of the business or trade of the company and in its character as trader. The only question is whether or not it was in the nature of a capital expenditure. In our opinion it is an expenditure incurred for the purpose of retaining the capital asset, something which was vital to the business of the company something that would enable the company to earn more profits in the future. The company honestly considered it was entitled so to do, that it should take steps necessary or

proper for protecting its interests and to engage in litigation for the protection or preservation of valuable assets acquired by it for the purpose of its trade or business. If the company succeeded in the litigation the profits from its business would increase and a company which spends money for increasing its profits spends it for the purpose of its business. Litigation is often conducted by business men in order to maintain, preserve or defend an existing right or title to property or to prevent the invasion of such right in future. Legal expenses incurred in such litigation do not create a new capital asset or stock-in-trade but are incurred in the ordinary course of the preserving or maintaining the assets or stock-in-trade of the business. We therefore think that such expenses are part of the revenue expenditure of the business and their deduction is permissible under section 10 (2) (xv) of the Income-tax Act. This is our opinion unassisted by authority.

In *Ushers Wiltshire Brewery, Ltd.* v. *Bruce*[1], it was held by the House of Lords reversing the decision of the Court of Appeal that a brewery company was entitled to deduct legal expenses incurred in connection with the renewal of licences, preferring of complaints against tenants and obtaining advices as regards thefts of beer, etc. Such expenses had the effect of preserving the brewery company's interest just as much as the defending of an action attacking the title of the company to the property in which it carried on its business. The leading modern authority on the subject of what is a business expenditure and what is not, is the judgment of Lord Cave in *British Insulated and Halsby Cables, Ld.* v. *Atherton*[2]. The learned Lord says :—

"Where an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or advantage for the enduring benefit of a trade, I think there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."

The next decision which need be noticed is *Vanden Bergh's case*[3], where the House of Lords held that a sum of money paid upon the cancellation of a contract was a capital expenditure, the contract in that case not being an ordinary contract entered into in the course of the business but one which related to the whole structure of the company's business, and the totality of its capital assets. The House of Lords held that the payment made was for a radical alteration of those capital assets and was therefore a capital payment.

These decisions were relied on on behalf of the Crown in *Southern* v. *Borax Consolidated, Ltd.*[4], where the question was whether legal expenses incurred by a company in defending its title to a property where its business was partly carried on were admissible deductions in computing its profits. Lawrence, J., held that as the land in connection with which the expenditure was incurred was used by the assessee in connection with its business the profits of which were taxed, the expenses incurred in defending title to the property were allowable deductions in computing the profits of the company for income-tax purposes, being in the nature of a revenue expenditure. This decision is very instructive as showing on which side of the line the present case falls. The learned Judge considered that the principle deducible from the cases was that where a sum of money was laid out for the acquisition or the improvement of a fixed capital asset, it was attributable to capital, but that if no alteration was made in the fixed capital asset by the payment, then it was properly attributable to revenue being in substance a matter of maintenance, the maintenance of capital structure, or the capital asset of the company. In the present case the only way in which it can be said that there was anything like an alteration in the capital assets of the respondent company was that Veerappa Pillai, the plaintiff in the suit filed in the Court of the Subordinate Judge of Kumbakonam, was removed from the category of possible litigants who might challenge the title of the company to the buses. In our opinion, it could not be said that this expenditure in any way altered the original character of the capital asset which was

1. (1915) A.C. 439.
2. (1926) A.C. 205 at 213.
3. (1935) A.C. 431.
4. (1941) 1 K.B. 111.

acquired by the company. If it had done so, certainly it would be a payment in respect of capital. As the capital assets of the company remained absolutely unaltered and all that was done was to retain the capital assets in the hands of the company by resisting attempts to deprive the company of such assets, the expenses incurred in connection with the defences of a litigation threatening the title to these assets would properly be attributable to revenue. The decision of Lawrence, J., was summed up in the last paragraph of the judgment in these terms:

"It appears to me that the legal expenses which were incurred by the respondent company did not create any new asset at all, but were expenses which were incurred in the ordinary course of maintaining assets of the company and the fact that it was maintaining the title and not the value of the company's business does not in my opinion make it any the different."

We respectfully follow this reasoning of the learned Judge and hold that the present case is similar in its facts to the decision in *Southern* v. *Borax Consolidated, Ltd.*[1] The learned advocate for the revenue authority referred to the decision of the Court of Appeal in *Associated Portland Cement Manufacturers Ltd.* v. *Kerr*[2]. Lord Greene, M.R., who delivered the leading judgment in this case quoted with approval the decision of Lawrence, J., in *Southern* v. *Borax Consolidated, Ltd.*[1] and observed as follows:

"The money that you spend in defending the title to a capital asset which is, assailed unjustly is obviously a revenue expenditure. There, again there is all the difference in the world between defending your assets against the claim of some body who has no claim against them and the acquiring of a new asset or adding to an existing asset. If you acquire the benefit of a covenant which improves the value of your goodwill, in my opinion, you have acquired a capital asset".

This decision clearly approves of the reasoning in *Southern* v. *Borax Consolidated, Ltd.*[1] and merely decides that acquisition of or addition to goodwill is acquisition of a capital asset. As regards Indian decisions we need only refer to the decision of the Lahore High Court in *Mahabir Prasad and Sons* v. *Commissioner of Income-tax, Punjab*[3], overruling an earlier decision of the same Court in *Kangra Valley State Co., Ltd.* v. *Commissioner of Income-tax*[4]. The Court there held that the expenses of defending a suit for pre-emption in respect of property acquired for the purpose of storing its stock-in-trade was a revenue expenditure. It is not necessary that the litigation should be even of a defensive character to enable the assessee to deduct the expenses incurred in connection therewith. In *Central India Spinning, Weaving and Manufacturing Co., Ltd.* v. *Commissioner of Income-tax, Central Provinces*[5], the Nagpur High Court held that legal expenses incurred in connection with a suit brought by the assessees against another company to restrain the latter from using the trade-mark to which the assessee claimed exclusive right was deductible as revenue expenditure. It may be said that at least in the opinion of Digby, J., one of the learned Judges who decided that case, the threat was directed not against the capital of the assessee, but against its trade and the object of the litigation was to prevent a drop in the sales and a loss of profits. The attack on trade-mark by infringement was treated as an attack not on capital asset but rather as an attack on the existing and future trade and on the value of the stock-in-trade existing and in the course of manufacture and to be manufactured in future. It may be that a trade-mark is in the nature of a capital asset and expenses incurred in repelling an attack on an existing capital asset must be attributed to revenue. Legal expenses incurred in connection with the acquisition or protection of stock-in-trade are clearly in the nature of revenue expenditure. It is on this ground that litigation expenses incurred by a money-lender in connection with loans advanced or capital invested in the course of his business have been held to be admissible deductions, money being his stock-in-trade. See *Commissioner of Income-tax, Bihar and Orissa* v. *Sir Kameswar Singh of Darbhanga*[6].

We are unable to accept the contention of the revenue authority that the expenditure in this case was incurred for the acquisition of fixed capital assets. The expenditure, as we already stated, did not create any new asset nor did it

1. (1941) 1 K.B. 111.
2. (1945) 27 T.C. 103 at 118.
3. (1945) I.T.R. 340 (F.B.).
4. (1934) 3 I.T.R. 324.
5. (1943) I.T.R. 266.
6. (1942) 2 M.I.J. 261 (P.C.).

alter the character of the capital asset that had been acquired by the company under the contract. That remained unaltered. The asset, to defend the title to which the expenditure was incurred was an existing asset and was not acquired in consequence of the expenditure. Nor was there any improvement of the capital assets of the company by reason of the litigation. For these reasons we hold that the decision of the Appellate Tribunal was correct and that the reference must be answered in the affirmative and in favour of the company. The Commissioner of Income-tax shall pay a sum of Rs. 250 as costs of this reference to the assessee.

K.S. ——— *Reference answered in the affirmative.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

Batcha Sahib .. *Appellant**

v.

Periyanayagammal .. *Respondent.*

Practice—Compromise decree—No proof that the agreement in terms of which the compromise decree was passed was attested by the advocates of parties—Whether affects executability of the decree.

The requirement of attestation by the advocates of the parties of an agreement which was subsequently embodied in a decree in one of form and not of substance and, therefore does not affect the validity of a decree and its executability.

Appeal against the order of the District Court, South Arcot, dated 14th October, 1947, in A.S. No. 50 of 1947 preferred against the order of the District Munsif Court, Kallakurichi, in E.P.R. No. 746 of 1945 in O.S. No. 577 of 1936.

K. V. Ramachandra Aiyar for Appellant.

V. C. Viraraghavan for Respondent.

The Court delivered the following

JUDGMENT.—The document of compromise executed by the parties does not appear to have been before either of the Courts below so that we do not know for certain whether as a matter of actual fact that document was attested or not. The copy of the decree in O.S. No. 577 of 1936 shows that two advocates appeared for the petitioner and a pleader for the first defendant and in the ordinary course of practice, the learned District Munsif would not have accepted the compromise and embodied it in a decree of his Court if counsel on both sides had not signed the document to vouch for its authenticity. The probability is therefore in favour of the view that the document was actually attested.

Even if it was not, I do not think that it vitiates the decree and the charge it created. In those cases where parties enter into a compromise and that compromise is embodied in a decree of Court, we have to make a distinction between the substance of the transaction and the formalities necessary to give it validity. Thus merely because a compromise is embodied in a decree it will not prevent the parties affected by it from showing that it was vitiated by fraud, deception, undue influence or other invalidating circumstances. Such factors would affect the substance of the transaction. But this does not mean that the decree which embodies the compromise entered into by the parties should be attested in those cases where the agreement between the parties requires attestation or that because the agreement subsequently embodied in the decree is not attested, the decree is invalid. These are matters of form which do not affect the decree. The provisions relating to attestation are primarily intended as safeguards against forgery and false personation and similar malpractices and there is no reason in principle why the requirements about attestation should be extended to agreements which immediately afterwards are incorporated in a decree of Court. After all, it is the decree that is being executed and not the agreement on which it is founded. And the decree

* A.A.A.O. No. 113 of 1948. 24th January, 1951.

creates a charge by operation of law (vide *Venkatachala Pillai* v. *Rajagopal Naidu and another*[1], *Abdul Gaffar* v. *Ishtiaq Ali*[2] and *Rustamalli* v. *Aftabhusainkhan*[3].

It is true that a different view was taken in *Ghasiram* v. *Kundanbai*[4], but I find it difficult to follow it.

I think the objections taken to the execution of the decree are without substance. The appeal is allowed with costs throughout.

V.P.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Doraiswami Reddiar and another .. *Petitioners.**

Penal Code (XLV of 1860), section 477-A—Requirements of—Fraudulent entries in accounts—Bogus bills—No deprivation of property—Whether an offence.

Section 477-A of the Indian Penal Code only requires the falsification of accounts with intent to defraud. It does not require any deprivation of property.

Where two bills admittedly false were entered into the account books of a company,

Held, that the making of false entries of bogus transactions in the accounts of a company or stores will injure the company or stores in property and cannot be considered to be only a 'game in fraud' like a school boy's farce or play even though no one may lose eventually.

Queen-Empress v. *Abbas Ali*, (1898) I.L.R. 25 Cal. 512 and *Emperor* v. *Rash Behari*, (1908) I.L.R. 35 Cal. 450, followed.

Held, further, that the fact one of the accused was a clerk under the control of another would not mitigate the offence against him unless it was proved that there was ground to suspect fear of instant death or instant grievous hurt to him.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of Sessions, Madura, in C.A. No. 15 of 1950 preferred against the order of the Court of the First Additional First Class Magistrate, Madura, in C.C. No. 667 of 1949 on his file.

S. Govind Swaminathan for *G. D. Williams* for Petitioners.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

The Court made the following

ORDER.—The two petitioners in this case, the president and the clerk of a Co-operative Stores in Vadipatti, have been convicted under section 477-A, Indian Penal Code, read with section 109, Indian Penal Code, for falsifying the accounts of the stores of Vadipatti by making two false and fraudulent entries in the account book of the stores (Exhibit P-12) regarding two false and fraudulent bills (Exhibits P-13 and P-14, dated 16th February, 1949 and 1st May, 1949) about the alleged sale of cane jaggery and ground-nut on those days, when really these things had been sold away before 27th January, 1949 and the bills (Exhibits P-13 and P-14) were bogus and false ones not relating to any genuine sales to the parties mentioned, or for the sums mentioned, or for the qualities mentioned, or on the dates mentioned. They were sentenced by the First Additional First Class Magistrate, Madura, to pay fines of Rs. 500 and Rs. 200 respectively. On appeal, the learned Sessions Judge of Madura reduced the fine on the first accused to Rs. 400 and on accused 2, a clerk under his control and subject to his orders, to Rs. 50.

I have perused the entire records and heard the learned counsel for the petitioners and the learned Public Prosecutor *contra*. Mr. Govind Swaminathan, for the petitioners, conceded that the two bills were not true bills, and were bogus and false ones, but stated that nobody had been defrauded of property, or caused wrongful loss eventually and that every member of the stores, and the stores itself had received all the moneys due to them. He contended that,

1. (1945) 2 M.L.J. 388.
2. A.I.R. 1943 Oudh 354 (F.B.).
3. 45 Bom.L.R. 862 . A.I.R. 1943 Bom. 414.
4. I.L.R. (1941) Nag. 513.

*Cr.R.C. No. 482 of 1950.
(Cr.R.P. No. 459 of 1950).

28th March, 1951.

though the bills were not true and genuine ones and were indeed false ones, there was no *fraud* as there was no deprivation of property, and therefore there could be no conviction for an offence under section 477-A. I cannot agree. Section 477-A only requires the *falsification of accounts* with intent to *defraud*. It does not require any *deprivation of property*. In fact, fraud means what it says, namely, making a person believe what is not true with intent to cause some injury of some kind in property or reputation to him or to suppress some previous fraudulent transaction and action about it. It has been held by a Full Bench of the Calcutta High Court in *Queen-Empress* v. *Abbas Ali*[1], as follows :

"The word 'fraudulently' should not be confined to transactions of which deprivation of the property, either actual or intended, forms part."

They held finally that deprivation, actual or intended, is not a necessary ingredient to defraud. They also relied upon the decision in *Reg* v. *Toshack*[2], in support of the view they took. A Bench of the Calcutta High Court has, later on, held in *Emperor* v. *Rath Behari Das*[3], that the making of false entries in a book or register by any person in order to conceal a fraudulent or bogus act falls within the purview of section 477-A, Indian Penal Code, inasmuch as the intention is undoubtedly to defraud. I have absolutely no hesitation in holding that both the petitioners in this case acted *fraudulently* in bringing into being these two bogus false bills, Exhibits P-13 and P-14 and entering them in the account book of the stores, Exhibit P-12, as if they represented genuine transactions. The two bills were admittedly false, and entering them in the society's account as if they were true was undoubtedly done with intent to defraud, and for the purpose of concealing the previous fraud of the petitioners. It cannot be said that making false entries regarding bogus transactions in the accounts of a company or stores will not injure the company or stores in property, and will be only "a game in fraud", like a school boy's game or play. Often these accounts have to be put into Court, either for claiming something on behalf of the stores, or for defending some action against the stores, and, once it is proved or admitted that bogus and false entries are to be found in the accounts (no honest society could avoid making such admissions in cases like this), no Court will act on these accounts. These accounts containing false entries will be thrown out as unworthy of credence for any purpose whatever, and that will be doing very serious pecuniary injury indeed to shops and societies, whose usual method of proof, offensive and defensive, is in such accounts kept in the usual course of business. If the president and the clerk of the society go round making such *false* entries, regarding false bills and transactions in the store's accounts, that will certainly be "*fraudulent*" also within the purview of section 477-A, Indian Penal Code, even though no one may lose one pie *eventually* by such false and fraudulent conduct or entry on the part of the petitioners. The law is not concerned with the "eventual result". Thus, a pick-pocket, hoping to get a good scoop, puts his hands into the pocket of a millionaire, but, unfortunately finds it empty ; still, he will commit an offence despite his eventually gaining not a pie. So, I confirm the conviction of the first petitioner, but, considering all the circumstances reduce the sentence to a fine of Rs. 100, or, in default, rigorous imprisonment for one month. The excess fine, if paid, will be refunded.

A special argument was urged on behalf of the second petitioner, *viz.*, that he was only a clerk under the orders of the first petitioner and so had to make those false and fraudulent entries in the account book from *fear*. The law allows *fear* as a reason for acquittal in such offences only if there is *fear of instant death* or *instant grievous hurt apprehended to result in instant death*, which is not alleged or proved in this case. So the conviction of the second petitioner also was correct. He was given sufficient indulgence, in the matter of sentence, after considering the above circumstances. Therefore his conviction and sentence are confirmed and the petition is dismissed as regards him.

K.C. *Sentence on first petitioner alone reduced.*

1. (1898) I.L.R. 25 Cal. 512.
2. 4 Cox. C.C. 38.
3. (1908) I.L.R. 35 Cal. 450.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Damarla Krishnarao and another .. *Petitioners* *

Criminal Procedure Code (V of 1898), sections 264 and 537—Conviction and sentence without writing a judgment by two only of three members constituting a Bench of Honorary Magistrates and without consulting the third member—Legality.

Where two only of the three members constituting a Bench of Honorary Magistrates convict and sentence the accused of the offences under sections 323 and 504, Indian Penal Code, without writing a judgment (which was subsequently written after five days) and even without consulting the other member of the Bench, the convictions are illegal and not merely irregular and so are not curable under section 537, Criminal Procedure Code.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the First Class Bench of Magistrates, Bapatla, dated 19th April, 1950, in B.C. No. 657 of 1949.

K. Kanniah for the Petitioners.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

The Court made the following

ORDER.—This is an extraordinary case. The two petitioners, grandfather and grandson, were tried for offences under sections 323 and 504, Indian Penal Code, by a Bench of Honorary Magistrates at Bapatla. They were convicted and sentenced on 19th April, 1950, by two out of the Bench of three, to pay a fine of Rs. 25 each, or, in default, to undergo rigorous imprisonment for two weeks each, without writing a judgment. The judgment was subsequently written, on 24th April, 1950, by the President and member who pronounced the sentence on 19th April, 1950, and sent to the third member, Yelliah, on 24th April, 1950, for his opinion. He dissented from the judgment of the other two.

As urged by the learned counsel for the petitioner and agreed to by the learned Public Prosecutor, the President and the other member acted illegally (and not merely irregularly) in convicting and sentencing the petitioners without even consulting the third member Yelliah and without writing a judgment. A sentence follows a conviction, which is embodied in a judgment. Here the judgment followed five days after the sentence, and the sentence was by the two members of the Bench without even consulting the third. It was not only like putting the cart before the horse but a fragment of a cart before the horse. It is such illegalities, by a Court like this, which shake the confidence of the public in all Bench Courts. These should stop at once. The phrase "Judgment will follow" in High Court orders communicating the modified sentence in appeal, etc., does not mean that judgments will be written leisurely thereafter but that judgments already written or dictated and delivered will be fair copied and sent in due course.

The convictions and sentences of both the petitioners are set aside as illegal (as they are not merely irregular and curable under section 537, Criminal Procedure Code) and the petitioners are acquitted, and the fines, if paid, directed to be refunded to them. The learned Public Prosecutor agrees with me that there is no need for a retrial in this petty case.

V.S. *Petition allowed.*

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* Cr.R.C No. 1157 of 1950. 30th March, 1951.
(Cr.R.P. No. 1086 of 1950).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Mrs. A. Marthamma .. *Petitioner* *

v.

A. Munuswami and others .. *Respondents.*

Penal Code (XLV of 1860), section 494—Offence under—Hindu convert to Christianity marrying a Christian lady and after re-conversion to Hinduism marrying a Hindu lady.

It cannot be said that once a Hindu becomes a Christian, he has no right to relapse into Hinduism or any other alternative religion. On re-conversion he acquires the right of the religion which he re-enters.

When a Hindu becomes a Christian to marry a Christian lady there is nothing to prevent him on re-conversion to Hinduism from marrying a Hindu lady and he will not be guilty of an offence under section 494, Penal Code. (The marriage in this case was before the coming into force of the Madras Hindu (Bigamy Prevention and Divorce) Act).

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Fifth Presidency Magistrate of the Court of the Presidency Magistrates, Egmore, Madras, dated 27th April, 1950, in C.C. No. 3917 of 1949.

Gopala Menon and *C. Sriramulu* for Petitioner.

Venkataraman for *Messrs. Row and Reddy* for Respondents.

The State Prosecutor (*S. Govind Swaminathan*) for the State.

The Court made the following

ORDER.—This is a petition for setting aside the discharge of the three accused in C.C. No. 3917 of 1949 on the file of the Fifth Presidency Magistrate, Madras. They had all been complained against under sections 494, 495 and 496 read with section 109, Indian Penal Code, by the petitioner, Mrs. Marthammal, and were discharged by the learned Presidency Magistrate under section 253 (1), Criminal Procedure Code.

The facts were briefly these. The petitioner Mrs. Marthammal was a Christian School mistress, aged 29, in September, 1943, when she met the first accused, Munuswami, a Hindu student, just past 18. She fell madly in love with him and began to have sexual intercourse with him. Her father and brother chided her for thus misconducting herself. Later on, she and her father and brother arranged with the first accused that he should become a Christian and marry the petitioner and thus regularise the illicit relationship between him and the petitioner. On 9th April, 1944, the first accused, Munuswami, was baptised and converted to Christianity by Rev. Moses, P.W. 4, in the Perambur Telugu Baptist Church. P.W. 3, the Deacon of the Church, was also present at the conversion. No intimation was sent to the boy's parents or relatives, who apparently did not know anything at all about his illicit intercourse with the petitioner or his intention to marry her after becoming a Christian, or even the fact of his knowing the petitioner. On 17th April, 1944, eight days after the conversion, the first accused was married to the petitioner in the same church in the presence of P.Ws. 2, 3, 4 and 6, all Christians. Again, no information about the marriage was sent to the relatives of the first accused and not one of them was present. The evidence showed that none of the relatives of the first accused ever knew that the first accused had become a Christian or had been baptised or had married the petitioner. After living together for some time, the first accused and the petitioner got estranged, in 1946, and the first accused was living away from the petitioner for some time. The petitioner then wrote to him several pathetic letters telling him that she loved him and wanted him alone, and not his money or belongings and that he was her life and joy and comfort and that she would get her sister or any other girl married to him as second

* Cr.R.C. No. 1084 of 1950. 8th March, 1951.
(Cr.R.P. No. 1017 of 1950).

wife in addition to herself and that he might live happily enjoying jollily with both his wives and that she would give him whatever money is wanted but that he should not marry a Hindu girl as he was intending to do. She wanted him to see the fair girl she was choosing for him as second wife and also to be with her for 24 hours in a hotel room. She added that she did not know before marrying him what love was or what sin and the world were and that she began realising them all only after marrying him. In spite of all these letters in 1946 and after a temporary reconciliation for some months and getting a son by her on 27th July, 1948, the first accused again went away from her in the latter half of 1948 and married P.W. 11, Sarojini, the daughter of A-3 and a Hindu, on 3rd February, 1949, according to Hindu rites. A-2 the father of A-1 was also present at that marriage. According to P.W. 11 and the other evidence in the case A-2 and A-3 had never heard of the marriage of the first accused with the petitioner or of his having had sexual intercourse with the petitioner or even of his acquaintance with her or of his having been baptised and converted to Christianity. The evidence of P.Ws. 1 and 2 to the contrary was held rightly to be false by the lower Court. The lower Court discharged A-2 and A-3 on the facts as it was satisfied that they knew nothing about his first marriage and had not been present at the second marriage of the first accused with knowledge of such first marriage and with intent to abet an offence of bigamy. Regarding the first accused the lower Court held that he too should be discharged as the evidence of P.W. 11, the second wife of the first accused showed that he, a native convert to Christianity having married P.W. 1 the petitioner, according to Christian rites in a church, had relapsed to Hinduism and exercised his right as a Hindu to enter into another (polygamous) marriage with P.W. 11. P.W. 11 had sworn that the first accused was observing only Hindu festivals and Hindu customs, and was not observing any Christian festivals or customs, and that she had married the accused according to Hindu rites. She was a girl of 17, and was not shaken in cross-examination, and her evidence was rightly accepted by the lower Court.

The learned counsel for the petitioner, Mr. Gopala Menon, did not seriously contest before me the correctness of the discharge of accused 2 and 3 as they were not proved to have had any knowledge of the first marriage of the first accused with the petitioner and to have been present with such knowledge at the second marriage of the first accused with P.W. 11. So the petition is dismissed against accused 2 and 3 (respondents 2 and 3 here).

Regarding the first accused, however, Mr. Gopala Menon urged that the order of discharge was wrong for three reasons. The first was that the lower Court had gone wrong in its statement of the law regarding the right of a native convert to Christianity to again relapse into Hinduism and marry a Hindu girl in spite of his marriage with a Christian girl when he was a Christian. He contended that the lower Court had misinterpreted the ruling in *Emperor* v. *Antony*[1], and paragraph 5117 in Gour's Indian Penal Code, 2nd Volume, at pages 2258-59. I cannot agree. The lower Court has interpreted the ruling and the passage in Gour correctly. The statement of Gour that a conversion to Christianity of a native of India, and the member of a community where polygamy is the rule and monogamy an exception, does not necessarily imply any religious obligation to monogamy may be open to dispute, though this observation is supported by the weighty observation of Innes, J., and the conduct of the petitioner, offering girl after girl to the petitioner as second wife, and by the fact that Solomon the wise had seven hundred wives and three hundred concubines (*see* the Bible-Kings) and yet this is not referred to with disapproval even in the New Testament, where his wisdom is praised. So the observation of Innes, J., that a profession of Christianity does not *ipso facto* impose any such obligation to monogamy cannot be said to be without basis; but, even granting, for the sake of argument, that the profession of Christianity does impose a religious obligation to monogamy, that obligation goes when that religion is abandoned for a religion recognising polygamy. It does not follow that once a man

1. (1910) I.L.R. 33 Mad. 371.

becomes a Christian he has no right to relapse into Islam or Hinduism or any other of the alternative religions avaiable in this world for his purpose, holy or unholy, and get the rights of the new religion he embraces, subject, of course, to any laws taking away such rights. I cannot see why a man like the first accused who became a Christian to marry the petitioner, a woman 11 years older than himself, should not be allowed to revert to Hinduism to marry P.W. 11, another wife, 7 years younger than himself. Of course, the *religious motive* did not operate either for the conversion or for the re-conversion, and only the *woman motive* operated. It is admitted by Mr. Gopala Menon that at the time the first accused married P.W. 11, the Madras Hindu Bigamy and Divorce Act had not come into operation making bigamy by a Madras Hindu a crime. That Act came into operation only in March, 1949, a month after the second marriage of the first accused with P.W. 11. The Indian Union is now a secular State, and every man is given a right to follow any religion he likes, or to follow no religion at all. So, the conversion of a man to any religion will only enure so long as the person converted to it adheres to that religion and does not leave it for any other religion. There are well-known cases in this State of Hindus, even Brahmins, who were Christians for years and then relapsed to Hinduism and were accepted back by the caste and then followed the rights of the caste and even married their children into the caste. So it is not as if there is only a theoretical possibility of re-conversion to Hinduism of a man converted to Christianity or any other religion. The famous *Devalasmrithi*, of the 8th century A.D., provided for Hindu converts to Islam, to be taken back to Hinduism after *Suddhi* (purification). The great Sivaji re-converted his general Nethaji Palkar, who had been forcibly converted to Islam by Aurangazeb and married to a Muslim lady, from Islam to Hinduism after administering *Prayaschittam* (*Suddhi*) to him. He also re-converted Bajaji Nimbalkar, another famous Mahratta Chieftain, from Islam to Hinduism, and gave his own daughter in marriage to him. During the Moplah revolt in Malabar in 1921, and the Bengal and Punjab troubles in 1948, many Hindus converted by force to Islam were re-converted to Hinduism. So, re-conversion to Hinduism has existed for centuries past. It is the law that a man on re-conversion acquires the right of the religion which he re-enters, as correctly stated by the lower Court, subject to any law taking away particular rights. No such law exists here.

The second contention of Mr. Gopala Menon was that even if such a right to a polygamous marriage occurs on re-conversion, there is nothing to show that the first accused was actually re-converted to Hinduism and abandoned Christianity, and that the first accused's case was that he never became a Christian, and this was found to be false. The lower Court was of opinion that the first accused was really baptised in the church and that he did become a Christian, though it was of opinion that the first accused, having committed the youthful indiscretion of pre-marital sexual intercourse with P.W. 1, and having been under the sway and influence of P.W. 1 and her brothers, should have been pressed to legalise his relationship with P.W. 1 by her people and he should have therefore consented to embrace Christianity for the purpose of marrying P.W. 1, and that his conversion was certainly not one which was of his own free choosing and that there should have been an element of *coercion* on the part of P.W. 1 and her relations on this boy who had just attained the age of majority, by taking advantage of his sin, in having had intercourse with P.W. 1 before marriage, as a lever to make him embrace Christianity and marry P.W. 1. But the lower Court was satisfied, from the evidence of P.W. 11, that the first accused had relapsed to Hinduism and had given up Christianity at least a month before he married P.W. 11. Mr. Gopala Menon urged that merely following Hindu customs and Hindu festivals, as P.W. 11 spoke to, would not be sufficient to show that the first accused had left Christianity and embraced Hinduism. But, here, there are five other additional facts. The first accused was never given a Christian name, and kept his Hindu name Munuswami, throughout his career, at the time of the first marriage as well as at the time of the second marriage. Secondly, P.W. 11 swore that the first accused never observed any Christian festival or ceremony. Thirdly, the conversion of the first accused

to Christianity was not intimated to his parents either by the Pastor and the Deacon, who converted him, or by the first accused himself, or by P.W. 1, the petitioner, or by any others, and all his relatives and castemen, including accused 2 and 3 and P.W. 11, never knew of his being converted to Christianity and always knew him only as a Hindu. Fourthly, it is very doubtful whether the first accused really willingly embraced Christianity. If he simply went through that ceremony of baptism with mental reservations and under moral compulsion, by stressing the fact of his having had sexual intercourse with P.W. 1 before marriage, it is obvious that he would have left that religion, as willingly as he had entered it unwillingly, as soon as he went back to his people. Lastly, I cannot agree with Mr. Gopala Menon that a month's time would not be enough for re-conversion. Even a few hours will be enough if the intention to leave one religion and embrace another can be inferred beyond all reasonable doubt. Surely, the first accused, who was a Hindu and had been, converted to Christianity on 9th April, 1944, in the course of a few hours could go back to Hinduism in the course of a month! The disruption of joint status in a Hindu joint family takes only a minute of unequivocal intention to separate expressed clearly. The festival of Pongal fell during the period after the first accused left P.W. 1 for good and went back to his relatives, and he seems to have observed it, by the general evidence of P.W. 11. After all, the religious persuasion of a man now-a-days depends on his *subjective preference* for any religion, and we must take it that the first accused, who asserted that he was a Hindu when he married P.W. 11 and that he married her as a Hindu, was a Hindu at that time, even though his denial that he became a Christian some time earlier was disbelieved by the Court below on the evidence of the Pastor and the Deacon regarding his baptism. It is rather unfortunate that there is not one and the same law of bigamy for all the citizens of the Indian Union, and that while a Christian bigamist has been liable to punishment ever since the Penal Code was enacted, and some Hindu bigamists have become liable to punishment ever since March, 1949, when the Madras Hindu Bigamy and Divorce Act was enacted, several Hindu, Buddhist and Jain Bigamists (including Maharajas and millionaires) remain untouched, and Muslim bigamists can marry four wives at a time without running the risk of any prosecution or punishment. In fact, this discrimination between the various communities living in the Indian Union regarding this crime has been made recently the peg for arguments, by some Hindu bigamists convicted in this State, that the Madras Hindu Bigamy Act is illegal as it is discriminatory and therefore void under the Constitution of India. Similar arguments have been adduced against even section 494, Indian Penal Code itself, and against section 497, Indian Penal Code, as only the *adulterous man* is punished and not the *adulterous woman* without whose co-operation he could never have committed the offence. Indeed, even maintenance to a wife alone has been argued to be invalid under the Constitution as discriminatory as a husband cannot get maintenance from a rich wife. We need not go into the realm of all this argument and speculation in this case where the question has not been raised seriously. It is obvious that, in the light of the facts stated above, the lower Court's order discharging the accused cannot be said to be incorrect or illegal or irregular or improper or to have occasioned a failure of justice.

No doubt, as Mr. Gopala Menon urged, as his third contention, the petitioner, Mrs. Marthammal, has been left in a miserable predicament by the act of the first accused in deserting her and her son and marrying P.W. 11. But this hardship has existed in all polygamous marriages by lusty fellows preferring younger woman, and is nothing to go by in criminal cases; and equal hardship will be caused to P.W. 11, the second wife of the first accused, if the marriage with her is declared illegal. Anyway, sending the first accused to jail in this bigamy case cannot be of much relief to the petitioner in her hardship or difficult situation.

In the end, therefore, the petition is dismissed regarding A-1 also.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Abdullah .. *Petitioner* *

v.

State .. *Respondent.*

Madras Prohibition Act (X of 1937), sections 4 (1) (a) and 34—Dealer found in possession of exempted medicinal preparation—If bound to verify spirits content of the medicine—Dispute as to the articles seized by search officer—Duty of prosecution to examine Panchayatdars.

No duty is cast by law on a dealer offering for sale medicinal preparation exempted under the Madras Prohibition Act to open the bottles of the medicine containing a certain specified percentage of spirits and to satisfy himself that the contents did not exceed the specified percentage of spirits. If in fact, it is found to contain a greater percentage than that specified, the dealer cannot be held guilty of an offence under section 4 (1) (*a*) of the Prohibition Act.

The Madras Prohibition Act gives very great powers to the searching authorities and inflicts very severe punishment on people committing offences under that Act. It is therefore of the utmost importance that there should be satisfactory evidence before the Court regarding the articles seized from the accused person. When the accused disputes the statement of the search officer as to the identity of the articles seized, it is the clear duty of the prosecution to examine the panchayatdars to corroborate the statement of the search officer. Failure to do so will lead only to one result, namely, giving the benefit of doubt to the accused and holding that the articles seized are those as alleged by the accused.

Petition under sections 436 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order in C.C. No. 5004 of 1949, dated 4th May, 1950, on the file of the Court of the Chief Presidency Magistrate, Madras.

Inamdar Abdul Salam for Petitioner.

The State Prosecutor (*S. Govind Swaminathan*) for the State.

The Court made the following

ORDER.—The petitioner in this case is one Abdullah carrying on a petty betel shop business in Gandhi-Irwin Road, Egmore. The prosecution case was that P.W. 1, a Sub-Inspector of Police, searched his shop on 1st October, 1949 and seized therefrom 10 bottles (M.O. 1) suspected to contain liquor. On analysis, on 12th December, 1949, they were found to contain 1·4 per cent spirits. The petitioner's contention before the learned Chief Presidency Magistrate, who tried him, was that the bottles seized from his shop were bottles called *Jeeva Bhaskaram*, a medicinal preparation exempted by the Madras Government from the operation of the Prohibition Act and said to contain 0·2 per cent spirits and manufactured by D.W. 1, K. B. Subramaniam, an illiterate man who submitted a bottle of this mixture to the Board of Revenue which tested it and found it to contain 0·2 per cent spirits, and exempted it from the operation of the Act. D.W. 2, a neighbouring shopkeeper, corroborated the petitioner's version and said that the 10 bottles seized were only bottles of *Jeeva Bhaskaram*. The learned Chief Presidency Magistrate did not believe the evidence of D.W. 2 as he was a neighbouring shopkeeper and a fellow Muslim, and might have been actuated by a desire to make the petitioner escape. He was confirmed in this belief by the fact that D.W. 2 stood surety for the petitioner and got him out of jail. The lower Court held that the 10 bottles seized from the petitioner were not bottles of *Jeeva Bhaskaram* and must have been different bottles containing a higher percentage of spirits. It believed the evidence of P.W. 1 that the bottles he seized did not have the label *Jeeva Bhaskaram* on them, as spoken to by the petitioner and D.W. 2. It also went on to observe that even if the bottles seized were really bottles of *Jeeva Bhaskaram*, the petitioner would still be liable to be convicted under the Madras Prohibition Act as, on examination by the analyst, the contents of these bottles showed 1·4 per cent spirits instead of 0·2 per cent spirits which alone had been found in the *Jeeva Bhaskaram* bottle submitted to the Board of Revenue and Government for exemption, and exempted from the

*Cr.R.C. No. 996 of 1950. (Cr.R.P. No. 949 of 1950). 7th March, 1951.

operation of the Act. D.W. 1, the maker of the preparation, said that with long keeping the spirits content of the *Jeeva Bhaskaram* would go on increasing. The lower Court remarked that even if that were so the petitioner would still be liable, as he should have sold them away before the spirit content increased above 0·2 per cent, the exempted figure. It, therefore, convicted the petitioner under section 4 (1) (*a*) of the Madras Prohibition Act, and sentenced him to pay a fine of Rs. 100 or, in default, to undergo rigorous imprisonment for six weeks.

I have perused the records and heard the learned counsel for the petitioner and the learned State Prosecutor *contra*. The learned counsel for the petitioner urged vehemently that the bottles seized were only *Jeeva Bhaskaram* bottles, and not any other bottles, and that the lower Court went wrong in believing the uncorroborated testimony of P.W. 1 that they were not *Jeeva Bhaskaram* bottles, especially when Munuswami Gramani, one of the Panchayatdars present at the seizure was not examined to corroborate P.W. 1, and no one else also had corroborated him, and D.W. 2, a neighbouring shopkeeper, had sworn that the bottles seized were only *Jeeva Bhaskaram* bottles. The learned State Prosecutor agreed that Munuswami Gramani ought to have been examined to corroborate P.W. 1 in the circumstances of this case. I have no hesitation whatever in holding that, in the circumstances of this case, Munuswami Gramani ought to have been examined if the prosecution relied on its contention that the bottles seized were not *Jeeva Bhaskaram* bottles. The Madras Prohibition Act gives very great powers to searching authorities, and inflicts very severe punishment on people committing offences under the Prohibition Act. It is therefore of the utmost importance that there should be a satisfactory evidence before the Courts regarding the articles seized from each accused person. That is why search officers have to take Panchayatdars with them at the time of the search under the law, but the object of taking such Panchayatdars will be frustrated if those Panchayatdars, or one of them at least, are not examined in Court to corroborate the evidence of the search officer. It is no use saying that P.W. 1, the Sub-Inspector of Police, had no motive to perjure against the petitioner. When his statement that the bottles seized by him were not *Jeeva Bhaskaram* bottles were disputed, it was the clear duty of the prosecution to have examined Munuswami Gramani, the Panchayatdar, to corroborate P.W. 1. Failure to do so will only lead to one result, namely, giving the benefit of doubt to the petitioner, and holding that the bottles seized by P.W. 1 were *Jeeva Bhaskaram* bottles, as I do now.

Now we come to the second point. I cannot agree with the lower Court that it was the duty of the petitioner to examine the contents of *Jeeva Bhaskaram* bottles given to him for sale by the manufacturer, D.W. 1, or his agents, and to satisfy himself that those contents did not exceed 0·2 per cent spirits, as found in the bottle submitted to the Board of Revenue for examination before it approved its exemption. No dealer can be compelled under the law to open bottles of medicines and preparations containing a percentage of spirits and exempted from the Act, in order to see whether they contained more spirits than found by the authorities when they were exempted. In that case, every bottle of Woodwards Gripe Water and other well-known medicines will have to be opened and tested by the dealers and commission agents, who are often not qualified at all to examine the contents before they can sell them. Once the Government takes the grave responsibility of exempting any medicine or preparation from the Prohibition Act, it must take the risk of some of the bottles of that preparation so exempted containing, either deliberately or accidentally, more spirits than the bottles submitted to the Government for purpose of exemption, did. That risk will be greater in the case of country preparations, like *Jeeva Bhaskaram* made by the illiterate D.W. 1, than in the case of standard preparations like Woodward's Gripe Water manufactured by well-known chemists. The lower Court went further and observed that even if the spirits content of *Jeeva Bhaskaram* would increase by keeping, it was the petitioner's duty to see that the 0·2 per cent spirits, exempted, was not exceeded. It forgot that the petitioner must find a buyer and cannot be expected to sell without finding

him. Once the preparation is exempted, it must be taken for granted that any dealer or commission agent, like this petitioner, trading in such preparation is free to trade in it without examination of the contents or limitation of the period of keeping unless, of course, the notification exempting the preparation prescribes these additional limitations, which is not the case here, or the dealer adds spirits himself, which also is not the case here.

In the end, therefore, I give the benefit of the doubt to the petitioner and set aside his conviction and sentence, and acquit him, and direct the fine, if paid to be refunded to him.

V.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

C. Raghava Variar and another .. *Accused* *

Criminal Procedure Code (V of 1898), section 438 (1)—Reference on appeal by one only of the several accused—High Court, if can accept reference on behalf of the other accused also.

The powers of a Criminal Court of Justice, in revision are even wider than the powers of a Civil Court acting under Order 41, rule 33 of the Civil Procedure Code.

Where the owner of a house alleged to have been used as a common gaming-house is acquitted by the Appellate Court of the offence under section 8 of the Madras Gaming Act and a reference is made in respect of one of the other accused convicted under section 9 of the Act who alone had appealed, the High Court can accept the reference on behalf of the non-appealing accused also and set aside the convictions and sentences of those accused also.

Case referred for the orders of the High Court under section 438 (1), Criminal Procedure Code, by the Sessions Judge, North Malabar, in his letter, dated 22nd June, 1950, in Crl. R.P. No. 4 of 1950 on his file (C.A. No. 42 of 1949, Joint Magistrate's Court, Tellicherry, in C.C. No. 550 of 1949, on the file of the Court of the Sub-Magistrate, Taliparamba).

S. Venkatachala Sastri for accused.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

The Court made the following

ORDER.—As accused 1 was acquitted by the appellate Court of the offence under section 8 of the Madras Gaming Act, though it was admittedly his own house and he permitted the gaming therein, obviously on the ground that it was not proved to be "a common gaming-house," it follows that all the accused should also have been acquitted of the offence under section 9 which will apply only to gaming in "a common gaming-house." There has been also no appeal against the acquittal of accused 1 regarding section 8 by the State. So, the reference by the Sessions Judge, North Malabar, is right. When the trunk is cut and falls, the branches will fall by themselves. Though accused 3 and 4 did not appeal, and are not represented before me by any counsel (possibly due to poverty, ignorance of law, despair, etc.). I see no reason why I should reject the reference as regards them alone when there is no difference between their case and the case of accused 1 and 2, in law and in fact, and when Order 41, rule 33, Civil Procedure Code, allows a Court to interfere in the interests of justice for the benefit of even *ex parte* defendants who have not appealed, and the powers of a Criminal Court of justice, in revision, are, in this respect, even wider. I accept the reference of the Sessions Judge, North Malabar, in full, and set aside the convictions and sentences of accused 1 to accused 4 under section 9, acquit them of that offence, and order the fines, if paid, to be refunded.

V.S. ——— *Reference accepted against all the accused.*

* Cr. R.C. No. 697 of 1950. 29th March, 1951.
(Case Referred No. 53 of 1950).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Doddapaneni Sitaramiah (died) and others .. *Appellants**

v.

Sanka Kanakaiah and others .. *Respondents.*

Transfer of Property Act (IV of 1882), section 119 (as amended)—Scope and applicability.

Section 119 of the Transfer of Property Act as amended in 1929 at the same time enlarges and limits the scope of the previous section. Under the amended section not only a party deprived but also his transferee can get back the thing transferred. He can recover the property not only from the other party to the exchange but also from any person claiming through him, his legal representative or transferee from him without consideration. Under the amended section the right to the return of the thing transferred is limited only to the three classes of persons specified therein and that so long as they continued to be in possession of the same. As a right to a return of the thing exchanged implies a cancellation of the transaction, it follows that a person who seeks to exercise his right of re-entry must also be in a position to restore to the other person the property he got under the exchange. Under section 119 a party to an exchange who lost the property got by him thereunder will have a statutory right of re-entry subject to certain specified conditions and limitations and if he seeks to exercise that right, he must be bound by the conditions and cannot import or rely upon other equitable considerations.

Hence, there can be no right of re-entry as against trespassers because they are neither the original parties nor their legal representatives nor transferees from them without consideration within the meaning of section 119 of the Transfer of Property Act.

Appeal against the decree of the Court of the Subordinate Judge, Tenali, dated 22nd July, 1947, in O.S. No. 34 of 1946.

B. V. Subrahmanyam for Appellants.

G. Chandrasekhara Sastri and *K. B. Krishnamurthi* for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal against the decree and judgment of the Subordinate Judge of Tenali in a suit filed by the first respondent for recovery of possession of the B schedule lands and for mesne profits. The plaint B schedule property of the extent of 2 acres 68 cents is agraharam land situate in the village of Belijepalli. A schedule property of the extent of 1 acre 68 cents bearing D. No. 408/1 is situate in the village of Nelapadu. The B schedule property originally belonged to one Venkamamidi Balakrishnayya, the paternal grandfather of defendants 1 and 2. He was also the hereditary trustee of the temple of Sri Sitaramanjaneyaswami Varu. A schedule property was an endowment to the temple. On 17th March, 1933, under Exhibit A-1 Balakrishnayya sold the B schedule property to the plaintiff for Rs. 850. On 19th March, 1933, by Exhibit A-2 Balakrishnayya as trustee of the temple and the plaintiff executed an exchange deed whereunder the temple gave the A schedule property to the plaintiff in exchange of the B schedule properties which the plaintiff purchased from Balakrishnayya two days prior. Subsequently it transpired that the northern half of the A schedule property was mortgaged to one Choparala Lakshminarayana. He filed O.S. No 63 of 1932 in the Court of the Subordinate Judge of Bapatla and in execution of the decree obtained therein, he purchased the property and took delivery of the northern half of A schedule lands with crops thereon on 7th December, 1943. The plaintiff therefore was dispossessed of the northern half of the A schedule land, *i.e.*, 87½ cents in extent. Meanwhile, on 4th December, 1934, Balakrishnayya sold the B schedule property along with some other lands in his personal capacity to the fifth defendant. The 6th defendant is the brother of the 5th defendant and both of them are alleged to be in possession of B schedule property. Defendants 1 and 2 are the grandsons of Balakrishnayya. Defendants 3 and 4 are the same persons but added in their separate capacity as the present trustees of the temple. The plaintiff, after having lost half of A schedule property he got under the exchange deed, filed this suit for recovery of possession of B schedule lands with mesne profits and alternatively for compensation from defendants 1 to 4 for the loss incurred by him by being

* Appeal No. 454 of 1947. 5th December, 1950.

dispossessed of half the lands he got under the exchange deed. Defendants 1 to 4 pleaded *inter alia* that the sale deed in favour of the plaintiff conveying the B schedule property was nominal and at any rate not binding on their shares of the property and that the exchange deed was void as it was brought about by fraud and collusion and in breach of trust. Defendants 5 and 6, apart from questioning the validity of the exchange, also contended that Balakrishnayya was the absolute owner of the B schedule property and therefore the fifth defendant acquired a valid title thereto under the sale deed in his favour. The following issues reflect the contentions of the parties :

"1. Whether B schedule property was the self-acquired or joint family property of Balakrishnayya ?

2. Whether the reunion set up by defendants 1 to 4 is true and valid ?

3. (*a*) If the reunion is true, whether the sale deed dated 17th March, 1933, is supported by consideration, valid and binding on defendants 1 and 2 ?

(*b*) Whether the exchange deed dated 19th March, 1933, between the plaintiff and late Balakrishnayya was beneficial to the deity and binding on it ?

4. If the exchange deed is void, is the plaintiff entitled to any and what damages ?

5. Whether the plaintiff is entitled to recover any and what portion of the B schedule property ?

6. Whether defendants 5 and 6 are *bona fide* purchasers for value and whether they have acquired any title ?

7. Whether the defendants 5 and 6 are entitled to any and what improvements ?

8. Whether the plaintiff is entitled to any and what mesne profits ? "

Pending the suit, the plaintiff filed I.A. No. 600 of 1947 for withdrawing the suit against defendants 1 to 4 with liberty to file a fresh suit for the reliefs against them and the petition was allowed on 9th July, 1947. Thereafter, the suit proceeded against defendants 5 and 6 alone and the trial was confined to issues 5 to 8. The learned Subordinate Judge on a consideration of the evidence, held that the sale deed and exchange were not nominal transactions but were acted upon and that the plaintiff would be entitled to a decree for possession of B schedule property under section 119, Transfer of Property Act. He also awarded mesne profits, past and future. Defendants 5 and 6 have preferred the above appeal. As the fifth defendant died pending the appeal the third and fourth appellants are added as his legal representatives along with the second appellant. The plaintiff is the first respondent and defendants 1 to 4 are also added as respondents 2 to 5.

Learned counsel for the appellants raised before me two points. (1) On the findings arrived at by the lower court, defendants 5 and 6 would be trespassers without title and therefore the plaintiff would not be entitled to possession under section 119, Transfer of Property Act. (2) The lower court should not have allowed the plaintiff to withdraw the suit as against defendants 1 to 4 at a late stage with liberty to file another suit as by that procedure, defendants 5 and 6 who were expecting defendants 1 to 4 to establish the defences raised by them, were taken unawares and therefore were prejudiced. If defendants 1 to 4 were on record and the issues framed at their instance were also decided in their favour, either on the ground that the sale deed Exhibit A-1 was nominal or did not bind the shares of defendants 1 and 2 or for the reason that the exchange deed Exhibit A-2 was void for one reason or another, the suit would have been dismissed wholly or in part in which case defendants 5 and 6 would have acquired a valid title from Balakrishnayya to that extent.

The first question turns upon the construction of section 119, Transfer of Property Act. It reads :

"If any party to an exchange or any person claiming through or under such party is by reason of any defect in the title of the other party deprived of the thing or any part of the thing received by him in exchange, then, unless a contrary intention appears from the terms of the exchange such other party is liable to him or any person claiming through or under him for loss caused thereby, or at the option of the person so deprived, for the return of the thing transferred, if still in the possession of such other party or his legal representative or a transferee from him without consideration."

This section adopted the old English common law doctrine and implies both a condition and a warranty of title giving rise to a right of re-entry on the thing exchanged and giving rise to compensation for damages sustained. Section 119 was substituted for the original section by Amending Act of 1929. The old section was in the following terms :

"In the absence of a contract to the contrary, the party deprived of the thing or part thereo he has received in exchange, by reason of any defect in the title of the other party, is entitled at his option to compensation or to the return of the thing transferred by him."

There was a conflict of judicial opinion on the interpretation of the unamended section. The Madras High Court held that under that section a transferee for consideration would also be liable to return the thing exchanged if the other party lost the property given to him in exchange by title paramount—see *Srinivasa Aiyangar* v. *Johnsa Rowther*[1] and *Chidambara Tevar* v. *Swaminatha Rao*[2], whereas the Lahore High Court has taken the view that the original section assumed a case in which the parties to the exchange had retained the properties exchanged and were in a position to restore them and therefore the principle of that section did not apply to an innocent transferee for value from one of the parties to the exchange—*Ganga Singh* v. *Raghu Ram*[3]. This view was also accepted by the Nagpur High Court which held that section 119 can have no reference to the case of a third person who is not a party to the exchange and who is not in any way bound by it, *Sujat Khan* v. *Seth Nazafali*[4]. The amended section at the same time enlarges and limits the scope of the previous section. Under the amended section not only a party deprived but also his transferee can get back the thing transferred. He can recover the property not only from the other party to the exchange but also from any person claiming through him, his legal representative or a transferee from him without consideration. The unamended section was couched in general terms which gave scope for the argument that under the section the property could be recovered from persons who are *bona fide* purchasers for consideration and even from trespassers. But under the new section, the right to the return of the thing transferred is limited only to the three classes of persons specified therein and that so long as they continued to be in possession of the same. It may also be mentioned that a right to a return of the thing exchanged implies a cancellation of the transaction and therefore the parties should be placed in the position in which they were before the transaction. It follows from the said proposition that a person who seeks to exercise his right of re-entry must also be in a position to restore to the other person the property he got under the exchange. Under section 119 a party to an exchange who lost the property got by him thereunder will have a statutory right of re-entry subject to certain specified conditions and limitations and if he seeks to exercise that right he must be bound by the conditions and cannot import or rely upon other equitable considerations. If the aforesaid propositions are borne in mind the solution to the instant problem is not difficult. On the facts found by the learned Subordinate Judge, defendants 5 and 6 are in the position of trespassers as they purchased from a person who had no title to alienate the same.

The contracting parties to the exchange were the plaintiff and the trustee of the temple. Defendants 5 and 6 are therefore neither the original parties nor their legal representatives nor transferees from them without consideration within the meaning of section 119, Transfer of Property Act. The section therefore obviously cannot apply to them. It was argued with some plausibility that this construction would lead to anomalous results as a party to an exchange can exercise his right of re-entry against the other party to the exchange or his representatives but cannot recover the property from a trespasser who has no right at all to be in possession. This may be a lacuna but it is for the Legislature to amend the section. But if the argument is accepted it will lead to equally curious results. Though a party to the exchange is deprived of the

1. (1919) I.L.R. 42 Mad. 690.
2. (1940) 1 M.L.J. 248.
3. A.I.R. 1934 Lah. 934.
4. A.I.R. 1934 Nag. 61.

part of the land he got under the exchange deed, he can recover the entire property given to the other party without at the same time giving up the property in his hands for the trespasser would not be entitled to that. The principle, *viz.*, that in the happening of a contingency contemplated under section 119, Transfer of Property Act, both the parties should be placed in the position they occupied prior to the exchange will certainly be violated. It cannot be said that the construction I am putting on this section, which in my view is in accord with the express terms used therein, will necessarily lead to any hardship, for the party, who was deprived of the property, can exercise his alternative right, *viz.*, to recover damages from the other party. That alternative remedy certainly is given only to meet the contingency of the other party not being in possession at the time when the first party exercises his right of re-entry. I am therefore constrained to hold that section 119 has no application and the plaintiff is not entitled to recover possession under that section. He could have, if he so wished, pressed his relief for compensation against the other defendants or taken other steps to enable the said defendants to recover possession from the trespasser; but he has chosen the course of withdrawing the suit against them and if he suffers it is only because of hi action.

In the view I am taking on the first point, the second question need not be gone into. The plaintiff withdrew his suit and it was dismissed against defendants 1 to 4. They did not prefer an appeal against the order of the lower Court allowing the plaintiff to withdraw the suit with liberty to file a fresh suit. The appellants before me obviously cannot have any grievance as the decree against them will be vacated.

In the result the decree of the lower Court is set aside. The appeal is allowed with costs against the first respondent here and in the Court below.

V.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE SOMASUNDARAM.

Hoosen Kasam Dada (India) Ltd. .. *Petitioner**

v.

Custodian of Evacuee Property, Madras and others .. *Respondents.*

Administration of Evacuee Property Ordinance (XXVII of 1949) and Administration of Evacuee Property Act (XXXI of 1950)—Company registered in Calcutta—Branch at Madras—Jurisdiction of Assistant Custodian of Evacuee Property in Madras to declare the firm in Madras as evacuee property.

Neither the Administration of Evacuee Property Ordinance, 1949, nor the Administration of Evacuee Property Act, 1950, which replaced the Ordinance extends to West Bengal. It follows therefore that a company registered in Calcutta could not be declared to be an evacuee under either the Ordinance or the Act, though it is very doubtful whether a Company incorporated under the Indian Companies Act would fall within the defintion of an "Evacuee". The fact that there is a branch of a public limited company situate in Madras cannot empower the Assistant Custodian of Evacuee Property at Madras to take proceedings under the Ordinance or the Act in respect of a company situated in West Bengal. He has no jurisdiction to declare the firm in Madras as evacuee property.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in A. C. No. 271 of 1949 on the file of the Assistant Custodian of Evacuee Property, Madras, and the records in A. C. No. 7 of 1950 on the file of the Deputy Custodian of Evacuee Property, Madras, and to quash the orders therein.

S. Azizuddin for Petitioner.

The State Counsel (*V. K. John*) for Respondent.

* C, M, P. No. 5067 of 1950. 22nd January, 1951.

The Order of the Court was made by

Chief Justice.—Hoosen Kasam Dada (India) Ltd. is admittedly a public limited company registered in Calcutta. It has got a branch functioning at Madras. The Assistant Custodian of Evacuee Property passed an order on 22nd February 1950, which concludes thus :

"Hence considering the above circumstances, I declare the firm of Hoosen Kasam Dada (India) Ltd., in Madras as evacuee property under Section 2 (*f*) of the Ordinance and will be notified accordingly."

There is some obviuous confusion here. It is only property that can be declared to be evacuee property and a firm as such is not property. It must be again pointed out that there is a very important difference between a limited company and a firm. The circumstances which, in the opinion of the Assistant Custodian, justified the order which he passed were that 96 out of 121 shareholders of the company were in Pakistan and they were evacuees under section 2 (*d*) (i) of the Administration of Evacuee Property Ordinance, 1949.

Assuming that the majority of the shareholders of the company could be held to be evacuees within the meaning of section 2 (*d*) (i) of the Ordinance, the question is : whether the Ordinance itself is applicable to this case. Admittedly these 96 shareholders were not residents of Madras before they migrated to Pakistan, which fact is denied by the counsel for the petitioners. The company was registered in Calcutta and it is the High Court at Calcutta that would be the Court having jurisdiction over that company. Now neither the Ordinance nor Act XXXI of 1950 which replaced the Ordinance extends to West Bengal. It follows therefore that the company itself could not be declared to be an evacuee under either the Ordinance or the Act, though we entertain considerable doubt whether a company incorporated under the Indian Companies Act would fall within the definition of "an evacuee". The fact that there is a branch of a public limited company situate in Madras cannot empower the Assistant Custodian of Evacuee Property at Madras to take proceedings under the Ordinance or the Act in respect of a company situated in West Bengal. Obviously, the dividends, if any, would be distributed only from the registered office at Calcutta and presumably the transactions of the Branch offices, if there are many, would also be taken into account before arriving at the net profit or loss. We are, therefore, constrained to hold that the Assistant Custodian of Evacuee Property had no jurisdiction to pass the order that he did.

There was an appeal from his order to the Custodian who confirmed the order of the Assistant Custodian. He held that since the vast majority of the shareholders of the "firm" were in Pakistan, the order of the Assistant Custodian "declaring the firm to be an evacuee firm and taking over its properties" is correct. This is obviously wrong. The Assistant Custodian at Madras cannot take over properties belonging to a company registered in Calcutta, *i.e.*, in West Bengal, to which neither the ordinance nor the Act extends. Then the Custodian went on to make a curious order, namely, that

"the share of the 25 non-evacuee shareholders in the net assets of the firm will be refunded to them, but they cannot do any business in the name of the firm in this district."

Evidently, the Custodian did not realise that in effect he was ordering the winding up of the company. He had no jurisdiction to pass any such order and any proceeding for having the company wound up must be taken only in the High Court at Calcutta. His order also must be, and is hereby, quashed. There will be no order as to costs.

V.S. ——— *Order quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AIYAR.

The Indian Mutual Life Association Ltd. .. *Appellant**

v.

The Commissioner, Corporation of Madras .. *Respondent.*

Specific Relief Act (I of 1877), section 45, Proviso (d)— Applicant for mandamus having other remedies under Schedule IV to the Madras City Municipal Act (II of 1919) in respect of assessment to company's tax under section 110, City Municipal Act—Right to relief.

In an application by the appellant under section 45 of the Specific Relief Act for a direction to the Commissioner, Corporation of Madras to correct the books maintained by him under rule I of Schedule IV of the Madras City Municipal Act by deleting the name of the appellant in the said books from the list of Companies liable to payment of Company's tax.

Held : (*i*) The remedy by way of *mandamus* would be available only if the applicant has no other specific adequate legal remedy. (*ii*) The appellant had the remedies provided in Schedule IV to the City Municipal Act in respect of the assessment. He could file an appeal to the Taxation Appeals Committee and then to the Chief Judge of the Court of Small Causes and could also ask for a reference to the High Court if a question of law was involved in the case. From the fact that the appellant may be compelled to take similar proceedings by way of appeals and references every half-year if he is assessed, it cannot be held that the remedies under the City Municipal Act are not adequate.

Accordingly, the application for issue of *mandamus* is not maintainable.

Appeal against the judgment and order of Rajagopalan, J., dated 9th February, 1950, in the exercise of the Ordinary Original Civil Jurisdiction in Application No. 4688 of 1949.

T. M. Ramaswami Aiyar and *A. R. Krishnaswami* for Appellant.

Messrs. John and *Row* for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—This is an appeal against the order of Rajagopalan, J., dismissing an application by the appellant, the Indian Mutual Life Association Ltd., made under section 45 of the Specific Relief Act. The appellant prayed that the Commissioner, Corporation of Madras, be directed to correct the assessment books maintained by him under rule 1, of Schedule IV of the Madras City Municipal Act by deleting the name of the applicant in the said books from the list of companies liable to payment of company's tax and thereby bring the assessment books in conformity with the order passed by the learned Chief Judge of the Court of Small Causes in Taxation Appeal No. 2 of 1947, dated 24th February, 1948.

The immediate cause for the application was the demand by the Corporation of company's tax for the first half year 1949-50. There was a prior assessment of company's tax on the appellant company in 1942-43, and the company eventually succeeded in obtaining a decision from the Court of Small Causes in Appeal (T. A. No. 2 of 1947) that the appellant was not liable to be assessed under section 110 of the City Municipal Act. It is admitted that, in accordance with this decision of the Court of Small Causes, the tax collected from the appellant for that half-year was refunded. It also appears that after the date of that decision there has been no further levy of company's tax on the appellant till 1949-50.

The first question that arises is whether a remedy by way of an application under section 45 of the Specific Relief Act is open to the appellant. Proviso (*d*) to that section enacts that the remedy by way of *mandamus* would be available only if the applicant has no other specific and adequate legal remedy. It was conceded that, in respect of the assessment now in dispute, the appellant had the remedies provided in Schedule IV to the City Municipal Act. He could first file an appeal to the Taxation Appeals Committee and then to the Chief Judge of the Court of Small Causes and he could also ask for a reference to this Court if a question of law was involved in the case. There is therefore another specific legal remedy. But it was contended

* O.S.A. No. 46 of 1950.

5th January, 1951.

that this remedy is not adequate, because the appellant may be compelled to take similar proceedings by way of appeals and references in every half-year. Assuming this is so and that it would cause the appellant inconvenience and expense, we cannot hold that on that ground the remedies under the City Municipal Act are not adequate. For that matter, even in spite of an order on this application, it may be the Commissioner might again assess the appellant in which case the appellant may have to again resort to another application under section 45 of the Specific Relief Act. But then Mr. T. M. Ramaswami Aiyar, for the appellant, urged that the decision of this Court would be *res judicata*. In fact, he went further and contended that even the decision of the Small Cause Court in respect of the assessment of the year 1942-43 would operate as *res judicata*. We have not heard him on this point as, in our opinion, this is a point which might well be taken before the Court of Small Causes. The only question which falls for decision is whether this application under section 45 of the Specific Relief Act is maintainable. As, in our opinion the appellant has another specific and adequate legal remedy, the application is not maintainable.

The application does not appear to be maintainable also for another reason. The prayer as framed is for a direction to correct the assessment books maintained by the Corporation by deleting the name of the applicant from the list of companies liable to payment of company's tax. We see nothing in the provisions of the City Municipal Act, including the schedules under which a permanent record of assessment is kept in which occasionally there should be changes made in accordance with decisions of Courts, something like what is done in the case of Survey and Settlement registers and Record of Rights. It cannot therefore be said that it was incumbent on the Commissioner to do any such act as is mentioned in the application of the appellant.

For these reasons we agree with the learned Judge that the application must be dismissed as not maintainable. We have, of course, refrained completely from going into the merits in the view that we have taken. The appeal fails and is dismissed with costs.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Moppuru Narayana .. *Petitioner**

v.

Mallavarapu Lurudu Mareyya .. *Respondent.*

Stamp Act (II of 1899) section 35, proviso (a) and Schedule I, Article I—Scope—Implied promise to pay the debt inherent in an acknowledgment—Does not take it out of first part of Article 1 of Schedule I—Exclusion from proviso (a) to section 35—Such acknowledgment inadmissible in evidence.

An acknowledgment which does not contain an express promise to pay the debt though an implied promise is inherent in it falls under the first portion of Article 1 of Schedule I, of the Stamp Act and is therefore inadmissible in evidence under section 35 and the prohibition in proviso (*a*) applies to it.

Observations in *Maniram Seth* v. *Seth Rupchand*, (1906) 16 M.L.J. 300 : 33 I.A. 165 : I.L.R. 33 Cal. 1047 (P.C.), *distinguished.*

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge, Tenali, dated 20th March, 1947, in S. C. S. No. 140 of 1946.

U. Sethumadhava Rao for Petitioner.

K. Kanniah for Respondent.

The Court delivered the following

JUDGMENT.—This revision is by the plaintiff against the dismissal of Small Cause Suit No. 140 of 1946 by the Subordinate Judge of Tenali.

* C. R. P. No. 1192 of 1947. 17th March, 1950.

The suit is for the recovery of Rs. 331-4-0 based on an acknowledgment of liability made by the defendant in his own writing on 11th May, 1945. This was done in a note book belonging to the plaintiff and it was left in the possession of the plaintiff. The writing was in Telugu and as there was some dispute with regard to the translation, I had it translated by Court and it reads as follows :

"Three hundred and two rupees and annas eight only being the amount due to this date on looking into the accounts up to this date in respect of miscellaneous khatha (account) and in respect of the principal and interest relating to previous accounts. (Sd.) Mallavarapu Lurudu Marayya".

The plaintiff bases his action solely on this acknowledgment as is clear from his averments in paragraphs 1 and 4 of his plaint. The lower Court finds that there is no other evidence of the amount now claimed except the ackr owledgment relied on and this finding is not seriously disputed by the plaintiff. The only question is whether this document is admissible in evidence. Under section 35 of the Stamp Act

"no instrument chargeable with duty shall be admitted in evidence for any purpose . . . . . unless such instrument is duly stamped ;"

"Provided that :

(*a*) any such instrument not being an instrument chargeable with a duty of one anna (or half an anna only), or a bill of exchange, or promissory note, shall, subject to all such exceptions, be admitted in evidence on payment of the duty with which the same is chargeable . . . . . together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, or a sum equal to ten times such duty or portion."

Article 1 of Schedule I is as follows :

"1. Acknowledgment of a debt exceeding twenty rupees in amount or value, written or signed by, on behalf of a debtor in order to supply evidence of such debt in any book (other than a banker's pass book) or on a separate piece of paper when such book or paper is left in the creditor's possession ; provided that such acknowledgment does not contain any promise to pay the debt or any stipulation to pay interest or to deliver any goods or other property".

This document will therefore be admissible in evidence only if it falls within the proviso. The classes of documents to which the prohibition in the proviso applies are (1) bill of exchange, (2) promissory note (3) an instrument chargeable with the duty of one anna or half anna only. If this document therefore falls within any one of the above classes, it will not help the plaintiff. That this is not a bill of exchange or a promissory note is clear from the terms of the document and is conceded to be so by both the parties. What is contended for by the plaintiff is that though apparently this falls under Article 1 to Schedule I, it does amount to a promise to pay the debt and therefore this falls outside the purview of documents prohibited under proviso (*a*) to section 35 ; that is to say the privilege granted by the proviso which does not apply to the three classes of documents mentioned above applies to this case. This argument is based on the dicta of the Privy Council in *Mauiram Seth* v. *Seth Rupchand*[1]. Their Lordships in that case were considering the question whether a particular statement amounts to an acknowledgment within the meaning of section 19 of the Limitation Act. The statement which was the subject of construction by the Privy Council was :

"For the last five years he (the respondent) had open and current account with the deceased".

Their Lordships construed this as a clear admission on the part of the respondent that there were open and current accounts between the parties and they furtherheld :

"The legal consequence would be that at that date either of them had a right as against the other to an account. It follows equally that, whoever, on the account should be shown to be the debtor to the other, was bound to pay his debt to the other, and it appears to their Lordships that the inevitable deduction from this admission is that the respondent acknowledged his liability to pay his debt to Motiram or his representative, if the balance should be ascertained to be against him" (at page 1057.)

Then they proceeded to consider whether this is sufficient under the Indian Law to take the case out of the statute of limitation and they held this was a sufficient acknowledgment. In doing so they pointed out that there is no reason for drawing any distinction between the English and Indian law and held following In re *River Steam Co., Mitchell's claim*[2]:

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1. (1906) 16 M.L.J. 200 : L.R. 33 I.A. 165 : I.L.R. 33 Cal. 1047 (P.C.).
2. (1871) L.R. 6 Ch. App. 822.

"That an acknowledgment to take the case out of the Statute of limitations, must be either one from which an absolute promise to pay can be inferred, or, secondly, an unconditional promise to pay the specific debt."

They further added :

"An unconditional acknowledgment has always been held to imply a promise to pay, because that is the natural inference, if nothing is said to the contrary. It is what every honest man would mean to do. There can be no reason for giving a different meaning to an acknowledgment that there is a right to have the accounts settled, and no qualification of the natural inference that whoever is the creditor shall be paid, when the condition is performed by the ascertainment of a balance in favour of the claimant."

These observations are relied on to state that this acknowledgment amounts to an unconditional promise to pay and this therefore takes the case out of the category of Article 1 and therefore is admissible in evidence. In the Privy Council case their Lordships were construing a particular statement as to whether it amounts to an acknowledgment within the meaning of section 19, Limitation Act, so as to save limitation. They were comparing the Indian and English Law. There is no doubt, there is an observation that every acknowledgment is an implied promise to pay. But the words in Article 1 are :

"That such an acknowledgment does not contain any promise to pay the debt or any stipulation to pay interest or to deliver any goods or other property."

It is one thing to say that an acknowledgment of a debt implied a promise to pay and another thing to find within the meaning of Article 1, Schedule 1, whether such an acknowledgment does or does not contain any promise to pay. The words "contain any promise to pay" in my opinion amount to more than a mere implied promise. If every acknowledgment of a debt is to be taken as containing a promise, then there is no need for the Legislature to add the words "provided that such an acknowledgment does not contain any promise to pay the debt". The words, undoubtedly, indicate express terms of promise and not merely an implied promise which is inherent in every acknowledgment of a debt. I therefore do not accept the contention that it is a promise to pay. It therefore falls under the first portion of Article 1.

The next question that has to be considered is whether this is intended to supply the evidence of debt. It is a matter which depends on the facts of each case and the lower Court has come to the conclusion that there was no other evidence in this case and that it is intended to supply evidence of the debt. I agree that this document was given to the plaintiff with the intention to supply evidence of a debt and therefore the document clearly falls within the first portion of Article 1, Schedule 1. If it falls under Article 1 then this document is inadmissible in evidence under section 35 and prohibition in proviso (*a*) applies to it. As pointed out by the lower Court there is no other claim based on the original cause of action. The suit was therefore rightly dismissed.

In the result the petition fails and is dismissed with costs.

K. S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AYYAR.

Dr. M. Krishnamoorthy .. *Petitioner**

v.

The State of Madras and another .. *Respondents.*

Constitution of India (1950), *Articles* 226, 227, 310 (1) *and* 311—*Dismissal of civil servant—Requirements of validity—High Court if can interfere with order of dismissal by the Government or Disciplinary Proceedings Tribunal.*

Under Article 310 (1) of the Constitution except as expressly provided by the Constitution, every person who is a member of civil service of the Union and every person who is a member of

* C. M. P. No. 11900 of 1950. 19th January, 1951.

civil service of the State holds office during the pleasure of the President or the Governor respectively.

Article 311 lays down two requirements to be fulfilled before a person who is a member of a civil service of a State is dismissed or removed. They are (1) that he shall not be dismissed or removed by an authority subordinate to that by which he was appointed and (2) that he shall not be dismissed or removed or reduced in rank until he has been given a reasonable opportunity to show cause against the action proposed to be taken in regard to him. The proviso exempts the observance of the second requirement in certain circumstances, *e.g.*, where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge.

It is nowhere stated on what grounds a civil servant might be dismissed or removed. One can conceive of a dismissal or removal being justified on grounds of inefficiency, insubordination or general reputation of corrupt conduct. It cannot be said that the ground on which a dismissal could be justified must be akin to a criminal charge. All that proviso (*a*) to Article 311 (2) enacts is that even the reasonable opportunity of showing cause need not be given to a person who has been actually convicted on a criminal charge.

So far as there is no contravention of Article 311 which corresponds to the provisions of section 240 of the Government of India Act (1935), the High Court would have no jurisdiction to quash an order of dismissal of a civil servant by the Government and interference under Article 226 will not be justified.

The prescribed proper authority of Government has ample power to dismiss and if such authority was satisfied that there was reasonable cause for such dismissal the High Court has no jurisdiction to interfere even if there are irregularities in the reception of evidence and the conclusions of the Tribunal are based on evidence on which no criminal Court would have convicted the dismissed servant.

Neither the Government nor the Disciplinary Proceedings Tribunal would fall within Article 227 and come under the superintendence of the High Court "over all Courts and Tribunals in the territories in relation to which it exercises jurisdiction."

The fact that rules are made to safeguard the rights of a civil servant in matters of disciplinary action does not mean that the High Court has jurisdiction to quash orders of Government dismissing a civil servant because one or other of the rules has been contravened.

Petition under section 226, Indian Constitution Act, praying that in the circumstances stated in the affidavit therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the proceedings taken by the respondents herein, for dismissal of the petitioner by order of the 1st respondent herein dated 3rd March, 1950, and of the order dated 7th July, 1950, on the appeal thereon and to quash the same.

C. T. Ramanujachari for Petitioner.

The Order of the Court was made by

The Chief Justice.—The petitioner was employed as an Assistant District Health Officer in the Public Health Department of the Madras State and he acted as the Municipal Health Officer at Srivilliputtur from November, 1947, till about the middle of March, 1948. On complaints against him from the residents of the locality sent to the Director of Public Health and other authorities, there was first an enquiry by the District Health Officer and subsequently by an officer of the Crime Investigation Department. The Government finally referred the matter to the Disciplinary Proceedings Tribunal for an enquiry. The Tribunal called upon the petitioner to show cause against certain charges which included a charge of corruption. The petitioner filed a written statement meeting the charges. The Tribunal proceeded with the enquiry, recorded evidence and submitted its report dated 31st October, 1949, to the Government. The Tribunal recommended that the petitioner may be removed from service. Government apparently did not agree that this was a sufficient penalty as, in their opinion, the charges were proved beyond doubt and therefore by order dated 3rd March, 1950, dismissed the petitioner from service with effect from 10th March, 1950. Against this order of dismissal, the petitioner preferred an appeal to His Excellency the Governor under the Civil Services (Classification and Appeal) Rules. This appeal was rejected on 7th July, 1950. The petitioner now seeks for a writ under Article 226 of the Constitution to quash the orders of Government dated 3rd March, 1950 and 7th July, 1950.

The learned counsel for the petitioner attempted to bring the case under Article 227 of the Constitution under which this Court is given superintendence

over all Courts and Tribunals throughout the territories in relation to which it exercises jurisdiction. We have no hesitation whatever in holding that neither the Government nor the Disciplinary Proceedings Tribunal would fall within Article 227.

The question is whether any interference under Article 226 will be justified in this case. Under Article 310 (1) of the Constitution, except as expressly provided by the Constitution, every person who is a member of a civil service of the Union and every person who is a member of a civil service of a State holds office during the pleasure of the President or the Governor respectively. Article 311 lays down two requirements to be fulfilled before a person who is a member of a civil service of a State is dismissed or removed. They are (1) that he shall not be dismissed or removed by an authority subordinate to that by which he was appointed and (2) that he shall not be dismissed or removed or reduced in rank until he has been given a reasonable opportunity to show cause against the action proposed to be taken in regard to him. The proviso exempts the observance of the second requirement in certain circumstances, *e.g.*, where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge. Admittedly both these requirements have been fulfilled in the case of the petitioner. He was not dismissed by an authority subordinate to that by which he was appointed. Before he was dismissed, he was given a reasonable opportunity of showing cause against his dismissal. He was given notice of the charges against him and he was given the opportunity of meeting them. In these circumstances, we fail to see anything which calls for our interference.

It is however contended by learned counsel for the petitioner that there is another implied requirement that civil servants in the position of the petitioner can be dismissed or removed only for misconduct and at one stage of the argument he even went to the length of contending that in the case of a charge like corruption, the petitioner must have been convicted by a criminal Court for that offence, or, in any event, that this Court must be satisfied in the exercise of criminal appellate jurisdiction so to say, that there was evidence on which a conviction could be supported. We see nothing of this sort laid down in Article 311 or in any other Article of the Constitution. It is nowhere stated on what ground a civil servant might be dismissed or removed. One can conceive of a dismissal or removal being justified on grounds of inefficiency, insubordination or general reputation of corrupt conduct. The Constitution itself does not give any clue. Learned counsel wanted to argue from proviso (*a*) to clause (2) of Article 311 that the ground on which a dismissal could be justified must be akin to a criminal charge. On the other hand, all that that proviso enacts is that even the reasonable opportunity of showing cause need not be given to a person who has been actually convicted on a criminal charge.

Learned counsel for the petitioner sought to attack the finding of the Disciplinary Proceedings Tribunal on the ground that there were irregularities in the reception of evidence and the conclusions of the Tribunal were based on evidence on which no criminal Court would have convicted the petitioner. Assuming that this complaint is well founded, we do not think that we have jurisdiction to set aside the dismissal of the petitioner. The prescribed proper authority of Government had ample power to dismiss the peitioner if that authority was satisfied that there was reasonable cause for such dismissal. All that had to be done was to afford a reasonable opportunity to him to show cause against the action proposed to be taken in regard to him.

Learned counsel for the petitioner also contended that the appeal was not properly disposed of because it was disposed of not by the Governor personally but by the Secretary to the Government, Public Health Department. Here again we should mention that the petitioner is not entitled under any statute or any statutory rule to a right of appeal. The Governor to whom an appeal is preferred is not a Tribunal subject to the superintendence of this Court. The fact that rules are made to safeguard the rights of civil servants in matters of disciplinary action does not mean that this Court has jurisdiction to quash orders of Government dismissing

a civil servant because one or other of the rules has been contravened. So far as there is no contravention of Article 311 of the Constitution which corresponds to the provisions of section 240 of the Government of India Act, 1935, this Court would have no jurisdiction to quash an order of dismissal by the Government.

The decision in *Lord Lecconfield* v. *Thornely*[1], was relied on and much time occupied with reading passages from the speeches of the noble Lords in that case. That case has no bearing whatever on the questions which arise in this case, because it was found by the House of Lords in that case that the office of a clerk of the Peace of the Country was an office held during good behaviour ; that is to say, that it was a freehold office and that the Local Government Act of 1888 did not change the tenure into a tenure of pleasure. Obviously, different considerations would prevail in the case of a freehold office which could not apply to the case of a tenure at pleasure as is the case of a civil servant of the State in the position of the petitioner.

The application is dismissed.

K. S. ——— *Application dismissed.*

[End of (1951) 1 M.L.J.]

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Rajamannar C.J. and Panchapakesa Ayyar, J.
28*th November*, 1950.

Govindaswami Padayachi *v.* Sheriff Rowther.
C. M. P. No. 9719 of 1950.

Madras Local Boards Act (*XIV of* 1920), *Rules for decision of Election disputes, Rule* 11 (2)—*Commissioner declaring election of a candidate void on account of offence of personation committed by his agent—Jurisdiction of Commissioner to declare the other candidate duly elected —No interference by* certiorari.

Where the Election Commissioner has declared the election of the returned candidate void as it was found that such candidate's agent was guilty of offence of personation, he can either declare the other candidate to have been duly elected or order a fresh election. Rule 11 of the Rules for decision of election disputes confers on the Election Commissioner full authority and discretion either to declare the other candidate duly elected or to order a fresh election. Where though it might have been better to have ordered a fresh election, the commissioner has exercised his discretion and declared the other candidate duly elected the High Court will not interfere by a writ of *certiorari*. 68 M.L.J. 932, relied on.

P. Satyanarayana Raju and *V. V. Raghavan* for Petitioner.

K. Rajah Aiyar and *R. Rangachari* for Respondent.

K.S. ——— *Application dismissed.*

Govinda Menon, J.
30*th November*, 1950.

Ramiah, *In re.*
Cr.R.C. Nos. 665 and 666 of 1949.
(Cr.R.P. Nos. 611 and 612 of 1949).

Penal Code (*XLV of* 1860), *sections* 186 *and* 21—*Commissioner appointed by Civil Court to divide properties by metes and bounds as a result of preliminary decree for partition— —If a public servant.*

A Commissioner appointed by a Court to divide the properties by metes and bounds as a result of a preliminary decree for partition is a public servant, within the meaning of the term under section 21 of the Penal Code. Persons obstructing such a Commissioner while measuring the properties are guilty of the offence under section 186 of the Penal Code. Though the Commissioner is not a permanent Government servant like an amin or a process server or a clerk, still he is an officer appointed or specially authorised by a Court of Justice to investigate and report on a question of fact as contemplated by clause 4 of section 21 of the Penal Code. The proper procedure for persons claiming the property or protesting against the Commissioner carrying out his duties will be to apply to the Court stating that the Commissioner was trespassing upon the lands which are not the subject-matter of the suit.

K. Bhimasankaram for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) on behalf of the State.

K.S. ——— *Petitions dismissed.*

Somasundaram, J.
1st December, 1950.

Venkatachallam Chettiar, *In re.*
Cr.R.C. No. 1608 of 1949.
(Cr.R.P. No. 1523 of 1949).

Madras Cloth (Dealers) Control Order (1948), *Sections* 4 (1) *and* 7 (1)—*Retail licence issued with clause prohibiting the licensee from selling B. & C. Mill Cloth—Validity of condition—Breach of condition—Effect.*

A condition prohibiting the licensee from selling B. & C. Mill Cloth cannot be validly introduced in a retail licence issued to a dealer and a prosecution for violating such a condition is unsustainable.

M. Ranganatha Sastri for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) and *A. S. Sivakaminathan* on behalf of the State.

K.S.

Accused acquitted.

Somasundaram, J.
7th December, 1950.

Rajagopalan, *In re.*
Cr. App. No. 750 of 1950.

The Madras Building (Lease and Rent Control) Act (XV of 1946), *Section* 3 (1) *—Monthly tenant assigning his tenancy to another—If vacancy which landlord is bound to give notice to accommodation controller.*

The house concerned was leased to *A*. *A* wrote to the landlord on 23rd October, 1948, that he had assigned the tenancy to *M* and that *M* will pay the rent subsequently and asking the petitioner to accept rent from *M*. The landlord subsequently accepted rent from *M*. The lease was not one for any fixed period but the usual monthly lease. On these facts

Held:—There was a termination of the tenancy on *A's* writing to the landlord and as a vacancy arose the landlord should have given notice of the vacancy to the controller. Failure to do so is an offence for which the landlord is liable.

T. M. Kasturi and *A. K. Sreeraman* for the Accused.

The State Prosecutor (*S. Govind Swaminathan*) on behalf of the State.

K.S.

Sentence reduced.

Govinda Menon, J.
8th December, 1950.

Sathayee *v.* Angappa Kone.
Cr.R.C. No. 1344 of 1949.
(Cr.R.P. No. 1269 of 1949).

Criminal Procedure Code (*V of* 1898), *Section* 488—*Custom of community under which a man after marriage lives in his wife's family house, and becomes a part of it and manages the properties of his wife and mother-in-law—Husband leaving wife's house—Liability to order of maintenance under section* 488, *Criminal Procedure Code.*

According to the custom of the community to which the parties belonged a man, after marriage lives in his wife's family house and becomes a part of it. He manages the properties of his wife and mother-in-law and should consider himself as a member of the family. Where on account of misunderstandings and exchange of words such a husband went away from his wife's house and lived outside and it was not his case that the wife or her mother had made it irksome or impossible for him to live with his wife, he must be deemed to have deserted his wife and he will be liable to an order of maintenance under section 488, Criminal Procedure Code, in default of his failure to return to the wife's home within a fixed time.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Petitioner.

Vepa P. Sarathy and *S. Krishnamurthi* for Respondent.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

K.S.

Order modified.

Subba Rao and Panchapakesa Ayyar, JJ.
31st *October*, 1950.

State of Madras *v.* Maharaja of Pithapuram.
Appeal Nos. 93 and 111 of 1947 and Transferred Appeals Nos. 251 to 257 of 1948.

Rivers—Bed of navigable rivers—Title to and law relating to—Madras River Conservancy Act (VI of 1884), *section* 16—*Refusal of permission to cultivate—Liability to pay compensation.*

(1) The bed of a navigable river in any part of India whether tidal or not, is vested in the Government, and not in the Zamindar or other private person owning lands on both sides of the river, unless it has been granted. The English Common Law Rule that the bed of non-tidal rivers, even though they are navigable, belongs to the riparian proprietors, does not apply to Madras State.

(2) To create a title to the river bed in the Government, the river should be navigable at that part of it where the disputed plots are situated.

(3) The ownership of the bed of the river would depend upon its character in 1802, the time of the Permanent Settlement and the grant of the adjacent land to the plaintiff.

(4) A river in India is not navigable in the legal sense unless it is navigable throughout the year, though it need not be navigable for a portion of the day, as at low tide.

(5) Facilities for passage of large river crafts which may not be capable of rising to the dignity of ships, seem to be generally considered sufficient to call a river affording such facilities a navigable river.

The mere fact that orders under section 16 of the Madras River Conservancy Act refusing permission for cultivation were proper and in public interests cannot take away the private parties' right to compensation, as no private party need shoulder the whole burden of conferring such a benefit on the public.

The Government Pleader (*P. Satyanarayana Raju*) and *V. Balakrishna Eradi* for Appellants in A. S. Nos. 93 of 1947, 251 to 257 of 1948 and Respondents in Appeal No. 111 of 1947.

A. Sundaram Aiyar, Ch. Ramakrishna Rao, U. Sethumadhava Rao and *K. Ramamurthi* for Respondents in Appeal No. 93 of 1947, etc., and with *C. Durga Bai* for Appellants in Appeal No. 111 of 1947.

K. S. *Appeals dismissed.*

Subba Rao, J.
28th *November*, 1950.

Province of Madras *v.* Arunachalam Chettiar.
Appeal No. 412 of 1947.

Madras Estates Land Act (I of 1908), *Section* 20-*A—Order of Collector under, declaring that a land is no longer required for original communal purpose and returning it to landholder—Government failing to appeal—Civil suit claiming that land—If barred.*

Under section 20-A of the Madras Estates Land Act the Collector can declare that a land which is set apart for any of the purposes referred to in section 3 (16) (*a*) and (*b*) is no longer required for its original purpose. He may also assign such a land for any other specified communal purpose. If such a land is not required for any communal purpose, he may convert the said land into ryotwari or ryoti as the case may be. If the Collector decides that the land is not required for any communal purpose, he is empowered to hand it over to the owner and for the purpose of ascertaining ownership he can look into the title deeds, but it is not intended, nor is it expected of him, that he should decide any dispute *inter se* between the landholder and the Government in respect of the title to the property. Such questions are in the exclusive jurisdiction of the Civil Courts.

The Government Pleader (*P. Satyanarayana Raju*) and *K. N. Karunakaran* for Appellant.

V. Ramaswami Ayyar for Respondents.

K. S. *Appeal dismissed.*

Rajamannar, C.J. and Panchapakesa Ayyar, J.
1st December, 1950.

Raju's Cafe, Coimbatore and others *v.* The Industrial Tribunal, Coimbatore.
C. M. P. No. 4409 of 1950.

Industrial Disputes Act (XIV of 1947), Section 10 (1) (c)—Single reference in respect of several managements and their workers—Validity—Conditions.

As a reference to the Industrial Tribunal was incompetent as it was in general terms the Government made to the same Tribunal a second reference in which it gave a list of 85 hotels and a list of 11 items of disputes. On a question as to the validity of such a reference,

Held:—If the Government had before them material to conclude that in respect of each of the 85 hotels there were disputes as regards each of the 11 items of disputes between the management and the workers, it cannot be said that a single reference would be incompetent. It will be a joinder of several references into one comprehensive reference to the same Tribunal. There can be a single reference of disputes common to several hotels and the workmen employed therein. However, where it is found that the reference was made, not on the subjective satisfaction of the Government of the existence or apprehension of an industrial dispute, but merely on the representation of one of the interested parties (in this case the employee's union) and that too on unverified information which subsequently proved to be substantially incorrect, because out of 85 hotels over 60 hotels were omitted from the enquiry, the reference must be held to be invalid.

The new sub-section (2-A) to section 10 inserted by the Madras Amendment Act (XII of 1949) in the Industrial Disputes Act provides for the reference of disputes straightaway by the employer or the majority of workmen concerned to Tribunal constituted for adjudication of disputes in any specified industry or industries.

K. Bhashyam and *T. R. Srinivasan* for Petitioners.

C. K. Viswanatha Iyer for the second Respondent.

K. S. ——— *Reference and award quashed.*

Govinda Menon, J.
7th December, 1950.

Gowramma, *In re.*
Cr. R. C. No. 1577 of 1949.
(Cr. R. P. No. 1474 of 1949.)

Criminal trial—Jail appeal pending when another appeal through counsel was filed on behalf of the same prisoner—Dismissal of Jail appeal—The other appeal after notice to Public Prosecutor coming on for hearing the next day—If can be dismissed without opportunity to counsel to argue the appeal.

The petitioner appealed from Jail and the appeal came on for hearing on 26th October, 1949, when the Sessions Judge after looking into the records dismissed the appeal. But on 4th October, the petitioner through her Counsel had filed another appeal which after notice to the Public Prosecutor came up for disposal on 27th October, when it was brought to the notice of the Court that an appeal had been disposed of on the previous day. Therefore holding that he had no jurisdiction to hear the appeal preferred by the Counsel the Judge dismissed the appeal. On revision,

Held: The Court has no jurisdiction to dismiss the Jail appeal without affording an opportunity to the Counsel to argue the case. It is as if there were two appeals by the same individual and so a Court cannot dispose of an appeal without affording an opportunity to the accused person to argue his case if he is represented by Counsel. As the disposal of the Jail appeal was without jurisdiction, the subsequent dismissal of the other appeal is irregular.

N. Subramanyam and J. V. Krishna Sarma for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Iyengar*) on behalf of the State.

K.S. ——— *Order set aside and appeals remanded.*

Govinda Menon and Basheer Ahmed Sayeed, JJ.
28th November, 1950.

Gopalaswami Mudaliar *v.*
Thyagaraja Mudaliar.
A. A. O. Nos. 118 and 223 of 1949.

Madras Hindu Religious Endowments Act (II of 1927 as amended by Act IV of 1930 and Act X of 1946), section 84 (1) (b)—Jurisdiction of Board to decide a dispute regarding succession to the trusteeship of an Endowment.

No doubt what is contemplated by clause (*b*) of section 84, sub-section (1) of the Madras Hindu Religious Endowments Act, is the determination by the Endowments Board only of the hereditary trusteeship but in finding out whether a person who claims to be a hereditary trustee is such a hereditary trustee, if a preliminary question regarding his rights to trusteeship itself has to be decided, the Endowments Act does not oust the jurisdiction of the Board for that purpose. If in deciding whether a person is a hereditary trustee or not, the initial point regarding his trusteeship has to be considered and concluded, it cannot be said that such an enquiry and conclusion are taken out of the scope of the powers of the Board.

[Authorities discussed].

R. Sundaralingam and *B. G. Chokkappa* for Appellants and *K. Soundararajulu Naidu and M. Chockalingam* for Respondents in C. M. A. No. 118 of 1949.

M. Seshachalapathi and *M. Chockalingam* for Appellants and *K. Soundararajulu Naidu* and *R. Sundaralingam* for Respondents in C.M.A. No. 223 of 1949.

K. S. *Appeals allowed.*

Chandra Reddi, J.
29th November, 1950.

Achuthan *v.* Choyi.
A. A. A. O. No. 117 of 1950.

Malabar Tenancy Act (XIV of 1930), section 3 (j)—Usufructuary mortgagee who parted with a portion of the mortgaged property—If "Intermediary"—Execution of decree for redemption—If can be stayed under section 4 (1) of Madras Act, XXIV of 1949.

A person is an intermediary within the meaning of clause (*j*) of section 3 of the Malabar Tenancy Act, who not being a jenmi has an interest in the land and is entitled to possession of such land by virtue of his interest but transferred such possession to others. That it covers the case of an usufructuary mortgagee does not admit of any doubt. If the Legislature intended to apply this to a case of transfer of portion of interest which the mortgagee has in the lands mortgaged to him, it would have certainly made specific provision for that purpose as is done in some of the sections of the same Act. It does not include a usufructuary mortgagee who has parted with a portion of the property mortgaged to him. In execution of a decree for redemption of such mortgage stay of execution under section 4 (1) of Madras Act, XXIV of 1949, cannot be granted.

K. Bhashyam and *M. C. Sridharan* for Appellant.

The Advocate-General (*K. Kuttikrishna Menon*) and *K. N. Karunakaran* for Respondent.

K.S. *Appeal dismissed. Leave to appeal refused.*

Govinda Menon, J.
30th November, 1950.

Marutha Goundan, *In re.*
Crl. R. C. No. 1287 of 1949.
(Crl.R. P. No. 1215 of 1949).

Madras Prohibition Act (X of 1937), section 4 (1) (a)—Effect on Hemp Drug Rules framed under Madras Abkari Act (I of 1886)—Possession of 1/16th tola of Ganja—Offence.

The Madras Prohibition Supplementary Act, XI of 1941, rectified the mistake pointed out by the Full Bench in *Adi Lakshmi Ammal*, In re, (1941) 2 M.L.J. 41. Madras Act, XI of 1941, by section 2 provided that the provisions of the Madras Prohibition Act in regard to intoxicating drugs shall apply to every intoxicating drug as therein specified although such a drug may also be a dangerous drug. In view of this rectifying clause, it cannot be said that the Hemp Drug Rules framed under the Madras Abkari Act are in force after the enactment of Madras Act, XI of 1941. [Under rule 23 of Hemp Drug Rules, a person may have in his possession ganja not exceeding three tolas]. Accordingly possession of even

1/16th tola of ganja will be an offence under section 4 (1) (*a*) of the Madras Prohibition Act.

R. V. Raghavan for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*), on behalf of the State.

K.S. *Conviction confirmed but sentence reduced.*

Govinda Menon, J.
7th December, 1950.

Kolandayappan and others, *In re.*
Cr. R. C. No. 1411 of 1949.
(Cr. R. P. No. 1333 of 1949).

Madras Maintenance of Public Order Act (*XVII of* 1948), *section* 2-A (1)—*Validity* —*Madras Act, XXIII of* 1949, *section* 19—*Effect of.*

Section 19 of Madras Act, XXIII of 1949, has validated all previous actions or acts or rules or any other thing done in pursuance of Madras Maintenance of Public Order Act (XVII of 1948). Accordingly, it cannot be contended that section 2-A (1) of Act XVII of 1948, is null and void in view of the decision in *Kalyanam Veerabadrayya* v. *The King*, (1949) 2 M.L.J. 663.

A person who knowing or having reason to believe that an order for detention has been made harbours or conceals the person against whom such order has been made commits an offence.

K. S. Jayarama Aiyar, *C. K. Venkatarnarasimham* and *Padmini Raghavan* for Petitioners.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

K.S. *Petition dismissed.*

Govinda Menon, J.
8th December, 1950.

Venkateswara Rao *v.* Satyanarayana.
Cr. R. C. No. 1559 of 1949
(Cr. R. P. No. 1476 of 1949).

Madras Devadasis (*Prevention of Dedication*) *Act* (*XXXI of* 1947), *section* 3 (3)—*Gist of offence—Dancing by* Kalavanthula *women in front of a picture of Sri Rama, Lakshmana and Sita temporarily put up in a pandal for celebrating Sri Rama Navami Utsavam by a private person.—If contravenes the section.*

What the Legislature must be deemed to have contemplated in section 3 (3) of the Madras Devadasis (Prevention of Dedication) Act is that the festival or ceremony must be held in respect of a Hindu Deity, idol or object of worship installed in any such temple or religious institution. Coloured pictures of Sree Rama, Lakshmana and Sita temporarily put up in a pandal in connection with Sri Rama Navami celebrated by a private person cannot be said to be a deity or idol or any object of worship installed in a temple or other religious institution. What the section says is, if a woman dances either within the precincts of the temple in front of the deity, or in front of the idol or other object of worship in the temple or in a procession where the deity, or idol or other object of worship is carried out then such an act is unlawful. It may also be that a festival or a ceremony held elsewhere in honour of such a deity or idol or object of worship is equated to what happens in the temple itself. But it cannot be safely predicated that if a private individual, out of devotion and orthodoxy, celebrates the Sree Rama Navami festival either in his own office or in any public place and does pooja to coloured pictures of these Gods, it can be said that his action can be called a festival or a ceremony held in respect of a deity or idol or object of worship installed in a temple. Dancing before such picture will not be an offence. Supposing a *Utsavamurthy* in a well known temple is brought out and kept in a particular locality and a festival or religious ceremony is held therein and a dance takes place in front of such a *Utsavamurthy*, then the action would be in contravention of section 3 (3) of the Act.

N. V. B. Sankar Rao for Petitioner.

Neti Subramaniam, *J. V. Krishna Sarma* and *G. Venkatarama Sastri* for Respondents.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

K.S. *Petition dismissed.*

Govinda Menon, J.
8th December, 1950.

Nanjappa Goundan *v.* Periakkal
Cr. R. C. No. 573 of 1950
(Cr. R. P. No. 546 of 1950)

Criminal Trial—Revision—Sessions Judge setting aside order of discharge—Jurisdiction to direct a charge to be framed against the accused.

A Sessions Judge has no jurisdiction in setting aside an order of discharge, to direct that a charge be framed against the accused. All that the Sessions Judge has got the right to do is to direct a further enquiry, so that the Court which heard the case afresh has to take evidence and come to a conclusion as to whether there is enough evidence to frame a charge or not. If it is a case which is to be tried exclusively by a Sessions Court, then the Sessions Judge would be justified in framing a charge and directing a committal. Where it is not a case exclusively triable by a Sessions Court a direction to the Court of first instance to frame a charge is not legal.

N. S. Mani for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

Respondent not appearing in person or by advocate.

K.S. ——— *Order set aside.*

Somasundaram, J.
12th December, 1950.

Intoor John, *In re.*
Cr. App. No. 469 of 1950.

Penal Code (*XLV of* 1860), *section* 304-*A—Reckless driving of bullock cart and racing to overtake another bullock cart—If rash and negligent driving—Death caused to child hitting against wheel—Offence.*

Where at that part of the day when the road was likely to be used frequently by others, the driving of a bullock cart by letting loose the reins of the bull and racing with another bullock cart amounts not only to rashness but also to negligence. And where by such rash and negligent driving by the accused a child is hit by the wheel and killed, the accused will be guilty of the offence under section 304-A of the Penal Code.

M. Damodaram Naidu for Accused.

The State Prosecutor (*S. Govind Swaminathan*) on behalf of the State.

K. S. ——— *Sentence reduced and appeal dismissed.*

Rajamannar, C.J. and
Panchapakesa Ayyar, J.
12th December, 1950.

Ramalinga Mooppanar v. Narayana Iyer.
C. M. P. No. 4164 of 1950.

Madras Buildings (*Lease and Rent Control*) *Act* (*XV of* 1946), *section* 7 (3) (*a*) (*ii*)—*Applicability—Landlord carrying on retail business in textiles in a building of his own—If entitled to evict tenants in another building on the ground that the building was required for carrying on his wholesale business in textiles.*

If a landlord is carrying on more than one business but is not occupying a building of his own for carrying on any one of such business, he would certainly be entitled to obtain possession of a building of his own for carrying on that business. There is a difference between retail business and wholesale business in textiles and according to the licence granted by the Government both the business cannot be carried on at the same place. Accordingly the landlord though having a building for his retail business in textiles is entitled to claim under section 7 (3) (*a*) (ii) of the Madras Buildings (Lease and Rent Control) Act that he had no building of his own for his wholesale business which was distinct and separate from his retail business.

S. Ramachandra Ayyar for Petitioner.

N. R. Govindachari for 1st Respondent.

K.S. ——— *Appeal remanded for fresh disposal.*

Somasundaram, J.
18*th December*, 1950.

K. V. R. S. Mani, Petitioner.
Cr. R. C. Nos. 1260 to 1262 of 1950.
(Cr. R. P. Nos. 1190 to 1192 of 1950).

Criminal Procedure Code (*V of* 1898), *section* 540—*Prosecution in possession of all materials which can be spoken to by a witness not calling him—Calling such witness as a Court witness—Propriety.*

The discretion that is given under section 540 of the Criminal Procedure Code, to examine a person as a Court witness, is very wide and the very width requires a corresponding caution in using the power given to a Court under that section. By its very nature, the discretion to be exercised under section 540, Criminal Procedure Code, depends on the facts of each case. When the prosecution knowing full well and being in possession of all the materials which can be spoken to by a particular witness and intending to call him as a witness and intimating to the Court at one stage that it intends to call him as a witness fails to do so, the Court cannot exercise its powers to call such a person as a Court witness. The exercise of the power of Court in the circumstances will only amount to filling up a gap in the prosecution case. That the prosecution asks the Court to examine him because it could not examine him, though it had intended to do so, should be no ground for the Court to exercise its discretion under section 540, Criminal Procedure Code.

V. Ramaswami Iyer and *C. K. Venkatanarasimhan* for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

K. S. *Petitions allowed.*

Govinda Menon and Basheer Ahmed Sayeed, JJ.
4th January, 1951.

Chatterjee *v.* Sub-Area Commander, H. Q., Madras Fort St. George.
Cr. M. P. Nos. 2478, 2479 and 2633 of 1950.

Army Act (*VIII of* 1911)—*Applicability to Commissioned officers—Commissioned officer—If automatically discharged on expiry of term of his commission—Arrest and detention after such period for purpose of trial by Court Martial—Legality—Inauguration of Republic—Effect—Army Act* (*XLVI of* 1950)—*Applicability.*

It is the Army Act, 1911 and the rules made thereunder that is applicable even to short service commissions and not the terms of contract. A commissioned officer cannot leave the force without being discharged or released or his resignation accepted, even though he has tendered his resignation and till his discharge is completed he remains, subject to Military law and under the rules a person awaiting trial or investigation of a serious charge against him will not be released from service until the investigation and/or trial has been completed. Once a soldier has completed the terms of his engagement his discharge will not be delayed unless a serious charge is pending against him. Unless an Army officer who is due to be discharged is released by the Army Authorities, he cannot be considered as not subject to the Military law and discipline.

There is no force in the contention that after the inauguration of the Republic till the passing of Act XLVI of 1950, the Army Act, 1911 and the rules and orders made thereunder have no effective applicability at all. After 22nd June, 1950, an officer who is charged with offences committed prior to that date would be subject to the provisions of Act XLVI of 1950 and for any offence committed by him while he was so subject he can be arrested and tried. The detention of such person for the purpose of bringing him to trial before a Court Martial cannot he held to be illegal.

E. C. Padmanabhan for *Messrs. Short Bewes & Co.* for Petitioner.

Vepa P. Sarathy for *Messrs. John and Row*, State Counsel on behalf of the Respondent.

The Deputy Judge Advocate General, Southern Command, Poona and the Public Prosecutor, Madras (*V. T. Rangaswami Aiyangar*).

K.S. *Petition dismissed.*

Raghava Rao, J. Kannan *v.* Ambu Krupp.
24th October, 1950. S.A. No. 1847 of 1947.

Malabar Law—Tarwad—Division of certain items by metes and bounds—Remaining items—If divided or joint property.

It cannot be said that there is any distinction to be drawn between a joint Hindu family under the Mitakshara Law and a Malabar tarwad with reference to the principles governing a case where some items are divided by metes and bounds. In spite of division of certain items by metes and bounds the remaining property will continue to be joint property if there is clear indication of such intention in the document.

C. S. Swaminathan for Appellant.

V. P. Gopalan Nambiar (*Amicus curiae*) for Respondents.

K.S. ——— *Appeal allowed.*

Somasundaram, J. Durgaprasada Rao *v.* Sundar Bhatt.
7th November, 1950. C.R.P. No. 1809 of 1948.

Penal Code (*XLV of* 1860), *section* 183—*Offence under—Complaint for if can be filed by Court—Criminal Procedure Code* (*V of* 1898), *sections* 476 *and* 195—*Scope.*

Section 476, Criminal Procedure Code, applies only to cases falling within section 195, (1) clauses (*b*) and (*c*). This excludes cases falling under section 195 (1), clause (*a*), Criminal Procedure Code and as section 183, Penal Code, falls under section 195 (1) (*a*), Criminal Procedure Code, no complaint for an offence under section 183, Penal Code, can be filed by a Court. It is open to the Amin or the Subordinate Judge as public servant to whom the Amin is subordinate to file such complaint.

Neti Subramaniam and *R. Sitharaman* for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for Respondent.

K.S. *Complaint by Court directed to be withdrawn.*

Chandra Reddy, J. Doraikanna Asari *v.* Nataraja Chetty.
1st December, 1950. A.A.O. No. 173 of 1950.

Civil Procedure Code (*V of* 1908), *Order* 22, *rule* 10—*Purchaser of property in dispute pending an appeal—If can be added as party.*

A person who purchases the property in dispute during the pendency of an appeal cannot be impleaded as a party to the appeal though his interests might be prejudiced by any compromise reached by the parties especially where the genuineness and validity of the assignment is disputed. Any enquiry as to the validity or genuineness of the assignment is foreign to the scope of the appeal.

S. Krishnamurthi and *Vepa Sarathi* for Appellant.

M. S. Venkatarama Ayyar, *T. V. Srinivasachari* and *R. V. Seshadri* for Respondent.

K.S. ——— *Appeal allowed.*

Rajamannar, C. J. and Panchapakesa Ayyar, J. Guruswamy Pillai, *In re.*
4th January, 1951. C.M.P. Nos. 4599, 4623 and 5089 of 1950.

Motor Vehicles Act (*IV of* 1939), *section* 64-*A—Scope—Power of Provincial Government to order a stay—Conditions necessary for exercise of.*

Section 64-A of the Motor Vehicles Act provides that the Provincial Government may *call for* the records of any order or proceedings passed or taken by any authority or subordinate officer and after *examining such records* may pass such order in reference thereto as it thinks fit on grounds relating to the legality, regularity and propriety of such order or proceeding. The section certainly does not justify interference with any order passed or proceeding taken by a subordinate officer or authority without calling for the records relating thereto and examining

such records. It is also incumbent on the Government to give notice to parties likely to be aggrieved by their proposed action and to give them an opportunity to show cause against such a course.

An order (on an application by a disgruntled applicant) setting aside the grant of *pucca* stage carriage permits for certain routes and directing that the routes should be renotified under section 57 (2) of the Motor Vehicles Act and that fresh applications along with those already received should be considered, must be quashed where it was not passed after calling for the records or giving notice to the parties to whom the permits had been granted.

M. K. Nambiar for Petitioner.

K. S. Desikan for Respondent.

The Advocate-General (*K. Kuttikrishna Menon*) for the State Counsel, (*P. Satyanarayana Raju*) for the State.

K.S. *Order quashed.*

Govinda Menon and Basheer Ahmed Sayeed, JJ. Chunchu Narayana
4*th January*, 1951. *v.* Karrappatti Kesappa.
Cr. M. P. No. 2295 of 1950.

Constitution of India (1950), *Article* 134 (1) (c)—*Leave to appeal to the Supreme Court—Criterion and principles for granting of.*

In deciding whether leave to appeal to the Supreme Court should be granted under Article 134 (1) (*c*) of the Constitution in criminal cases the same principles as under Article 136 of the Constitution for grant of special leave have to be followed. The only standard which can be laid down is that the Court should grant leave only in those cases where special circumstances are shown to exist. Generally speaking, leave will not be granted unless it is shown that exceptional circumstances exist and that severe and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against. A.I.R. 1950 Orissa 235, (1950) 2 M.L.J. 569 and other case-law referred.

A decision that "as it is the duty of a Magistrate to pass a preliminary order under section 145, Criminal Procedure Code, without delay after the receipt of the application, the delay of the Court should not affect the rights of parties" is not of such general or even public importance as to warrant grant of leave to appeal to the Supreme Court.

J. Sithamahalakshmi and *N. Rammohan Rao* for Petitioners.

M. S. Ramachandra Rao for Respondent.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

K.S. *Petition dismissed.*

Govinda Menon and Chandra Reddi, JJ. Palaniswami Goundan, *In re.*
8*th January*, 1951. R. T. No. 123 of 1950.

Criminal trial—Murder—Absence of motive—Accused though not unsound in mind committing murder under some hallucination or frenzy—Proper sentence.

Where, though it cannot be predicated from the evidence that the accused in a murder case was unsound in mind or that he did not know the nature of his act, it is found that the murder is committed in some frenzied mood or something in the nature of an abnormal state of mind, and there is no motive for the murder, ends of justice would be met if the sentence of death is reduced to one of transportation for life.

V. N. Srinivasa Rao for Accused.

The Public Prosecutor (*V. T. Rangaswami Iyengar*) on behalf of the State.

K. S. *Sentence modified and appeal dismissed.*

Panchapakesa Ayyar, J. Venkatasubbamma *v.* Venugopala Rao.
17*th November*, 1950. A. A. A. O. No. 34 of 1949.

Insolvency—Insolvency Court's power to order dividends paid on time-barred debts expunged from the schedule to be put back into Court—Receiver, if can acknowledge and pay time-barred debts.

The Insolvency Court has not only the right, but also the duty, to order dividends paid on time-barred debts expunged by it from the schedule to be put back into Court.

The Official Receiver is a *trustee* in respect of the entire body of creditors and has no power at all, like ordinary full owners, to spend money on himself, or to make a gift of it to others, however deserving, or to acknowledge or pay time-barred debts, or settled debts, or other debts not binding on the insolvent's estate under the law, including the law of limitation.

P. V. Chalapathi Rao for Appellant.

B. V. Ramanarasu for Respondent.

K.S. ——— *Appeal dismissed. Leave refused.*

Viswanatha Sastri, J. Yagnanarayana Sastri *v.* Lakshminarayana.
30*th November*, 1950. Appeal No. 301 of 1947.

Hindu Law—Widow—Compromise by, of suit against estate—When binding—Suit by reversioner to declare that compromise was fraudulent and to have it set aside—Limitation—Limitation Act (*IX of* 1908), *Article* 125—*Applicability.*

A Hindu widow or other limited owner has power to compromise claims against the estate represented by her. But a compromise of a litigation entered into by the limited owner must, in order to bind the reversioner, be *bona fide*, fair and reasonable, or for the benefit of the estate and not for the personal advantage of the limited owner at the expense of the estate. If the compromise is fair, reasonable and prudent in the circumstances in which a widow is placed, the alienation which is involved in the compromise must bind the reversioners. The alienation cannot be considered apart from the compromise. If the arrangement or settlement is not *bona fide*, any property which the claimant takes from the widow under such arrangement will be held by him only as an alienee, from a limited owner and with no higher rights. If a compromise decree or an award or a lease is used by the widow as a pretext or cloak for parting with property belonging to the estate in favour of another person, there is an "alienation" by the widow, though no formal conveyance of the property is executed by her. Article 125 of the Limitation Act would apply to a suit by a reversioner to have such a compromise which resulted in an alienation declared invalid. (Case-law discussed.)

C. V. Dikshitulu and *N. Rajeswara Rao* for Appellant.

V. Subramanyam for Respondent.

K.S. ——— *Appeal dismissed.*

Govinda Menon, J. Kathikoolathil Mammu *v.* Vinayaka Kamath.
1*st December*, 1950. C. R. P. No. 894 of 1949.

Civil Procedure Code (*V of* 1908), *Order* 21, *rule* 89—*Attaching decree-holder—Right to make deposit and apply under Order* 21, *rule* 89—"*Interest*"—*Nature of, required to confer right.*

The word "interest" in Order 21, rule 89 of the Civil Procedure Code has got a very wide import and should be construed very liberally. Any inchoate right which a party may have over a property may be sufficient interest to enable him to apply under Order 21, rule 89. A person who has attached property has certainly got interest in seeing that the property is not alienated or otherwise transferred. An attaching decree-holder has got an interest in the property sufficient to enable him to make the deposit contemplated under Order 21, rule 89.

A. Achuthan Nambiar for Petitioner.

The Government Pleader (*P. Satyanarayana Raju*) and *K. Sanjiva Kamath* for Respondents.

K. S. ——— *Petition dismissed.*

Subba Rao, J.
4th December, 1950.

Veerayamma *v.* Venkanna.
Appeal No. 701 of 1947.

Hindu Women's Right to Property Act (XVIII of 1937) *before its amendment by Act (XXVI of* 1947)*—Widow if entitled to a share in a mortgage debt where the properties mortgaged are agricultural.*

A debt, apart from the security, can be transferred though the debt could be realised by enforcing the security by the mortgagee or an assignee from him. If it is assignable as a debt *simpliciter* it is equally partible. A mortgage debt is partible and the widow will be entitled to her share under the Hindu Women's Right to Property Act, even if the properties mortgaged consist of agricultural property.

M. S. Ramachandra Rao for Appellant.

V. Parthasarathy for Respondents.

K. S. ——— *Appeal allowed. Memorandum of objections dismissed.*

Subba Rao, J.
5th December, 1950.

Mukundarao *v.* Suryanarayana Naidu.
Appeal No. 615 of 1947.

Usurious Loans Act (X of 1918) *(as amended in Madras), section* 3 (1)*—Charging of compound interest—Presumption that it is excessive and transaction substantially unfair.*

If compound interest is charged and there is no rebutting evidence the Court shall presume that the interest charged is excessive and the transaction is also substantially unfair. Where the interest stipulated in a mortgage bond was at 12 annas per cent. per mensem at compound rate, 9 per cent. simple interest will be a reasonable rate to be allowed.

B. V. Ramanarasu for Appellants.

B. V. Subramanyam for Respondent.

K.S. ——— *Appeal allowed in part.*

Basheer Ahmed Sayeed, J.
7th December, 1950.

Sambayya *v.* Bala Subba Reddi.
C. R. P. No. 1618 of 1949.

Civil Procedure Code (V of 1908), *section* 88*—Inter-pleader suit—When sustainable.*

If the plaintiff in an inter-pleader suit is found to have colluded with one of the claimants, then the right to file an inter-pleader suit cannot be availed of by him. In order to enable a party to file an inter-pleader suit the party should be in a position to walk out of the suit with a mere claim for costs and shall not be entitled to have any other matter of contest between himself and the claimants.

N. Subramanyam for Petitioner.

W. Kothandaramayya for Respondent.

K.S. ——— *Petition allowed.*

[F.B.]

Rajamannar, C.J., Viswanatha Sastri and Panchapakesa Ayyar, JJ.
2nd January, 1951.

Parvathi *v.* Makkam Amma.
C. R. P. No. 1315 of 1946.

Court-Fees Act (VII of 1870), *sections* 7 (ix) *and* 17*—Suit for redemption of* kanom *—Court-fee payable—Incorporation of prayer for accounts and arrears of rent—Effect.*

A suit for redemption of a Malabar *kanom*, like any other suit for redemption of a possessory mortgage, can be valued under section 7 (*ix*) of the Court-Fees Act even though the plaintiff incorporates in his plaint a prayer for the taking of accounts and the payment of arrears of rent due from the *kanomdar*. The arrear of rent would have to be applied in reduction of the *kanom* amount and the value of improvements payable to the *kanomdar* and the plaintiff would be entitled to a decree only for such balance as might be found payable to him on taking the account. (Case-law discussed).

V. P. Gopalan Nambiar for Petitioner.

The Government Pleader (*P. Satyanarayana Raju*) for the State.

K.S. ——— *Petition allowed.*

Rajamannar, C.J. and Panchapakesa Ayyar, J. Bhashyam Iyengar *v.* Superintendent of
11th January, 1951. Police, Special Branch, C.I.D., Madras.
C.M.P. No. 6437 of 1950.

Government of India Act (1935), *section 175—House taken up for occupation by an officer of police department on monthly rent—Provincial Government if tenant—Default in payment of rent—Liability to eviction under section 7 (2), Madras Buildings (Lease and Rent Control) Act.*

The Superintendent of Police, Special Branch, C.I.D., Madras, wrote a letter to the landlord that the house would be taken up for occupation by an officer of the department on a monthly rent. There was no other document relating to the tenancy. A default in paying rent having occurred the landlord applied for eviction under section 7 (2) of Madras Buildings (Lease and Rent Control) Act.

Held: It cannot be said that the Provincial Government was the tenant (as the document was executed by the Superintendent of Police who is not authorised to execute deeds and instruments on behalf of the Governor). It is not sufficient that an officer under the Provincial Government or a department under the Provincial Government is a tenant. Accordingly the tenants are not entitled to an exemption (provided by a notification issued under section 13 of the Act) from the provisions of section 7 (2) of the Madras Buildings Control Act. The landlord is therefore entitled to an order of eviction. The fact that the parties were under the impression that virtually the Provincial Government were the tenants cannot affect the legal rights of parties.

N. Rajagopala Ayyangar and *C. Natarajan* for Petitioners.

The Advocate-General (*K. Kuttikrishna Menon*) on behalf of the Respondents.

K.S.

Order quashed.

Rajamannar, C.J. and Panchapakesa Ayyar, J. Mathurai Sadhu Seva Samajam *v.*
11th January, 1951. Official Assignee of Madras.
O. S. A. No. 66 of 1950.

Insolvency—Investment of moneys belonging to a society registered under the Societies Registration Act (XXI of 1860) with a firm which became insolvent—Firm an ordinary member of the society—If makes the firm a trustee.

Where there is an investment of moneys belonging to a society (a charitable institution) registered under the Societies Registration Act, with a firm which became insolvent, though such firm was an ordinary member of the society, it cannot by reason of such membership be said to be in the position of a trustee in respect of moneys belonging to the society as such. The society is a corporate body with a separate juristic personality which is distinct and separate from that of its members. The moneys and properties of the society are vested either in the trustees, if any, duly appointed under the provisions of the Act, or, in the absence of trustees, in the governing body. Accordingly the insolvent firm was not a trustee for the amount deposited with it by the society.

D. Ramaswami Iyengar for *O. K. Ramalingam* for Appellant.

V. C. Viraraghavan for Respondent.

K.S.

Appeal dismissed.

Subba Rao, J. Meenakshi Ammal *v.* Manickam Chettiar.
12th January, 1951. Appeal No. 32 of 1948.

Transfer of Property Act (IV of 1882), section 63-A—Mortgagee in possession—Right to improvements.

Ordinarily a mortgagor is entitled to the improvement unless there is a contract to the contrary. If there be a contract to the contrary giving the improvement to the mortgagee, he will be entitled to the improvement. If there is no contract to the contrary the mortgagor would be liable only to pay the cost to the mortgagee when the improvement was necessary to preserve the property from destruction or deterioration or was necessary to prevent the security from becoming insufficient or was made in compliance of a lawful order of a public servant or public authority and such improvement was made at the cost of the mortgagee. Even in those cases there may be a contract to the contrary in and by which the liability of the mortgagor to pay the cost may be excluded. But section 63-A of the Transfer

of Property Act does not provide for the payment of the cost of improvement to a mortgagee when under the terms of the mortgage deed the mortgagee is entitled to the improvements. But when a mortgagee is entitled to the improvements the difficulty arises when the improvement made is not severable from the property. In such cases the only possible way of giving him the improvement is to give him the cost thereof. If there is a contract to the contrary within the meaning of section 63-A (1) the mortgagee will be entitled either to the improvement, or in the case the improvement is not severable from the land, to its cost. I.L.R. (1947) Mad. 411, relied on.

The word "Maramat" is comprehensive enough to take in reclamation operations to convert dry into wet land and is not confined to ordinary small repairs carried out for the purposes of cultivation.

M. S. Venkatarama Aiyar for Appellant.

R. Sundaralingam for Respondent.

K.S. ——— *Finding called for.*

Somasundaram, J. Venkataratnam, *In re.*

17*th January*, 1951. Crl. R. C. No. 884 of 1949.
(Crl. R. P. No. 820 of 1949).

Criminal Procedure Code (*V of* 1898), *section* 161 (3)—*Duty of investigating officers to record statements of witnesses separately.*

Under section 161 (3), Criminal Procedure Code, the Police Officer may reduce into writing any statement made to him in the course of an examination under the section, and if he does so he shall make a separate record of the statement of each such person whose statement he records. Failure to record the statement of each witness separately is a clear violation of the mandatory provisions of clause (3) of section 161, Criminal Procedure Code. It is necessary that the investigating officers should conform themselves to the requirements of the section. The failure to do so very often results in the earlier statements of these witnesses not being made available to the accused, and the Court is not in a position to test the veracity of these witnesses.

V. Venkataraman for *Rao and Reddy* for Petitioner.

R. Santhanam for the Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

K.S. ——— *Petition allowed.*

Somasundaram, J. Abu Syed Sahib *v.* Ahmed Mohideen Sahib.

18*th January*, 1951. Crl. R. C. No. 1611 of 1949.
(Crl. R. P. No. 1526 of 1949).

Criminal Procedure Code (*V of* 1898), *section* 145—"*Land*"—*Meaning—If includes mills—Applicability of section to dispute regarding mills.*

The definition of "land" in section 145, Criminal Procedure Code, is not exhaustive but only illustrative. "Land" in the section is used as synonymous with immoveable property which includes things attached to earth. Mill, therefore, which is attached to the earth will fall within the scope of immoveable property or land. A dispute though it may be to the mill really includes the dispute to the land on which it is situate and section 145 will apply.

S. Krishnamurthy for Petitioner.

S. Veeraraghava Ayyar for Respondent.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) on behalf of the State.

K.S. ——— *Petition dismissed.*

Rajamannar, C.J. and Somasundaram, J. Hoosen Kasam Dada (India), Ltd. *v.*

22*nd January*, 1951. Custodian of Evacuee Property, Madras.
C. M. P. No. 5067 of 1950.

Administration of Evacuee Property Ordinance (1949) *and Act XXXI of* 1950, *section* 2 (*f*)—*Company registered in Calcutta with branch in Madras—If can be notified and taken over as evacuee property.*

It is only property that can be declared to be evacuee property and a firm as such is not property. Assuming that the majority of shareholders of the company could be held to be evacuees as the company was registered in Calcutta it is the High Court at Calcutta that would have jurisdiction over that company. Neither

the Evacuee Property Ordinance nor Act XXXI of 1950 which replaced the Ordinance extends to West Bengal and therefore the company itself could not be declared to be an evacuee under either the Ordinance or the Act. It is doubtful whether a company incorporated under the Indian Companies Act would fall within the definition of "an evacuee". The fact that there is a branch of the company situate in Madras cannot empower the Assistant Custodian of evacuee property at Madras to take proceedings under the Ordinance or the Act in respect of a company situated in West Bengal.

S. Azizuddin for Petitioner.

The State Counsel (*John and Rao*) for Respondent.

K. S. ——— *Order quashed.*

Rajamannar, C.J. and Somasundaram, J. Koti Reddi *v.* Venkayya.

22nd January, 1951. C. M. P. No. 7066 of 1950.

Election petition—Civil Procedure Code—How far applicable—Election Commissioner if can set aside his final order on the ground that party was prevented by sufficient cause from taking part in the hearing.

The Civil Procedure Code in its entirety is not applicable to an election petition. Nor has the Election Commissioner all the powers and jurisdiction vested in an ordinary Civil Court governed by the Civil Procedure Code. If the Election Commissioner were such a Civil Court, then section 115 would also have been applicable. Though rule 6 renders the procedure applicable under the Civil Procedure Code to the trial of suits applicable also to the enquiry of election petitions, it cannot be held that the provisions of the Civil Procedure Code which deal with matters arising after the final disposal of a suit would also apply to an election petition.

The power to set aside a final order on the ground that one of the parties was prevented by sufficient cause from taking part in the trial of the suit must also be deemed not to have been conferred on the Election Commissioner. In the absence of an express provision empowering him to set aside his own orders either by way of review or by way of applications under Order 9 of the Code of Civil Procedure, the Election Commissioner will have no jurisdiction to do so.

V. Subramaniam and *M. Ramakrishna* for Petitioner.

D. Muni Kanniah for Respondent.

K. S. ——— *Petition allowed and order quashed.*

Panchapakesa Ayyar, J. Swaminatha Pillai *v.* Balasubramanya Udayar.

22nd January, 1951. C. R. P. Nos. 1198 and 1199 of 1950.

Civil Procedure Code (*V of* 1908), *Order* 44, *rule* 1—*Order rejecting petition to entertain pauper appeals—Points urged if should be set out and discussed.*

A Court is bound to reject an application to file an appeal *in forma pauperis* if upon a perusal thereof, and of the judgment and decree appealed from, it sees no reason to think that the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. When it hears the counsel for the petitioner and rejects the petition, it must be presumed to have applied its mind to the arguments of the learned counsel and the facts of the case before rejecting the petition. The mere fact that the learned District Judge gave no detailed reasons for his rejection is no proof that he did not apply his mind to the facts of the case or the arguments, the learned counsel had urged and does not call for interference with in revision.

I.L.R. 53 Mad. 245, not followed. I.L.R. 56 Mad. 323, I.L.R. 59 Mad. 805 and I.L.R. (1942) Mad. 746, relied on.

T. S. Vydianatha Aiyar for Petitioners.

A. V. Narayanaswami Ayyar and *R. Venkatachalam* for Respondents.

K. S. ——— *Petitions dismissed.*

Balakrishna Ayyar, J. Guruswami Naidu *v.* Guruswami Naidu.

22nd January, 1951. Cr. R. C. No. 1439 of 1949.
(Cr. R. C. No. 1361 of 1949.)

Criminal Procedure Code (*V of* 1898), *sections* 154 *and* 162—*First information report—Essentials of—Statement by injured person under section* 162—*False accusation—Statement not available for prosecution for offence under section* 211, *Penal Code* (*XLV of* 1860).

Whether a particular information amounts to an F. I. R. or not is essentially a question of fact. If some one goes to a police station and definitely tells the officer-in-charge there that a cognisable offence has been committed (*e.g.*, that *X* has been shot with a gun) and that statement is made with a view to inducing the police officer to enquire into the matter, it is information relating to a cognisable offence within the meaning of section 154, Criminal Procedure Code. Where subsequently a statement from the person wounded is recorded under section 162, Criminal Procedure Code, in which the wounded person named an assailant but ultimately it is found to be false, his statement falls within the mischief of section 162, Criminal Procedure Code and not available to be used against him for a prosecution under section 211, Penal Code.

M. K. Nambiar for Petitioner.

P. S. Kailasam for Respondent.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) on behalf of the State.

K. S. ——— *Petition allowed.*

Subba Rao, J. Public Prosecutor, Madras *v.* Vedantham.

30*th January*, 1951. Crl. Appeal No. 102 of 1950.

Penal Code (*XLV of* 1860), *section* 415—*Gist of offence under.*

Deceiving generally is to lead into error by causing to believe what is false or to disbelieve what is true. If *A* makes a representation to *B* intending to deceive *B* and *B* acts upon that representation, *B* may be said to be deceived by *A*. If *A* makes that representation which induces *B* to lend money to him who has no intention of repaying it to *A*, the offence of cheating is complete. But, on the other hand, if *B* does not act upon the representation of *A* but lends money because he is satisfied with the financial position of *A* and if *A* has the intention of repaying it, it cannot be said that *A* is guilty of the offence of cheating.

The State Prosecutor (*S. Govind Swaminathan*) for Appellant.

K. Kalyanasundaram for Respondent.

K. S. ——— *Appeal dismissed.*

Subba Rao, J. Govindarajulu Chetty, *In re.*

6*th February*, 1951. Crl. Appeal No. 150 of 1950.

Madras General Sales Tax Act (*IX of* 1939), *section* 15 (*a*)—*Return by dealer omitting certain items under* bona fide *belief that they were not taxable—If offence—*"*Wilful*"—*Meaning.*

As a general rule a guilty mind is an essential ingredient to crime. This mental element is ordinarily expressed in statutes by the use of the words such as "maliciously," "fraudulently," "negligently," "knowingly," etc. It is true that the rule is not inflexible and in some statutes particularly in the realm of municipal law an act is made an offence without an intention on the part of the accused. Whether a statute should be construed in that sense or is subject to an implied qualification that there must be a guilty mind depends not entirely upon its language but also upon its subject-matter and the various circumstances that make the one construction or the other reasonable including the nature of the punishment imposed for its infringement. In section 15 (*a*) of the Madras General Sales Tax Act, the Legislature designedly used the word "wilful" to express the mental element necessary to constitute the offence. The word "wilful" excludes *bona fides* in respect of the return. An honest and reasonable but a mistaken belief in the existence of circumstances which, if true, would have made the act lawful is a good defence. "Wilful" is a word of description. It describes the act constituting an offence, *viz.*, submission of a false return. A submission of a false return cannot be a wilful submission unless the dealer has deliberately made the return with the knowledge that he was excluding a taxable item. Otherwise, every submission of a return omitting a particular taxable item, though the assessee *bona fide* believed as one exempt from taxation, would become an offence.

C. K. Venkatanarasimham and *S. Swaminathan* for Accused.

A. C. Muthanna for the State Prosecutor (*S. Govind Swaminathan*) on behalf of the State.

K.S. ——— *Appeal allowed.*

Panchapakesa Ayyar, J. Mohamad Ibrahim *v.* Jaithoon Bivi Ammal.
14th December, 1950. C. R. P. No. 770 of 1950.

Mahomedan Law—Irrevocable thalak *by husband at Karur of wife living then at Tanjore —Suit for by wife for interim maintenance amount due and return of her clothes and jewels —If maintainable at Tanjore.*

An irrevocable *thalak* only terminates the wife's right to *conjugal relationship*, and makes the venue for filing a suit for restitution of conjugal rights, if any, subsist at the place where the irrevocable *thalak* is pronounced by the husband. But the right to interim maintenance and the return of clothes and jewels arises out of an irrevocable *thalak* and hence stands on a different footing. The divorced wife can bring the suit in respect of her prompt dower and also for her clothes and jewels at the place where she resides at the time of the divorce and receives notice thereof. So where the irrevocable *thalak* was pronounced by the husband at Karur of the wife residing normally at Tanjore and made known to her at Tanjore she can file a suit in respect of her interim maintenance during the intervening period allowed under the Mahomedan Law and her clothes and jewels, in the Tanjore Court.

It cannot, however, be said that the husband, the moment he pronounces an irrevocable *thalak* is bound to seek out the wife and return the clothes and jewels and that a suit for the same could be filed by her at the place where she resides.

S. Amudachari for Petitioner.

K. Raman for Respondent.

K. S. ——— *Petition dismissed.*

Govinda Menon and Chandra Reddi, JJ. Dinasari, Ltd. *v.* Hussain Ali & Sons.
4th January, 1951. A. A. O. No. 232 of 1950.

Arbitration Act (*X of* 1940), *section* 34—*Existence of agreement to refer to arbitration denied by one of the parties—Arbitrators have no jurisdiction to decide the point and suit cannot therefore be stayed.*

The existence of an admitted agreement is a necessary pre-requisite for an arbitration undertaking to decide the dispute. Where the written agreement is denied by one of the parties it is not open to the arbitrators to decide whether the agreement as such exists or not. As the arbitrators have no jurisdiction to decide the point, it necessarily follows that they are not competent to function as well. In such circumstances the suit cannot be stayed under section 34 of the Arbitration Act.

I.L.R. (1940) Bom. 249, relied on.

S. V. Narayana Aiyar for Appellant.

V. Srinivasan, T. R. Ramachandran and *N. Rajagopalan* for Respondents.

K. S. ——— *Appeal dismissed.*

Rajamannar C. J. and Panchapakesa Ayyar, J. Krishnamoorthy *v.*
19th January, 1951. The State of Madras.
C. M. P. No. 11900 of 1950.

Constitution of India (1950), *Articles* 227, 310 *and* 311—*Scope—Government or Disciplinary Proceedings Tribunal—If fall within the superintendence of the High Court—Dismissal of civil servant—Interference under Article* 226 *with such orders of dismissal or reduction—When justified.*

Neither the Government nor the Disciplinary Proceedings Tribunal fall within Article 227 of the Constitution of India, 1950, under which the High Court is given superintendence over all Courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

Under Article 310 (1) of the Constitution every person who is a member of a civil service of the Union and every person who is a member of the civil service of the State holds office during the pleasure of the President or the Governor respec-

tively. Article 311 lays down two requirements to be fulfilled before a person who is a member of a civil service of a State is dismissed or removed. (1) That he shall not be dismissed or removed by an authority subordinate to that by which he was appointed and (2) that he shall not be dismissed or removed or reduced in rank until he has been given a reasonable opportunity to show cause against the action proposed to be taken in regard to him. The proviso exempts the observance of the second requirement in certain circumstances *e.g.*, where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge.

Where those requirements are fulfilled the High Court will not be justified in interfering with such orders.

So far as there is no contravention of Article 311 of the Constitution (which corresponds to section 240 of the Government of India Act, 1935) the High Court would have no jurisdiction to quash the order of dismissal by the Government. The fact that rules are made to safeguard the rights of civil servants in matters of disciplinary action does not mean that the High Court has jurisdiction to quash orders of Government dismissing a civil servant because one or other of the rules had been contravened.

G. T. Ramanujachari for Petitioner.

K. S. ——— *Application dismissed.*

Govinda Menon and Chandra Reddi, JJ. Narasimhulu, *In re.*
12th February, 1951. R. T. No. 141 of 1950.

Evidence Act (I of 1872), section 33—Deposition of witness at preliminary enquiry—Conditions for admissibility of—Statement when to be acted upon.

What is contemplated under section 33 is an opportunity and not an effective use of it. It could not be postulated that in every case where the accused is not represented by counsel and could not submit the witness to a searching cross-examination, he has no opportunity to cross-examine and therefore that the evidence of the witness should not be admitted under section 33 of the Evidence Act. All that the Court has to do in such a case is to exercise caution before admitting such evidence.

K. Narayanaswami Mudaliar for Accused.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) on behalf of the State.

K. S. ——— *Appeal dismissed.*

Rajamannar, C.J. and Somasundaram, J. Subbayya *v.* Subordinate Judge,
14th February, 1951. Vijayawada.
C. M. P. No. 5099 of 1950.

Madras Buildings (Lease and Rent Control) Act (XV of 1946), section 7—Default in payment of rent—Right to evict—Practice of landlord accepting without protest rent which had accumulated at irregular intervals—If ground for refusing eviction.

It may be that the landlord was not insisting on regular payments of monthly rent and was accepting without protest arrears of rent which had accumulated. But when he chooses to apply under section 7 of the Act, he will be entitled to an order of eviction if he can prove that the tenant has not paid or tendered the rent by the last day of the month next following that for which the rent is payable. In the case of a monthly tenancy the rent for each month is payable on the last day of the month next following. Even if the tenant proves that by long practice the house owner did not insist on regular monthly payment of rent it cannot be said that default by itself cannot be regarded as a valid ground to eject a tenant. There cannot be an agreement under which rent is payable at irregular intervals.

D. P. Narayana Rao for Petitioner.

J. Sitamahalakshmi and *M. Satyavathi* for second Respondent.

K. S. ——— *Petition allowed and orders quashed.*

Balakrishna Ayyar, J. Valambal Ammal *v.* Veppilai *alias* Sreemathi Ammal.
18*th January*, 1951. S. A. No. 1087 of 1947.

Co-owners—Deed of partition of immoveable property of the value of over Rs. 100—*Necessity for registration.*

Where co-widows in a deed of partition were dealing with rights in the property and not merely with rights incidental to the ownership of the property and purported by virtue of the document to alter their legal relationship with regard to the property, registration is necessary if the value is over Rs. 100 as the instrument terminates their co-ownership and substitutes in its place individual ownership over the different halves which the widows took.

1943 Pat. 433, distinguished.

A. V. Narayanaswami Ayyar for Appellant.

T. A. Anantha Ayyar for Respondent.

K. S.

Appeal allowed.
Leave to appeal refused.

Panchapakesa Ayyar, J. Narayanaswami Udayar, *In re.*
13*th February*, 1951. Cr.M.P. No. 282 of 1951.

Madras Hindu (Bigamy Prevention and Divorce) Act (VI of 1949)—*Question of validity of the Act—Power of trial Court to go into—Remedy of party to take up matter in appeal and revision—Petition for quashing and stopping the trial—Cannot be entertained.*

It cannot be said that it is obvious that the Madras Hindu (Bigamy Prevention and Divorce) Act is invalid and null and void as it is discriminatory against Hindu bigamists alone. The point if it is considered important or sound can be taken at the trial and if it is taken and rejected, it can be agitated in due course in appeal and in revision too. It is not correct to say that the trial Court cannot go into these questions of law. Accordingly there is no need to entertain a petition for quashing and stopping the trial midstream.

K. Kalyanasundaram for Petitioner.

K.S.

Petition dismissed.

Rajamannar, C.J. and Panchapakesa Ayyar, J. Namazi *v.* Deputy Custodian of
16*th February*, 1951. Evacuee Property.
Cr.M.P. No. 4950 of 1950.

Administration of Evacuee Property Ordinance (XXVI of 1949)—*Validity—Effect of notification declaring any property to be evacuee property—Constitution of India* (1950), *Articles* 13, 14, 15, 19 *and* 31—*Scope.*

A person who has migrated from the territory of India to the territory included in Pakistan after 1st March, 1947, cannot be deemed to be a Citizen of India. If he is not a Citizen, Articles 15 and 19 of the Constitution of India, 1950, have no application as the Articles confer rights and privileges only on Citizens. Accordingly the Administration of Evacuee Property Ordinance (XXVI of 1949) cannot be said to be void as being inconsistent with those Articles.

The effect of a notification declaring any property to be evacuee property is that such property vests in the Custodian of Evacuee Property who can take possession of it. The entire scheme of the Ordinance in respect of what is called "evacuee property" is a provision for the custody and administration of such property and not for confiscation. The evacuee's title as such is never affected. Even the rights of his heir are recognised and restoration of the property is contemplated. The Custodian acts practically as a statutory agent with large powers, but under a duty to keep accounts.

Article 14 of the Constitution providing for equality before the law or equal protection of the laws within the territory of India applies to aliens also. But there can be a certain amount of discrimination so far as aliens are concerned which would be justified under the police power of the State. There has been no infringement of Article 14 in the provisions of the Administration of Evacuee Property Ordinance. Nor are the provisions of the Ordinance inconsistent with Article 31 (1). There is no deprivation of property within the meaning of Article 31 (1) nor is there any taking possession or acquisition falling under Article 31 (2).

Article 31 (1) means only that no person shall be deprived of his property by a mere executive, administrative or prerogative act.

Obiter.—The Ordinance and Act (LXXI of 1950) which has replaced it, if they involve acquisition, then such acquisition is for public purpose.

Dubitante.—The order of the custodian or the notification under section 7 of the Ordinance is not final in case of disputed title.

A person declared an intending evacuee under section 19 of the Ordinance is still a Citizen of India under Article 5 of the Constitution entitled to all the fundamental rights declared in Part III of the Constitution. It is in the interests of the general public that powers have been conferred on the custodian to see that moneys are not transferred to Pakistan before final settlement is arrived at between the Dominions of India and Pakistan as such indiscriminate transfer of assets would render the final settlement difficult. None of the restrictions contained in section 21 of the Ordinance can be said to be restrictions not reasonably imposed. Section 21 of the Ordinance does not really prohibit the moneys of an intending evacuee being used by him or being invested. The incidental powers of the custodian to require the intending evacuee to furnish returns and other information and the power of the custodian to inspect the books of account and other documents do not restrict the fundamental right to acquire, hold and dispose of property.

As section 20 stands, there is nothing to prevent the custodian from most unreasonably refusing to approve of any transfer by an intending evacuee. The restriction on the power of disposal of immoveable property contained in section 20 of the Ordinance is an unreasonable restriction on the exercise of the intending evacuee's right as a Citizen under Article 19 (1) (*f*) of the Constitution.

[As it was held that the applicant was rightly declared to be an intending evacuee the application was dismissed.]

Certificate under Article 132 (1) of the Constitution that the case involves a question of law as to the interpretation of the Constitution granted.

S. Govind Swaminathan, S. Venkatakrishnan and *A. C. Muthanna* for Petitioner.

The Advocate-General (*K. Kuttikrishna Menon*) on behalf of Respondents.

K.S. *Application dismissed.*

Satyanarayana Rao and Raghava Rao, JJ. A. K. Gopalan, *In re.*

22nd February, 1951. Cr.M.P. No. 153 of 1951.

Constitution of India (1950), *Article* 226 *and Criminal Procedure Code* (*V of* 1898), *section* 491—*Scope of jurisdiction of High Court—Preventive detention—Power to issue writ of* Habeas Corpus—*Successive order continuing detention—Validity—Preventive Detention Act* (1950).

If there are fresh facts and fresh matter or even a new situation had arisen, it would be open to the High Court as a Court of concurrent jurisdiction (with the Supreme Court under Article 32) to exercise the power conferred upon it under Article 226 of the Constitution and section 491, Criminal Procedure Code.

If on the grounds placed before the detaining authority, that authority was satisfied that the antecedents of the petitioner were such as to induce the belief that he would act in a manner prejudicial to public order, the order of detention would be justified. It may be by successive orders the detention is continued; but if each order can be justified on the grounds disclosed to the detenu, there is no reason to invalidate it on the ground that the object of the Government was to continue the detention from time to time.

The period of detention should be proportionate to the apprehension and must be fixed in the order of detention and should not be left for inference because the maximum is fixed by the Statute.

It cannot be said that where the order of detention does not mention the period for which the order has to remain effective, it should be presumed that the detaining authority intended that the detention should be for one year. An order which did not specify the period of detention and is vague and indefinite is illegal and the person detained under such order should be set at liberty.

Petitioner in person.

The Advocate-General (*K. Kuttikrishna Menon*) with the Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the State.

K.S. *Petition allowed.*

Satyanarayana Rao, J.
4th January, 1951.

Narayanaswami Pillai *v.* Ramaswamia Pillai.
C. R. P. No. 1989 of 1949.

Court-Fees Act (VII of 1870), section 7 (iv) (c)—Suit by lessee against prior lessee for possession claiming that prior lease not binding on him—Court-fee valuation.

Where the plaintiff a lessee claims that the lease put forward by the defendant as being a prior lease does not bind him and that he is entitled to recover possession of the property from the defendant, it is a suit for declaration coupled with a prayer for possession. Such a suit falls under section 7 (*iv*) (c) of the Court-Fees Act and the plaintiff can put his own valuation.

I.L.R. 62 Cal. 417, approved.

T. K. Subramania Pillai and *S. Rajagopal* for Petitioner.

The Government Pleader (*P. Satyanarayana Raju*) for the State.

K.S.

Petition allowed.

Rajamannar, C.J. and Panchapakesa Ayyar, J.
5th January, 1951.

Indian Mutual Life Insurance Association, Ltd. *v.* Commissioner, Corporation of Madras.
O. S. A. No. 46 of 1950.

Specific Relief Act (I of 1877), section 45, Proviso D—Application for writ of mandamus *does not lie when other adequate remedy available—Madras City Municipal Act (IV of 1919)—Assessment of a company by the corporation to Company's Tax—Remedy by way of appeals to Taxation Appeals Committee, the Chief Judge, Court of Small Causes and reference to High Court if a question of law was involved—Application for issue of* writ of mandamus *does not lie.*

The remedy by way of *mandamus* would be available only if the applicant has no other specific and adequate legal remedy. Where a company from whom Company's Tax has been collected by the Corporation of Madras applied under section 45 of the Specific Relief Act praying that the Commissioner, Corporation of Madras be directed to correct the Assessment Books maintained by him under rule 1 of schedule IV of the Madras City Municipal Act by deleting the name of the applicant in the said books from the list of companies liable to payment of Company's Tax and thereby bring the Assessment Books in conformity with the decision of the Chief Judge of the Court of Small Causes in an appeal by the applicant,

Held that the application will not lie as the applicant had the remedies provided in schedule IV of the City Municipal Act—he could file an appeal to the Taxation Appeals Committee and then to the Chief Judge of the Court of Small Causes and he could also ask for a reference to the High Court if a question of law was involved in the case. The fact that the applicant may have to take similar proceedings by way of appeals and references every half-year is no ground for holding that the remedies under the City Municipal Act are not adequate.

There is nothing in the City Municipal Act under which a permanent record of assessments is kept in which occasionally there should be changes made in accordance with decisions of Courts—something like what is done in the case of Survey and Settlement registers and Record of Rights. It cannot therefore be said that it was incumbent on the Commissioner to do any such act as is mentioned in the application.

T. M. Ramaswami Aiyar and *A. R. Krishnaswami* for Appellant.

Messrs. John and Row for Respondent.

K.S.

Appeal dismissed.

Subba Rao, J.
30th January, 1951.

Public Prosecutor, Madras *v.* Jacob Nadar.
Cr. Appeal No. 181 of 1950.

Madras General Sales Tax Act (IX of 1939), section 15—Assessment made on "firm"—One of the partners in his personal capacity, if can be prosecuted in default of payment by firm.

A firm is a "person" and for the purpose of assessment under the Madras General Sales Tax Act the firm is treated as one entity and in default of payment pursuant to the notice the firm is liable to be prosecuted. Where however an assessment was made on the firm and the notice was issued to the firm, a partner of the firm on whom no notice at all was served cannot be prosecuted. As the defaulter is the "firm" the firm should be prosecuted for contravening the provisions of section 15 of the Sales Tax Act.

The State Prosecutor (*S. Govind Swaminathan*) for the Public Prosecutor.

K. Kalyanasundaram for Respondent.

K.S. ——— *Appeal dismissed.*

Rajamannar, C.J. and Somasundaram, J.
6th February, 1951.

Ebrahim Sahib *v.* Regional Transport Authority.
C. M. P. No. 11307 of 1950.

Motor Vehicles Rules—Rule 268 *as amended after decision in* (1950) 2 M.L.J. 592*—Resolution of Regional Transport Authority (after due notice to owner of existing bus stand) altering the starting places and terminii of buses to Municipal Stand—Validity of the rule—If repugnant to Article* 19 (1) (*g*) *of the Constitution*

Rule 268 of the Motor Vehicles Rules as amended subsequent to the decision in (1950) 2 M.L.J. 592 cannot be said to be *ultra vires*. The rule provides for the fixing of starting places and terminii for each vehicle on the route on which it is entitled to be plied. There is nothing in the rule which is opposed to clause (*r*) of sections 68 of the Motor Vehicles Act.

Assuming that having a bus stand amounts to carrying on an occupation, trade or business, rule 268 does not in any way interfere with that right. Every citizen does not have a vested and inviolate right to run a bus stand at whatever place he chooses. This right is subject to any regulations that may be made statutorily or otherwise in the interests of public convenience. If according to such regultions a citizen is not allowed, for instance, to have a bus stand in a particular locality on grounds which relate to public health or other similar considerations, it cannot be said that the right had been unreasonably restricted.

(1950) S.C.J. 324, *distinguished.*

It may be that even on account of proper exercise of powers conferred under the Motor Vehicles Act or under the District Municipalities Act there may be loss sustained indirectly by persons carrying on any occupation, trade or business, but it cannot he said that, on that ground mainly, there has been an infringement of the fundamental right vouchsafed to the citizen under Article 19 (1) (*g*) of the Constitution.

The grant of a licence to keep a private bus stand under section 270-E of the Madras District Municipalities Act does not in law amount to an assurance that there would be no alteration which may adversely affect the licensee in making a profit from the bus stand.

G. R. Jagadisa Ayyar for Petitioner.

The Advocate-General (*K. Kuttikrishna Menon*) on behalf of the Respondent.

K. S. ——— *Petition dismissed.*

Rajamannar, C.J. and Somasundaram, J.
16th February, 1951.

Chandrasekhara Reddi *v.* Commissioner of Income-tax, Madras.
C. M. P. No. 11070 of 1950.

Income-tax Act (*XI of* 1922), *section* 61 (3)*—Order disqualifying an auditor who had been removed from the Register of Accountants for one year on being found guilty of misconduct —"Thence forward be disqualified"—Meaning—Order how far final.*

Section 61 (3) of the Income-tax Act does not by itself prevent the income-tax authorities (including the Central Board of Revenue) from permitting a person against whom they had passed an order under that provision to appear before the authorities on behalf of assessees at a later date, provided, of course, there was nothing in the original order itself which precluded them from doing so. An order in terms of the language in section 61 (3) without mentioning the period of disqualification would not be such an order as to preclude reconsideration on a subsequent date. The words " thenceforward be disqualified " cannot be read as " thenceforward and for ever ". The word " thenceforward " fixes only one limit, namely the limit from which the order begins to have effect. By itself it does not necessarily fix the other limit.

An order under section 61 (3) does not prevent a person who has been disqualified from carrying on his profession, namely that of auditor or accountant. Such order only prevents him from representing assessees before a particular department of the Government. Section 61 (3) of the Income-tax Act is in the nature of a reasonable restriction on the exercise of the right under Article 19 (1) (*g*) of the Constitution of India, 1950, in the interests of the general public and the section is valid.

S. Krishnamachariar for Petitioner.

C. S. Rama Rao Saheb for Respondents.

K. S. *Application dismissed.*

Rajamannar, C.J. and Somasundaram, J.
22nd February, 1951.

Murugappa Chettiar *v.* Balasundaram Chetty.
C. M. P. No. 4564 of 1950.

Madras Buildings (Lease and Rent Control) Act (XV of 1946), *section* 7——*Default in payment of rent—Liability to eviction under section* 7—*Pendency of application for fixing fair rent and possibility that on fixing fair rent landlord would have sufficient money to discharge the arrears relating to the period in default—Effect on right to evict.*

Where there has been default in the payment of rent (which was payable daily) the fact that there was another application for fixation of fair rent and according to the rent so fixed the landlord would have with him sufficient money to discharge the arrears relating to the period of the alleged default, does not save the tenant from the consequence of the default he has made. It is one thing to say that the tenant has a right to have the excess amount, on the basis of the fair rent, adjusted towards the arrears; it is another thing to say that he can escape the consequences of not tendering or paying the rent on or before the date allowed under section 7 of the Act.

V. Srinivasan for Petitioner.

A. Narasimhachari and *K. S. Narayana Aiyar* for Respondent.

K. S. *Petition dismissed.*

Panchapakesa Ayyar, J.
22nd February, 1951.

Muhammad Mustapa Rowther, *In re.*
Cr. R. C. No. 116 of 1950.
Cr. R. P. No. 109 of 1950.

Madras Prohibition Act (X of 1937), *section* 5—*Denatured spirit containing sugar, and lemon juice seized from accuseed—Sufficiency to convict accused for an attempt to " renature" the spirit to render it fit for human consumption.*

In a case where the certificate of the Analyst showed that the denatured spirit seized from the possession of the accused contained sugar and lemon juice and

that an attempt had been made to "renature" it an offence under section 5 of the Madras Prohibition Act is proved. To "renature" means to restore to its original nature, that is the nature of spirits fit for human consumption, as against "denature" which means to render spirits fit for human consumption unfit for such consumption. Sugar and lime juice are such well-known articles of human consumption that they must have been put into the denatured spirit by the accused only in an attempt to renature the denatured spirit and make it fit for human consumption. An attempt to render them fit for human consumption will do, however, unsuccessful, for a conviction under section 5 of the Madras Prohibition Act.

G. Gopalaswami for Petitioner.

The Public Prosecutor (*V. T. Rangaswamy Aiyangar*) on behalf of the State.

K. S. *Sentence reduced.*

Panchapakesa Ayyar, J.
23rd February, 1951.

Karuppiah Nadar, *In re.*
Cr. R.C. Nos. 112, 113, 300 and 301 of 1950.
(Cr. R. P. Nos. 105, 106, 283 and 284 of 1950.)

Opium Act (*I of* 1878), *section* 9 (*a*)—*Shopkeepers having in their shops some bottles of pills—Prosecution on the ground that pills contained opium—Scientific proof essential as to existence of opium in the pills and knowledge of it by the accused.*

The case against the accused was that they had in their shops bottles containing *Guru Tiger Pills* without licences as it was alleged that the pills contained opium. The only evidence was that of a prohibition sub-inspector that he had read somewhere that the pills contained 5 per cent. opium.

Held: For Courts and convictions scientific proof of a reliable variety regarding the pills is needed.

Though there is no knowledge required for possession of *opium pure and simple* certainly knowledge will have to be proved when it is alleged that some particular medicine or pill contains opium before the man can be convicted criminally as *mens rea* or guilty knowledge has to be established in such cases.

S. Ramachandra Ayyar and *G. M. Alagiriswamy* for Petitioners.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) on behalf of the State.

K. S. *Petitions allowed.*

Rajamannar, C.J. and Somasundaram, J.
8th March, 1951.

Dias Bai *v.* Bapunhi.
C. M. P. No. 7113 of 1950.

Madras Buildings (*Lease and Rent Control*) *Act* (*XV of* 1946), *section* 7—*Application under for eviction for default in payment of rent—Defence that tenant was entitled to compensation for improvement—Whether relevant for purposes of enquiry into the eviction application.*

In an application for eviction under section 7 of the Madras Buildings (Lease and Rent Control) Act it was contended on behalf of the tenant that he was entitled to be paid compensation for improvements at the time of eviction and that as that matter could be gone into only in a Civil Court the Rent Controller had no jurisdiction to entertain the eviction application. Negativing such contention,

Held: The question of improvements was not a matter relevant to the enquiry and it cannot afford a defence to the application for eviction.

M. L. Nayak for Petitioner.

K. Srinivasa Rao for Respondent.

K. S. *Petition allowed.*

Viswanatha Sastri, J. Saraswathi Raithi *v.* Duggamma Shedthi.
22nd November, 1950. Appeal No. 294 of 1947.

Aliyasanthana and Marumakkathayam Law—Right of junior members to maintenance—Quantum—Deductible expenses of family which can be taken into consideration.

To-day a junior member of an Aliyasanthana family who leaves the tarwad house to live separately with her husband and children is entitled to separate maintenance, and a male who lives separately from the tarwad in order to pursue his vocation or for other reasonable cause, is likewise entitled. Formerly, a right to maintenance meant only a right to sufficient food, raiment and a small quantity of oil. To-day the right includes a right to " menchilavu " or extra expenditure necessary for leading a comfortable life consistently with the status, dignity and the means of the family, and the needs of its members under the conditions of modern life.

If there is no facility for imparting education in or near the tarwad house and there are several boys and girls that have to be educated in schools or colleges there is nothing improper in the ejman or karnavan setting up a separate establishment in a city where educational facilities are available and providing for the residence and mess of the students who pursue their studies. The ejman is entitled to spend a reasonable portion of the income of the family properties for the maintenance of such a house and such expense cannot be left out of consideration in fixing the rate of maintenance of the junior members of the family. The fact that the husbands of the ladies or the children of the male members of the tarwad came and stayed at intervals in that house does not result in the karnavan becoming liable to account in respect of the expenses incurred for their food and lodging. The karnavan cannot be made liable to account for the expenses incurred in receiving and maintaining guests or near relations of the family.

The junior members cannot claim that the whole of the net income of the tarwad should be distributed among the several members or accounted for as if they were tenants-in-common. The Mitakshara rule of stirpital division does not apply. Maintenance is awarded *per capita*. A karnavan is not accountable if he gives some members more than what he gives to others, so long as he gives to each what under the circumstances, would be a reasonable allowance for his or her subsistence. The needs and requirements of the different members of the family may vary according to their age, health and other circumstances. The karnavan has to incur expenses in connection with payment of revenue on the lands, repairs to buildings, renewal of kanoms, births and deaths, performance of customary charities, reception of guests and relatives, maintenance of the establishment and similar items. A prudent karnavan might set apart a portion of the income of the tarwad in order to meet these charges year by year. It is by taking into account these several factors that the rate of maintenance awardable to each member of the family can be settled.

K. Y. Adiga, K. P. Adiga and *S. Ramayya Naik* for Appellants.

A. Narayana Pai, K. S. Shetty and *K. Srinivasa Rao* for Respondents.

K.S. ——— *Appeal dismissed.*

Satyanarayana Rao, J. Sastha Vasika Meenda Ayyar *v.* Somathammal.
1st December, 1950. S. A. No. 1852 of 1946.

Trust—De facto *trustee of temple—Can institute suit on behalf of idol.*

A *de facto* trustee of a temple can institute a suit on behalf of the idol.

(1949) 2 M.L.J. 171 : I.L.R. (1950) Mad. 191 (F.B.), followed.

K. S. Desikan for Appellant.

S. Ramachandra Aiyar for Respondent.

K.S. ——— *Appeal dismissed. Leave refused.*

Subba Rao, J. Dasappa Nayanim Varu *v.* Ramabhaktula Ramiah.
12th December, 1950. A. S. No. 550 of 1947.

Power of attorney—Scope—Principles of construction.

Powers of attorney must be strictly pursued, and are construed as giving only such authority as they confer expressly or by necessary implication. The following are the rules of construction. (1) The operative part of the deed is controlled by its recitals. (2) Where authority is given to do particular acts followed by general words, the general words are restricted to what is necessary for the proper performance of the particular acts. (3) General words do not confer general powers, but are limited to the purpose for which the authority is given, and are construed as enlarging the special powers when necessary for that purpose. (4) The deed must be construed so as to include all medium powers necessary for its effective execution. A special power of attorney was in the following terms. "We have filed a suit for possession of lands in O. S. No. 314 of 1943 on the file of the Court of the District Munsiff of Tirupathi . . . . . We have appointed you as our agent to carry on the said suit. We have authorised you to conduct on our behalf the entire proceedings which have to be taken in the said suit on the file of the Court of the District Munsiff of Tirupathi." The District Munsiff returned the plaint as he found that the subject-matter was beyond the pecuniary jurisdiction of that Court. The plaint was re-presented in the Subordinate Judge's Court, Chittoor and the power of attorney agent gave a fresh vakalat to the advocate.

Held, on a fair construction of the power of attorney the agent had no power to institute and conduct the suit in the Subordinate Judge's Court of Chittoor.

D. Ramaswami Aiyangar for *C. S. Venkatachariar* for Appellant.

V. Sethumadhava Rao for Respondent.

K.S. *Appeal dismissed.*

Subba Rao, J. State of Madras *v.* Kuppuswami Gounder.
12th December, 1950. Appeal No. 675 of 1947.

Equitable assignment—Essentials of—When agreement enforceable.

Where there is an agreement between a debtor and creditor that a particular debt should be paid from and out of a particular fund or money in the hands of a third party, the agreement will operate as an assignment of the debt or the money.

To create an equitable assignment no particular form is prescribed or necessary. If the intention to assign the debt can be gathered from the terms of a document, the form in which that intention is couched does not really affect the question.

The gist of the document in the case was that the plaintiff should advance monies for carrying out a contract, that the contract between first defendant and second defendant should be completed under the personal supervision of the first defendant himself and that the amounts payable by the Government in respect of such contracts should be received only by the plaintiff in full discharge of the monies due to him from the first defendant and the first defendant executed on the same day, a power of attorney empowering the plaintiff to be present and get the work completed within the period fixed to the satisfaction of the Public Works Department and also to sign the necessary documents on his behalf. The power was sent with a covering letter to the Executive Engineer who was informed before the bills were paid that the debt was assigned.

Held, the document created a valid equitable assignment of the amounts payable by the Government to the first defendant in favour of the plaintiff and if the Government paid the amount to the first defendant with the knowledge of the plaintiff's claim they cannot legally avoid paying the amount over again to the plaintiff.

The Government Pleader (*P. Satyanarayana Raju*) and *P. Ananthan Nair* for Appellant.

R. Rangachari, K. Veeraswami and *N. Kasiviswanathan* for Respondents.

K.S. *Appeal and Memorandum of Cross objections dismissed.*

Viswanatha Sastri, J.
7th December, 1950.

Narasinga Rao *v.* Pydah Venkatasubbamma.
Appeal No. 502 of 1947.

Madras Agriculturists Relief Act (IV of 1938), section 3 (ii), proviso (C)—Assessment to house-tax—Whether as manager of joint Hindu family or individual capacity—Test.

It is not the *vilasam* of the assessee that is the determining or decisive criterion, but the ownership of the property by the joint family and the position of the assessee as the manager of the family when considering the applicability of proviso (*C*) to section 3 (*ii*) of Madras Act IV of 1938. The entry in the assessment register is not conclusive and regard must be had to the real ownership of the property in determining whether a joint family has been assessed to the tax in the name of its manager.

D. Narasaraju, A. Krishnaswami and *K. B. Krishnamurthi* for Appellant.

P. Somasundaram and *K. Venkataramana* for Respondents.

K.S.

Appeal dismissed

Rajamannar, C.J. and Panchapakesa Ayyar, J.
12*th December*, 1950.

Sugan Chand & Co.*v.* Brahmayya & Co., Liquidators,
O. S. A. Nos. 85, 89 and 99 of 1949.

Bank—Liquidation—Purchaser of draft in one branch on another branch—Rights of.

A demand draft is of course a Bill of Exchange drawn by a bank on another bank, or by itself on its own branch, and is a negotiable instrument not offending the Paper Currency Act or the Reserve Bank Act. It is very nearly allied to a cheque, the difference between it and a cheque consisting largely in two facts. Firstly, it can be drawn only by a bank on another bank, and not by a private individual as in the case of cheques. Secondly, it cannot so easily be countermanded as a cheque, either by the person purchasing it, as the drawer of a cheque, or by the bank to which it is presented.

But there are many cases, especially where the bank issues a draft on its own branches, or one branch issues a cheque on another branch of the same bank, where the distinction between the cheques and the drafts becomes narrowed down and even the bank calls a draft a cheque.

A mere purchaser of a demand draft from a bank is only a creditor of the bank, and there is no fiduciary relationship between the bank which issued the draft and the customer who took it. The ownership of the money paid for the purchase of the draft passes to the bank, as it is one of the usual and recognised branking transactions, and the purchaser gets what he has bargained for, namely, a draft of the bank, the payment of which depends on the solvency of the head office at the time of the presentation of the draft.

There is however one exception to this rule. Where *A*, by paying money to a bank takes a draft drawn on its branch in another place, in favour of himself or any other person, *prima facie*, the relationship of a debtor and a creditor is constituted between the bank and *A*, and *A* must content himself with receiving payment like other creditors, on a suspension of payment by the bank. Still if *A* can show that at the time he paid the money in one branch of the bank and been given and had accepted a draft for the amount paid by him drawn on another branch, the sole object of making the payment, as understood by both the parties to the transaction, was the transmission of the money from one place to another for the express purpose of being paid to himself or some nominee of his, the bank being intended to be used merely as a transmitting agent, the parties may none the less be held to stand to each other in the relationship of principal and agent, the money paid being sufficiently appropriated for transmission according to the instructions of the principal. This exception is confined strictly to cases where a bank issues a draft on its own branch and there is no express agreement between the parties at the time of the issue of the draft by the bank on its own branch that the sole object of the issue of the draft is to transmit the money from one place to another

for the express purpose of being paid to the person applying for the draft or some nominee of his, provided the bank has not actually parted with the money held by it as agent, acting on the instructions of the principal, thus terminating the relationship of principal and agent.

But if the draft is negotiated by the person getting it, in favour of another, the ordinary law will at once operate and make the assignee only a mere creditor of the bank, the relationship of principal and agent having terminated. Where a cheque or bill is entrusted for collection there is a business relationship.

The mere fact that the money collected by the bank has been mixed up with money of its own is immaterial so long as there is a fund on which the principal *cesti que trust* can lay his hands on. The special business for which the agency has been created must be completed, and the agency must have terminated and the fiduciary relationship come to an end, before the former relationship of principal and agent can be replaced by the mere relationship of creditor and debtor.

The mere fact that a person had no prior banking transaction with the bank is not by itself sufficient to exclude the possibility of his having become the customer of the bank and a mere creditor when he pays in a certain amount and purchases a draft, nor does the fact that he gives directions to the bank to apply in a particular manner moneys standing to his credit in the bank already necessarily make the relationship between the parties fiduciary. The crucial test is whether the customer has an equitable right which prevents the Official Liquidator from interfering with those monies and annexing them to the general funds of the bank available for all creditors. [On the facts it was found that the parties only wanted the demand drafts for the purpose of transmitting the money to themselves—none of them had any banking accounts—and therefore the bank was entitled to hold the moneys involved *only in law*, and the parties have an equitable right to the moneys, preventing the Official Liquidator from merging them with the general funds of the bank.]

Merely purchasing drafts on their own bank at Madras and receipt of such drafts by the parties (for bills given for collection) did not terminate the relationship of principal and agent. Equity will compel the bank to honour the draft issued by itself on itself and will not allow it to escape its responsibility by this kind of tactics. The essence of payment by cheque or draft on oneself is the understanding that it will be honoured.

T. M. Ramaswami Ayyar, *A. R. Krishnaswamy*, *Y. Venkatasubramanyam* and *M. L. Nayak* for Appellants.

S. Swaminathan for Respondents.

K. S. O. S. A. Nos. 85 and 99 of 1949, allowed.
O. S. A. No. 89 of 1949, dismissed.

Govinda Menon and Chandra Reddi, JJ. Appala Raju *v.* Official Receiver, West Godavari.
2nd January, 1951.
A. A. O. No. 399 of 1948.

Provincial Insolvency Act (*V of* 1920), *sections* 4 *and* 37—*Order on application under section* 4 *for payment of money against a stranger—Annulment of adjudication*—Quondam *insolvent's right to execute order as a decree—Failure to execute—Limitation—Limitation Act* (*IX of* 1908), *Article* 182 (5).

When money is due to a person who has been adjudicated an insolvent and the Official Receiver in whom the estate of that person has become vested files a suit to realise that sum of money, it cannot be said that he is representing any of the creditors of the insolvent in realising that sum of money. After an adjudication has been annulled it is open to the *quondam* insolvent to take such steps regarding his property which he could ordinarily have done unless there had been an order under section 37 (1), clause (2) of the Provincial Insolvency Act, vesting the property in a trustee or in the Official Receiver. An order for payment of money on an application under section 4 of the Provincial Insolvency Act is

tantamount to a decree and if after annulment of adjudication the insolvent failed to apply for execution and three years had elapsed the Official Receiver cannot on the setting aside of the annulment seek to execute such decree.

C. V. Narasimha Rao for Appellant.

V. Suryanarayana for Respondent.

K. S. ——— *Appeal allowed.*

[Full Bench.]

Rajamannar, C.J., Viswanatha Sastri and Panchapakesa Ayyar, JJ. — Saraswathi Ammal *v.* Rajagopal Ammal. C. M. P. No. 7933 of 1949. 5*th January*, 1951.

Civil Procedure Code (V of 1908), *sections* 109 *and* 110—*Leave to appeal to Supreme Court—Several appeals against decree in same suit by different parties—Decree of High Court in all the appeals heard together—Value of all appeals more than Rs.* 10,000—*Right to leave to appeal.*

When several appeals are preferred against the decree in the same suit by different parties, they should be heard together and there can be only one decree of the High Court as an appellate Court embodying the decisions in the several appeals, which decree would supersede the decree of the trial Court.

Even when there are several defendants each one of whom is interested in terms which may not be of the required value, it will be sometimes permissible to take the aggregate value of all the items in dispute for purposes of leave to appeal to the Supreme Court.

T. V. Muthukrishna Ayyar, P. N. Appaswami Ayyar, S. V. Gopalakrishna Ayyar and *K. Vaitheeswaran* for Petitioners.

S. Ramachandra Ayyar for Respondent.

K. S. ——— *Leave to appeal to Supreme Court granted.*

Subba Rao, J. — Venkatarama Iyer *v.* Subramania Iyer. 9*th January*, 1951. Appeal No. 387 of 1947.

Limitation Act (IX of 1908), *Articles* 118, 142, *and* 144—*Applicability—Suit for recovery of possession from person who claims to be in possession as adopted son which is denied by plaintiff—Limitation.*

Article 118 of the Limitation Act should be confined only to a declaratory relief governed by section 42 of the Specific Relief Act. A suit for possession based on title is not governed by Article 118. If a plaintiff asks for a declaration of his title and for possession, if his title is established he will be entitled to possession unless the defendant acquired a right by adverse possession. If possession is asked for on the basis of dispossession, he will have to prove possession within 12 years from the date of the suit. If a defendant raises a plea that he is the adopted son or that he has any other title, it is for him to establish such a title to non-suit the plaintiff. The fact that in such a suit the adoption of the defendant by the plaintiff will be put in issue and will have to be decided cannot convert the suit into one for declaration that the adoption has not taken place. To such a suit either Article 142 or 144 would apply. The fact that in such suit the plaintiff asked for an unnecessary declaration that there was no adoption or a declaration in respect whereof the suit was barred cannot be a reason for refusing the plaintiff reliefs if he is otherwise entitled to them.

T. K. Subramania Pillai for *A. C. Sampath Aiyangar* for Appellant.

K. V. Ramachandra Aiyar for Respondent.

K.S. ——— *Appeal dismissed.*

Subba Rao and Panchapakesa Ayyar, JJ. — Muthayee Achi *v.* Subbia Chettiar. 12*th January*, 1951. Appeal No. 180 of 1947.

Contract Act (IX of 1872), *section* 25 (3)—*Scope—Promise to pay barred debt—Promisor's knowledge that debt was barred and irrecoverable—If essential.*

Section 25 (3) of the Contract Act does not require that the document should contain a promise to pay a sum of money in consideration of a debt which is barred nor that it should show that the promisor knew that it was barred, for the words used in the section show that it is the debt and not a sum of money in

consideration of the barred debt that the promisor should refer to, and there is nothing whatever in the section to indicate that the promisor should do more than promise to pay a debt of which the creditor might have enforced payment but for the law of limitation of suits. The words are not " promise to pay a sum of money in consideration of a debt" nor does the section refer to the knowledge of the promisor. A promise to pay under section 25 of the Contract Act will be enforced if the real consideration is shown to be a barred debt, though no reference is made in the document to such debt, and no knowledge of the debtor that the debt is barred is proved before the promise is made.

9 M.L.J. 335 : I.L.R. 23 Mad. 94 and I.L.R. 33 Mad. 159, followed.

20 M.L.J. 656, not followed.

It cannot be said that the promisor should at least have named the year of those time-barred debts to show that they were barred by limitation.

R. Gopalaswami Iyengar for Appellant.

C. S. Venkatachariar, D. Ramaswami Aiyangar and *K. K. R. M. K. Ramanathan Chettiar* for Respondents.

K.S.

Appeal dismissed.

Satyanarayana Rao and Raghava Rao, JJ.
18th January, 1950.

Seshagiri Iyer *v.* Valambal Ammal.
L. P. A. Nos. 64 and 106 of 1949.

Civil Procedure Code (*V of* 1908), *section* 47 *and Order* 21, *rule* 90—*Limitation for application under Order* 21, *rule* 90.

If a party impeaches a sale on grounds which attract the provisions of Order 21, rule 90, Civil Procedure Code, he cannot escape from the period of limitation provided by Article 166, Limitation Act, by framing his application as one under section 47, Civil Procedure Code. The substance of the application must be considered in order to determine whether the application is one which falls under section 47 or under Order 21, rule 90, Civil Procedure Code. If the grounds alleged do not relate to matters in publishing or conducting the sale but are anterior or subsequent to the sale, no doubt, in that event, the application is outside the purview of Order 21, rule 90. Of course, it is open to a party to get an extended period of limitation by alleging and establishing grounds which would entitle him to claim the benefit of section 18 of the Limitation Act.

An application under Order 21, rule 90 is governed by Article 166 of the Limitation Act and is barred when filed more than 30 days from the date of the sale. The procedure laid down under Order 21, for execution of decrees and for sale of the properties is a self-contained one and there is no room for engrafting into it the principles of natural justice or adding to it new rules on the principle of justice, equity and good conscience.

Quare.—Whether in the case of an adjourned sale, a fresh settlement of the proclamation of sale every time it is adjourned for more than 30 days in the same execution should be made so as to comply with the requirements of rule 69. [Necessity for clarification by alteration of the rules pointed out].

M. S. Venkatarama Aiyar and *S. Viswanathan* for Appellant in L. P. A. No. 64 of 1949 and *N. Sivaramakrishna Aiyar* for Appellant in L. P. A. No. 196 of 1949.

N. Sivaramakrishna Aiyar and *L. A. Gopalakrishna Aiyar* for Respondent in L. P. A. No. 64 of 1949 and *M. S. Venkatarama Aiyar* and *L. A. Gopalakrishna Aiyar* for Respondents in L. P. A. No. 106 of 1949.

K.S.

L.P.A. No. 64 *of* 1949, *allowed and L. P. A. No.* 106 *of* 1949, *dismissed.*

Subba Rao, J.
1st February, 1951.

Appa Rao *v.* Suryaprakasa Rao.
Cr. R. C. No. 1439 of 1950.
(Cr. R. P. No. 1364 of 1950).

Evidence Act (*I of* 1872), *section* 124—*Statements made by witnesses in an investigation made by the subordinates of the District Superintendent of Police—Privilege if can be claimed in respect of—Right of accused to copies of such statements.*

In respect of a complaint against a Sub-Inspector of Police, the District Superintendent of Police directed the Circle Inspector of Police to make an investigation.

Statements were recorded from various persons in the course of the investigation. On enquiry the police did not take any action. Then a private complaint was filed. The accused filed an application calling for the statements recorded by the Inspector for the purpose of contradicting the witnesses. The District Superintendent of Police claimed privilege in respect of those statements.

Held, section 124 of the Evidence Act can be applied only when the communication was made to a public officer in official confidence. The statements made by the witnesses in an investigation made by the Circle Inspector under the Criminal Procedure Code cannot be considered to be statements made in official confidence, when alone the public officer cannot be compelled to disclose such statements. Accordingly the accused is entitled to use the statements to contradict the prosecution witnesses.

T. Krishnamurthy for Petitioner. *S. Suryaprakasa Rao* for Respondent.

K.S. ——— *Petition allowed.*

Rajamannar, C.J. and Somasundaram, J. Arasu *v.* Sami Venkatachalam Chetty.

14th February, 1951. C. M. A. No. 6383 of 1950.

Civil Procedure Code (V of 1908), Order 41, rule 19—Not applicable to Court of Small Causes in disposing of appeals under section 12 of the Madras Buildings (Lease and Rent Control) Act (XV of 1946).

Order 41, rule 19, of the Code of Civil Procedure, which provides for re-admission of an appeal dismissed for default of appearance does not apply to the Court of Small Causes in disposing of appeals under section 12 of the Madras Buildings (Lease and Rent Control) Act, XV of 1946.

Accordingly an application to set aside an order dismissing an appeal under section 12 of the Madras Act (XV of 1946) for non-appearance of the appellant is unsustainable.

T. S. Narasinga Rao and *M. Balachandrudu* for Petitioner.

R. Krishna Ayyar for Respondent.

K.S. ——— *Petition dismissed.*

Rajamannar, C.J. and Somasundaram, J. Satyanarayana *v.* Yemmaji Rao.

22nd February, 1951. C.M.P. Nos. 5294 and 6936 of 1950.

Constitution of India (1950), *Article 226—Power to quash proceedings by writs of certiorari—If can be exercised where orders have become final according to the then state of law before the date of the commencement of the Constitution of India.*

Orders which have become final according to the then state of the law before the date of the commencement of the Constitution will not be interfered with under the power which the High Court undoubtedly has conferred on it by Article 226 of the Constitution.

S. Suryaprakasam and *A. S. Prakasam* for petitioner and *D. Narasaraju* for respondent in C.M.P. No. 5294 of 1950.

D. Narasaraju and *K. B. Krishnamurthy* for petitioners and *C. Rama Rao* for respondent in C.M.P. No. 6936 of 1950.

K.S. ——— *Petitions dismissed.*

Balakrishna Ayyar and Basheer Ahmed Sayeed, JJ. Guruswami Thevar, *In re.*

26th February, 1951. Ref. Trial No. 1 of 1951.

Criminal Procedure Code (V of 1898), section 350 (1)—Sessions Judge delivering judgment written by his predecessor, after he made over charge—Judgment a nullity.

A judgment delivered by a Sessions Judge which was written by his predecessor after the latter had ceased to be a Sessions Judge of the District concerned having, under orders of transfer made over charge previous to that date, is not a judgment as contemplated by the Criminal Procedure Code. Section 350 (1) of the Criminal Procedure Code does not apply to Sessions trials and there is no corresponding provision which can be invoked by Sessions Judges. Section 350 (1) is available only to Magistrates.

I.L.R. 1947 Mad. 365, followed; 18 M.L.J. 197; A.I.R. 1933 Mad. 251 and (1948) M.W.N. (Crl.) 65, distinguished.

C. Rajaraman for the accused.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) on behalf of the State.

K.S. *Conviction and sentence set aside and retrial ordered.*

Panchapakesa Ayyar, J.
7th March, 1951.

Abdulla *v.* State.
Cr.R.C. No. 996 of 1950.
(Cr.R.P. No. 929 of 1950.)

Madras Prohibition Act (*X of* 1937)—*Search under—Necessity to examine panchayatdars to corroborate evidence of search officer—Possession by shopkeeper of medicinal preparation exempted from operation of Act as containing* ·2 *per cent. spirit—Bottle seized actually found to contain a higher percentage of spirit—Liability.*

The Madras Prohibition Act gives very great powers to searching authorities and inflicts very severe punishment on people committing offences under the Prohibition Act. It is therefore of the utmost importance that there should be satisfactory evidence before the Courts regarding the articles seized from each accused person. That is why search officers have to take Panchayatdars with them at the time of the search under the law, but the object of taking such panchayatdars will be frustrated if those Panchayatdars, or one of them at least, are not examined in Court to corroborate the evidence, of the search officer. It is no use saying that the search officer had no motive to perjure against the accused. When his statement that the bottles seized by him were not *Jeeva Bhaskaram* (a particular medicinal preparation) is disputed, it is clearly the duty of the prosecution to examine the Panchayatdar to corroborate the search officer's evidence. Failure to do so will lead to one result namely, giving the benefit of doubt to the accused and holding that the bottles seized were *Jeeva Bhaskaram* bottles.

No dealer can be compelled under the law to open bottles of medicines and preparations containing a percentage of spirits and exempted from the Prohibition Act, in order to see whether they contained more spirits than found by the authorities when they were exempted. Once the Government takes the grave responsibility of exempting any medicine or preparation from the Prohibition Act, it must take the risk of some of the bottles of that preparation so exempted containing either deliberately or accidentally, more spirits than the bottles submitted to the Government for purposes of exemption did. That risk will be greater in the case of country preparations like *Jeeva Bhaskaram* made by an illiterate person than in the case of standard preparations like Woodward's Gripe Water manufactured by well known chemists.

Once the preparation was exempted it must be taken for granted that any dealer or commission agent trading in such preparations is free to trade in it without examination of the contents, or limitation of the period of keeping unless, of course, the notification exempting the preparation prescribes these additional limitations or the dealer adds, spirits himself. It is not the dealers' duty to see that the ·2 per cent. spirits exempted were not exceeded by the keeping of the bottles.

Inamdar Abdus Salam for the Petitioner.

The State Prosecutor (*S. Govind Swaminathan*) on behalf of the State.

K.S. ——— *Conviction and sentence set aside.*

Rajamannar, C.J. and Somasundaram, J.
13th March, 1951.

Ananta Lakshmi Ammal *v.* The Hindustan Investment and Financial Trust, Ltd.
O.S.A. No. 17 of 1951.

Companies Act (*VII of* 1913), *section* 79 (1) (*e*)—*Scope and effect.*

Section 79 (1) (*e*) of the Companies Act must override any provision made in the articles of a Company. If a shareholder's name is entered in the register of shareholders of the Company, he cannot be prevented from enjoying the right to vote on the ground that his name has not been on the register for any specified time.

Merely because of adjournments due to the action of one party or the other there should be no prejudice to the entire body of shareholders as on the date before the date for the meeting originally convened. Only such shareholders who were entered in the list of shareholders on that date would be entitled to vote at the meeting to be held on the adjourned date.

G. Vasantha Pai for Appellant.

O. Radhakrishnan for Respondent.

K.S. ——— *Appeal allowed.*

Satyanarayana Rao, J.
5th January, 1951.

Keshavan Battathiri *v.* Sri Madiyankool Kshetrapala Devaswom.
G. R. P. No. 1095 of 1949.

Civil Procedure Code (*V of* 1908), *Order* 21, *rule* 29—*Stay under—If can be granted where no application for stay of confirmation is made under rules* 89, 90 *and* 91 *of the Code and the sale has to be confirmed under rule* 92.

Order 21, rule 92 of the Code of Civil Procedure says that the Court is bound to confirm the sale where no application under rules 89, 90 and 91 is made. Where no such application is made it is imperative that the Court should confirm the sale, and in that respect the provision in Order 21, rule 29, must yield to the mandatory provision in rule 92. The stage in which the Court can exercise the power by granting stay of execution of the decree can only be before the stage of confirmation is reached and not after that.

C. R. Viswanatha Aiyar for Petitioner.

Respondent not appearing.

K.S. *Petition allowed.*

Balakrishna Aiyar, J.
24th January, 1951.

Batcha Sahib *v.* Periyanayagammal.
A. A. A. O. No. 113 of 1948.

Decree embodying a compromise creating a charge—Attestation if essential—Enforceability of charge by execution of decree.

Merely because a compromise is embodied in a decree it will not prevent the parties affected by it from showing that it was vitiated by fraud, deception, undue influence or other invalidating circumstances. Such factors would affect the substance of the transaction but this does not mean that the decree which embodied the compromise entered into by the parties should be attested in those cases where the agreement between the parties, requires attestation or that because the agreement (creating a charge) subsequently embodied in the decree is not attested, the decree is invalid. These are matters of form which do not affect the decree. The provisions relating to attestation are primarily intended as safeguards against forgery and false personation and such malpractices and there is no reason in principle why the requirement that it must be attested should be extended to agreements immediately after incorporation in a decree of Court. A decree creates a charge by operation of law and the decree can be executed.

(1945) 2 M.L.J. 388 ; 1943 Oudh 354 (F.B.) ; 1943 Bom. 414, relied on.

I.L.R. (1941) Nag. 513, not followed.

R. V. Ramachandra Aiyar for Appellant.

V. C. Veeraraghavan for Respondent.

K.S. *Appeal allowed.*

Rajamannar, C.J. and *Somasundaram, J.*
31*st January*, 1951.

Murugesan Chetty *v.* Kanniappa Mudaliar.
O. S. A. No. 5 of 1950.

Limitation Act (*IX of* 1908), *Article* 183—*Decree transmitted to High Court and application for execution against one of the defendants only—Death of decree-holder and application of his legal representatives to be brought on record and to continue execution—If revivor against other defendants.*

Where a decree is transmitted to the High Court and an application for execution against one of the defendants only is pending, the decree-holder dies and his legal representatives apply to be brought on record and ask for leave to continue the execution proceedings, the order on such application cannot act as

" revivor " within the meaning of Article 183 of the Limitation Act as against the other defendants, whose liability to be proceeded against in execution, the order did not purport to judicially determine.

T. A. Vijayaragavachari for Appellants.

N. R. Sesha Aiyar for Respondent.

K.S. *Appeal dismissed.*

Balakrishna Ayyar, J.
14th February, 1951.

Andavar *v.* Periathambi Padayachi.
S. A. No. 1882 of 1947.

Religious endowment—Poojari—When trustee—Tests—Festivals celebrated with collections and contributions from villagers—If makes villagers trustees.

Where a deity has no property of its own and the expenses of any celebration have to be met from collections and contributions provided by the villagers, obviously it would be impossible for the poojari or trustee to do anything without their active co-operation and assistance. But this does not mean that the villagers become the trustees. It is more material to consider what amount of control the villagers exercised over the moneys they placed in the hands of the poojaris or trustees. Where it is found that the poojari was in possession and paying kist of the only immovable property which was of inconsiderable value and that he had custody of all the movables and there was nothing to show that any control was exercised over him in the manner in which he disposed of the collections and contributions made for the annual festival, it can be presumed that he is the trustee.

K. Rajah Aiyar and *V. Seshadri* for Appellant.

K. S. Desikan for Respondents.

K.S. *Appeal allowed. Leave refused.*

Rajamannar, C.J., and
Panchapakesa Ayyar, J.
16th February, 1951.

Kamalamma *v.* Syed Ismail Ispahani.
O. S. A. No. 57 of 1949.

Madras High Court Original Side Rules—Order 7—Suits coming within the scope of —Civil Procedure Code (V of 1908), Order 37, rule 4—If applicable.

Order 37 of the Civil Procedure Code lays down a summary procedure for suits on negotiable instruments which may be availed of by the plaintiff. Order 7 of the Original Side Rules deals with the same topic generally, but differs in material particulars from Order 37 of the Code in its scope. While Order 37 of the Code gives the plaintiff an option, Order 7 of the Original Side Rules compels the plaintiff to resort to the procedure prescribed therein. Order 7 of the Original Side Rules applies to other suits also on debts and liquidated demands while Order 37, Civil Procedure Code, deals only with negotiable Instruments. While there is no provision in Order 37 of the Code for enlargement of time over and above ten days for applying and obtaining leave to defend there is provision in Order 7 of the Original Side Rules for extension of time by the Registrar. Having regard to all these vital differences, it is clear that Order 7 of the Original Side Rules supersedes and stands in lieu of Order 37 of the Code.

As Order 7 of the Original Side Rules now stands, in regard to suits coming within the scope of that order, Order 37, rule 4 of the Code can have no application.

K. Kuppuswami for Appellant.

M. S. Venkataramu Aiyar and *M. S. Mahadeva Aiyar* for Respondent.

K.S. *Appeal dismissed.*

Chandra Reddi, J.
21st February, 1951.

Muthu Vedi Ammal, *In re.*
Cr. R. C. No. 56 of 1950.
(Cr. R. P. No. 54 of 1950).

Penal Code (*XLV of* 1860), *section* 426—*Offence under—Complaint of the aggrieved person if* sine quo non *of the prosecution.*

It cannot be said that a complaint of the aggrieved person is the *sine quo non* of the prosecution for an offence under section 426 of the Penal Code. An offence under section 426 is not one that is covered either by section 198 or by section 199, Criminal Procedure Code and therefore the complaint of the person aggrieved is not essential.

V. V. Raghavan for Petitioners.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

K.S. ——— *Petition dismissed.*

Panchapakesa Ayyar, J.
8th March, 1951.

Marthamma *v.* Munuswamy.
Cr. R. C. No. 1084 of 1950.
(Cr. R. P. No. 1017 of 1950).

Penal Code (*XLV of* 1860), *sections* 494 *to* 496—*A Hindu convert to Christianity who had married a Christian abandoning Christianity and marrying again a Hindu after relapsing to Hinduism—If can be convicted for bigamy.*

A Hindu who became a Christian to marry a Christian woman and then reverted to Hinduism and married again a Hindu woman cannot be convicted for the offence of bigamy. Granting for the sake of argument, that the profession of Christianity does impose a religious obligation to monogamy that obligation goes when the religion is abandoned for a religion recognising polygamy. [The Madras Hindu Bigamy and Divorce Act came into operation only in March, 1949 and the second marriage of the accused took place a month before that Act came into force.]

The Indian Union is now a secular state, and every man is given a right to follow any religion he likes or to follow no religion at all. So, the conversion of a man to any religion will only enure so long as the person converted to it adheres to that religion and does not leave it for any other religion. It is the law that a man on re-conversion acquires the right of the religion which he re-enters.

Gopala Menon and *C. Sriramulu* for Petitioner.

Venkataraman for *Messrs. Row and Reddi* for the Respondents.

The State Prosecutor (*S. Govind Swaminathan*) on behalf of the State.

K.S. ——— *Petition dismissed.*

Panchapakesa Ayyar, J.
15*th March*, 1951.

Public Prosecutor, Madras *v.* Ramaswami.
Gr. A. No. 122 of 1950.

Evidence Act (*I of* 1872), *section* 106—*Applicability—Person buying steel or iron for a building under a permit under Iron and Steel Production and Distribution Control Order*, 1941 *not using it for purpose for which permit was issued—Prosecution—Burden of proving what became of the articles purchased is on the accused.*

In a prosecution of the accused for not using a quantity of M. S. Rounds purchased under a permit under Iron and Steel Production and Distribution Control Order, 1941, for the building for which the permit was given, section 106 of the Evidence Act throws on the accused the burden of proving what became of the materials he bought under the permit. Simply because the prosecution could not find out where the materials were and how they had been misused the accused cannot escape liability. The accused alone had this special *knowledge*, and he will be liable under section 106 of the Evidence Act to be convicted of the offence unless he proved that he had used the materials for the purpose granted. Courts should never fail to apply section 106 to cases of special knowledge and burden like this.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) in person.

P. S. Kailasam for Respondent.

K.S. ——— *Appeal allowed.*

Panchapakesa Ayyar, J.
15*th March*, 1951.

Palani Moopan, *In re.*
Cr. A. No. 573 of 1950.

Penal Code (*XLV of* 1860), *section* 304, *paragraph* 2—*Accused causing fatal injury though he had no intention to kill—Liability—Accused if entitled to be given advantage of section* 8 *of Madras Borstal Schools Act.*

Where a fatal injury is inflicted by the accused on a vital portion of the deceased's body (the abdomen) with a deadly weapon (a spear) and the blow must have been dealt with terrific force, there is no need to infer an intention on the part of the accused to *murder* the deceased, and an offence under section 304, Paragraph 2 of the Penal Code would be clearly proved against him. The exceptional case where the intention is relevant to constitute the offence will be, where a man intends to inflict a stab on the leg of another, but by misfortune, the stab falls on the stomach or other vital spot of the other by the other turning a somersault or making an unexpected movement at the psychological moment and getting the stab in that vital spot.

Where such accused person is of 19 years of age it is a fit case for applying section 8 of the Borstal Schools Act. That section should be interpreted to mean that whenever an adolescent offender has been convicted of an offence he should ordinarily be given the advantage of being put in the Borstal School so that by the training therein he should become a useful citizen of the country. Criminal tendency cannot be said to manifest itself in acts involving dishonesty like theft or cheating but can be inferred also in a person who owing to lack of self-control or as a result of his environment or association (with cantankerous persons) is unable to control himself and commits an offence of either grievous hurt or homicide by using a deadly weapon, without regard to the consequences for a petty reason.

K. V. Ramaseshan for Accused.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

K.S. *Order modified.*

Rajamannar, C.J. and
Somasundaram, J.
15*th March*, 1951.

Sitaramanjaneyalu *v.*
Krishnayya.
C. M. P. No. 1875 of 1951.

Madras Buildings (*Lease and Rent Control*) *Act* (*XV of* 1946), *section* 7 (6)—*Subsequent default in payment of rent occurring while application for eviction on the ground of default in payment of rent was pending—If can be made ground for application for ejectment after rejection of first application.*

A landlord filed a petition for eviction on the ground of default in payment of rent for the month between 10th August, 1949, and 9th September, 1949. The petition was not disposed of till 6th February, 1950, when it was dismissed. Meanwhile on 11th December, 1949, the landlord filed another petition for eviction on the ground of default in payment of rent for the month from 10th September, 1949, to 9th October, 1949. This petition was allowed by the controller and the order affirmed on appeal. In a petition to quash this order.

Held, having regard to the provisions of sub-section (6) of section 7 of the Rent Control Act the second petition was not maintainable. Once the first application is rejected, the tenancy is deemed to continue. The landlord cannot allege in a subsequent application that the tenancy has come to an end before the date of the rejection. The landlord can only rely upon default or other grounds committed or available after the date of the rejection of the first application.
(Decision in C. M. P. No. 499 of 1949, relied on).

C. Venugopalachari, T. T. Srinivasan and *A. N. Rangaswami* for Petitioner.

D. P. Narayana Rao for 1st Respondent.

K.S. *Order quashed.*

Satyanarayana Rao, J.
5*th January*, 1951.

Seethayya *v.* Venkanna.
C. R. P. No. 10 of 1949.

Provincial Insolvency Act (*V of* 1920), *section* 28-A—*Effect—Decree against Hindu insolvent father—Executability against son—Vesting of son's share in Official Receiver—How far saves bar of limitation.*

Section 28-A of the Provincial Insolvency Act was introduced for the first time in April, 1948. Where before that date the Official Receiver actually sold only the father's share and did not exercise the power of the father by bringing to sale the share of the son also, section 28 of the Provincial Insolvency Act did not prevent a decree-holder from proceeding in execution of the decree against the son's share notwithstanding the vesting of the power to dispose of the property in the Official Receiver. That vesting does not take away the power of the son to sell the property in his own right, and much less to prevent the execution creditor from proceeding with the sale of the son's share. As there is no bar under the law preventing the decree-holder from executing the decree against the son there will be nothing to prevent running of limitation for execution of the decree against the son. Section 28-A of the Provincial Insolvency Act recognises retrospectively the power of the Official Receiver in the case of insolvency of the father to dispose of the son's share; it does not save the bar of limitation against the son. There is no bar to execution against the son before the amendment of the Act and much less is there a bar after the amendment.

B. V. Subrahmanyam for Petitioner.

V. Subrahmanyam for Respondent.

K.S.

Petition allowed.

Rajamannar, C.J. and Somasundaram, J.
9*th March*, 1951.

Suryanarayana *v.* Venkata Subba Rao.
App. No. 607 of 1947.

Civil Procedure Code (*V of* 1908), *section* 66 (1)—*Scope of the prohibition under—Trusts Act* (*II of* 1882), *section* 82—*Effect.*

When *A* purchases property with his own money but in *B's* name without any intention of conferring on him any beneficial interest, the purchase is generally described as benami. In such a case the benamidar holds the property in trust for *A* and *A* may compel him to transfer the property to him. Section 82 of the Trusts Act embodies this principle. Such benami transactions are not illegal and ordinarily there is nothing to prevent a case of benami being put forward in Court successfully. But section 66 of the Civil Procedure Code lays down an embargo on the plea of benami when it forms the basis of a suit by the person claiming to be the real owner against a Court auction-purchaser alleged to be a benamidar. As the section places a procedural bar to the enforceability of a claim based on benami which is otherwise quite legal and valid and effective the section has to be strictly construed. But when substantially the facts attract the operation of the rule enacted by the section, Courts will be failing in their duty if effect is not given to it.

If a plaintiff's title depends ultimately on the benami nature of the transaction, then, section 66 of the Code would certainly be a bar, but if the plaintiff's title is dependent upon other facts and circumstances, like, for example, the application of the general law or the carrying out of a separate contract, then section 66 would not be a bar.

[Case-law discussed].

P. Somasundaram and *P. Suryanarayana* for Appellant.

M. S. Ramachandra Rao and *M. Krishna Rao* for Respondent.

K.S.

Appeal allowed.

Satyanarayana Rao and Viswanatha Sastri, JJ.
12*th March*, 1951.

Commissioner of Income-tax, Madras *v.* Raman and Raman, Ltd.
Case Referred No. 16 of 1948.

Income-tax Act (*XI of* 1922), *section* 10 (2) (*xv*)—*Expenses incurred in litigation—When allowable deduction—Test whether it is revenue or capital expense.*

Litigation is often conducted by businessmen in order to maintain, preserve or defend an existing right or title to property or to prevent the invasion of such right in future. Legal expenses incurred in such litigation do not create a new capital asset or stock-in-trade but are incurred in the ordinary course of preserving or maintaining the assets or stock-in-trade of the business. Such expenses are part of the revenue expenditure of the business and their deduction is permissible under section 10 (2) (*xv*) of the Income-tax Act.

C. S. Rama Rao Sahib for Applicant.

T. V. Viswanatha Ayyar and *S. Narayanaswami* for Respondent.

Reference answered in favour of the assessee.

K. S. ———

Panchapakesa Ayyar, J. Subbanna, *In re.*

21st March, 1951. Cr. M. P. No. 1524 of 1950.

Penal Code (*XLV of* 1860), *section* 366—*Construction—Meaning—Kidnapped minor girl's consent to her marriage—Effect—Criminal trial—Framing charge—Duty of Magistrate.*

A kidnapped minor girl's consent to her marriage with the accused is no consent at all even for purposes of section 366 of the Penal Code and a prosecution will lie in such circumstances.

A.I.R. 1929 All. 709; A.I.R. 1930 All. 19 (2) and A.I.R. 1944 Bom. 159 preferred to A.I.R. 1932 Cal. 442 and 48 Cr.L.J. 542.

Magistrates must stick to the law and not strike out the well-known and recognised clauses in printed forms of charges approved by the High Court and frame new and unauthorised methods of charges regarding offences which they are not "competent to try" and send the case up to their superior Magistrates to try, after recording the accused's plea also. That is clearly illegal, and not merely irregular under section 537, Criminal Procedure Code. Where the facts are not sufficient to sustain a charge under section 366 of the Penal Code it is not open to the sub-Magistrate to frame a charge under section 363 and send the case to a superior Magistrate.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

Counsel not appearing for accused.

K.S. ——— *Reference accepted.*

Panchapakesa Ayyar, J. Vellai Pillai, *In re.*

28th March, 1951. Cr. R..C. No. 1301 of 1950.

(Cr. R. P. No. 1229 of 1950.)

Evidence Act (*I of* 1872), *section* 106—*Scope—Carrier entrusted with corrugated sheets for booking—Failure to book—Matter within his special knowledge and he is bound to explain their missing.*

A carrier entrusted with some corrugated sheets for booking but fails to book is bound to explain their missing as it is a matter within his special knowledge.

71 M.L.J. 321 : 44 L.W. 86 (P.C.), *considered.*

V. Rajagopalachari and *B. Santhalingam* for Petitioner.

The State Prosecutor (*S. Govind Swaminathan*) on behalf of the State.

K.S. ——— *Petition dismissed.*

Panchapakesa Ayyar, J. Doraiswami Mudaliar, *In re.*

28th March, 1951. Cr. R. C. No. 482 of 1950.

(Cr. M. P. No. 459 of 1950).

Penal Code (*XLV of* 1860), *section* 477 (a)—*Gist of offence—Deprivation of property not essential.*

Section 477 (*a*) of the Penal Code only requires the *falsification of accounts* with intent to defraud. It does not require any *deprivation of property*. Deprivation, actual or intended is not a necessary ingredient to defraud. A clerk who commits such offence under fear of his master cannot escape liability as law allows *fear* as a reason for acquittal only if there is fear of *instant death* or *instant grievous hurt*.

The State Prosecutor (*S. Govind Swaminathan*) and *G. D. Williams* for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

K.S. ——— *Petition dismissed.*

Rajamannar, C.J. Senthilnathan Chettiar *v.* Panchayat Board of Mohanur
16th February, 1951. C. R. P. No. 1105 of 1949.

Madras Local Boards Act (XIV of 1920), *sections* 193 (1), 212 (2) *and Schedule VII—20 H. P. Motor installed in one place—Use of same for rice-hulling as well as groundnut decortication—Separate licences and fees cannot be insisted on.*

A licence fee which the Local Boards are permitted to levy are not intended to augment the revenues of the Board and their real purpose was to defray the expenses of the Board for supervising the places for which licences were granted. Under section 193 of the Local Boards Act it is the place that has to be licensed and for one place there can be only one licence, whether that place is being used for one or more purposes specified in Schedule VII.

A Panchayat Board would not be entitled to levy an additional fee as if for a separate licence in respect of the same place where a 20 H. P. Motor used for rice-hulling was also used for groundnut decortication.

A. Srirangachariar for Petitioner.

N. S. Raghavan for Respondent.

K.S. ——— *Petition allowed.*

Satyanarayana Rao and *Viswanatha Sastri, JJ.*
13th March, 1951.

Commissioner of Excess Profits Tax, Madras *v.* Jivraj Topun and Sons.
Case Referred No. 4 of 1948.

Excess Profits Tax Act (XV of 1940)—*Notice to undivided Hindu family after disruption had been accepted by department—Proceedings initiated under for assessment—Validity.*

Proceedings initiated under the Excess Profits Tax Act against "a Hindu undivided family" by issuing notice on 8th August, 1944, on a member of the disrupted family and assessing the family's income to Excess Profits tax thereon —partition and disruption having been accepted by the department on 18th March, 1943—is not valid in law. If by the time the notice is issued in respect of a chargeable accounting period the joint family has ceased to exist there is no provision under the Act to assess that undivided family which has become defunct and there is no procedure by which service of notice requiring the undivided family to submit a return can be effected. It is no doubt a lacuna in the Act but Courts cannot fill up gaps with a view to catch the profits of such assessee, who taking advantage of the omission in the Act escapes assessment.

C. S. Rama Rao Sahib for Applicant.

K. V. Ramachandra Aiyar and *S. Thyagaraja Aiyar* for Respondent.

K.S. ——— *Reference answered in favour of assessee.*

Satyanarayana Rao and *Viswanatha Sastri, JJ.*
13th March, 1951.

Commissioner of Income-tax, Madras *v.* Khadirwalli Sahib.
Case Referred No. 28 of 1948.

Income-tax Act (XI of 1922), *section* 34—*Scope and applicability—"Definite information"—Meaning.*

The question whether the requisites of section 34 of the Income-tax Act are fulfilled in a particular case must depend upon the facts and circumstances of each case. A mere change of opinion based on the same facts and figures which were present to the mind of the Income-tax Officer at the time of the original assessment does not amount to discovery. The discovery must be the result of definite information, that is to say, new information that has come to the knowledge of the Income-tax Officer. The Income-tax Officer cannot act under this section even though the tax-payer has escaped assessment if he is acting on information which was already in his possession and within his knowledge. Unless it can be said that there is fresh information which was not in his possession at the time when the original assessment was made, action under section 34 of the Income-tax Act is not

justified. The mere fact that a different opinion on the same facts was taken by somebody else is not definite information leading to discovery on the part of the Income-tax Officer who was in possession of the same facts and entire facts at the time of the original assessment.

[Section 34 has been radically amended in 1948 and much larger powers of revising the assessment have been given to the Revenue Authority possibly because the provisions of the section as it stood were found to be inadequate to prevent escape of taxation.]

C. S. Rama Rao Sahib for Applicant.

T. S. Krishnamurthi Aiyar for Respondent.

K.S. *Reference answered in favour of assessee.*

Rajamannar, C.J. and *Somasundaram, J.*
15*th March*, 1951.

Sitaramayya *v.* Rajasekhara Reddi.
C. M. P. No. 4924 of 1950.

Madras Buildings (Lease and Rent Control) Act (XV of 1946), *section* 7 (3) (a)—*Landlord requiring house for his own occupation—If should prove that he was put to any inconvenience in residing in rented house or that his landlord had taken proceedings to evict him.*

If a landlord is living in a rented house and not in a house of his own, he is not compelled by the Madras Buildings (Lease and Rent Control) Act to show more than that he requires a house which belongs to him for his occupation. It is equally not necessary for the owner of a building who happens to be residing in a rented building to prove that he is in danger of being evicted from the rented building, before he can obtain possession of his own building. Nor need he establish any inconvenience caused to him in occupying the rented building.

K. Umamaheswaram for Petitioner.

Respondent not represented.

K.S. *Petition allowed.*

Raghava Rao, J.
15*th March*, 1951.

Purnachandra Rao *v.* Mrutyanjayudu.
A. A. A. O. No. 177 of 1948.

Limitation Act (IX of 1908), *Article* 182 (5)—*Execution petition for costs filed within three years of the order on an earlier execution petition which was for possession—Not barred.*

An execution petition for cost filed within three years of the order on an earlier execution petition which was for possession will not be barred by limitation. It cannot be said that such decree must be split up into two different parts one relating to possession and the other to costs and that it must be regarded as really in the nature of two independent decrees in respect of both of which there must be execution initiated within three years of passing of the decree.

K. Krishnamurthi for Appellant.

M. Appa Rao and *M. V. Srinivasa Rao* for Respondent.

K.S. *Appeal allowed.*

Panchapakesa Aiyar, J.
28*th March*, 1951.

Maniklal, *In re.*
Cr. A. No. 504 of 1950.

Madras Essential Articles Control and Requisitioning (Temporary Powers) Act (XXIX of 1949) *section* 12 *and Madras Civil Motor Cars Control Order*, (1947), *clause* 6—*Sale of car by agent at above controlled price on the assumption that price mentioned in head-office letter was controlled price—Offence—Absence of moral turpitude—Effect.*

Where an agent is found to have sold cars at a price which is above the controlled price, the fact that he acted on the assumption that the price mentioned in the head-office letter was the controlled price is totally irrelevant except for sentence. Where

all the requisites under law to complete the offence and warrant the conviction are found, the absence of moral turpitude like greed and other unworthy motives are irrelevant except for sentence. Courts must necessarily make a distinction between sales of costly motor cars irregularly and sales of a petty quantity of iron nails or vegetables, in awarding sentences. Accordingly it cannot be said that a nominal fine will do in the case of sale of motor cars.

V. Rajagopalachari and *R. V. Raghavan* for Appellant.

The State Prosecutor (*S. Govind Swaminathan*) on behalf of the State.

K.S. ——— *Conviction confirmed but fines reduced.*

Satyanarayana Rao and *Viswanatha Sastri, JJ.* Commissioner of Income-tax
28th March, 1951. and Excess Profits tax *v.* Erin Estate Galaha:
Case Referred No. 62 of 1946.

Income-tax Act (XI of 1922), section 4-A (b)—Firm situate outside British India—If control exercised within British India—Test—Onus—Finding as to—If one of pure fact.

The onus of proving facts necessary to establish that the control and management of the affairs of a firm situate wholly outside British India is on the assessee. A firm is normally presumed to be resident in British India but such a presumption can be rebutted by showing that the case comes within the second part of the provision, *viz.*, that the control and management of its affairs is situated wholly without British India. The onus which is cast by the section on the assessee must be discharged by the production of evidence, that is or must be available with the assessee. The non-production of such material and available evidence is an infirmative circumstance that has to be taken into account against the assessee in arriving at a conclusion on the question whether thecontrol and management of the affairs of the firm was situate wholly outside British India. "Control and management" signifies the controlling and directive power, the head and brain as it is sometimes called, and "situated" implies the functioning of such power at a particular place with some degree of permanence while "wholly" would seem to recognise the possibility of the seat of such power being divided between two distinct and separate places.

(1947)2 M.L.J. 474 : I.L.R. 1948 Mad. 607 and (1951) 1 M.L.J. 310, referred to.

The control and management of a firm's business is situated at the place where the central management and control actually abides. Control of a business does not necessarily mean the carrying on of the business. The place of control may be different from the place where the physical operations of the business are carried on and the place where trading activities are carried on need not necessarily be the place of control or management. But it is not what the partners of the firm have power to do but what they actually do that is of importance in determining the place where the control is exercised. When section 4-A (*b*) of the Income-tax Act, refers to the control and management of its affairs by the firm it means the affairs which have some relation to the business whose income, profits and gains are sought to be taxed and not the private or domestic affairs of the individual partners having no relation to the firm's business. Where some part of the control is exercised within British India the firm is assessable to Indian income-tax. The question whether the control and management of a firm's business is situate wholly out of British India is not a mere question of fact. The proper legal effect of facts proved or admitted is essentially a question of law. The High Court can therefore go into the question.

C. S. Rama Rao Sahib for Applicant.

T. M. Krishnaswami Aiyar and *M. Subbaraya Aiyar* for Respondent.

K.S. *Reference answered in favour of the State.*

Panchapakesa Aiyar, J.
29*th March*, 1951.

Raghava Variar, *In re.*
Cr. R. C. No. 697 of 1950.
(Case Referred No. 53 of 1950).

Madras Gaming Act (III of 1930), *sections* 8 *and* 9—*Acquittal of owner of house of offence under section* 8 *on the ground that it was not proved to be a common gaming-house—Other accused under section* 9—*If can be convicted.*

Where the owner of the house was acquitted of the offence under section 8 of the Madras Gaming Act obviously on the ground that it was not proved to be a common gaming house, the remaining accused must be accquitted of the offence under section 9 which will apply only to gaming in a "common gaming-house." Even where some of the accused have not appealed when there is no difference between their case and the case of the accused who have appealed the High Court can accept the reference with regard to all the accused. The powers of a Criminal Court of Justice in revision are very wide in this respect—wider than the powers under Order 41, Rule 33, Civil Procedure Code, which allows a Court to interfere in the interests of justice for the benefit of even *ex parte* defendants who have not appealed.

S. Venkatachala Sastri on behalf of the accused.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

K.S.

Reference accepted.

Panchapakesa Aiyar, J.
30*th March*, 1951.

Krishna Rao, *In re.*
Cr. R. C. No. 1157 of 1950.
(Cr. R. P. No. 1086 of 1950).

Criminal Trial—Bench of Honorary Magistrates—Two out of three members if can sentence without consulting the third and write judgment later.

The accused were tried for offences under sections 323 and 504 of the Penal Code by a Bench of Honorary Magistrates. They were convicted and sentenced by two of the Bench of three to pay a fine of Rs. 25 each or in default to undergo rigorous imprisonment for two weeks without writing a judgment. The judgment was subsequently written by the President and the member who passed the sentence and sent to the third member who dissented from the judgment of the other two.

Held, the President and the other member acted illegally and not merely irregularly in convicting and sentencing the accused without consulting the third member and without writing a judgment. A sentence follows a conviction which is embodied in a judgment. The convictions and sentences must be set aside as illegal.

Konuru Kanniah for Petitioners.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

K.S.

Petition allowed.

Satyanarayana Rao and
Raghava Rao, JJ.
2*nd April*, 1951.

Commissioner of Income-tax *v.* Sathappa Chettiar.
Case Referred No. 22 of 1948.

Income-tax Act (XI of 1922)—*Amount received by assessee in pursuance of arbitrator's award in full settlement of his claims for compensation for use of his machinery—Is income liable to income-tax.*

An amount received by the assessee in pursuance of an arbitrator's award in full settlement of all his claims for compensation for the use of his machinery is income liable to income-tax.

C. S. Rama Rao Sahib for Applicant.

M. Subbaraya Aiyar for Respondent.

K.S.

Reference answered in favour of the State.

Satyanarayana Rao and Viswanatha Sastri, JJ.
16th March, 1951.

Commissioner of Income-tax, Madras *v.* Venkatasubbayya.
Case Referred No. 66 of 1947.

Income-tax Act (XI of 1922), sections 2 (1) (b) and 4 (3) (viii)—Merchant purchasing standing crop of tobacco harvesting and selling the same—Income, if agricultural income exempt from tax.

A merchant who purchases a standing crop (in this case of tobacco) derives profit from his contract of purchase at an advantageous price and resale of the produce at a higher price. The land is not the direct or immediate or effective source of his income. Agricultural income cannot be said to accrue to every person into whose hands the produce of the land passes. It is only the owner, landlord or ryot, or person having a derivative interest in the land from these persons that can be said to " derive " income from the land by the performance of agricultural operations on it. A merchant who purchases the standing crop appears on the scene when the crop is ripe or very nearly ripe for harvest, and pays a price for the commodity in which he is trading. No doubt he has a right to enter upon the land to preserve the crop, to tend it and to harvest it but he has no right or interest of any kind in the land itself nor has he any right to the exclusive possession of the land for any period. Growing crops are movable property under section 3 of the Transfer of Property Act and section 2, clause (6) of the Registration Act—*see also* the definition of immovable property in the General Clauses Act. The purchaser whether of standing crop or of the harvested produce derives his profits as a trader or merchant from the purchase and resale of the produce in the market and does not derive the profit from the land in which he has no interest. Such income is not exempt from liability to assessment to income-tax. [The pruning and ploughing operations after the purchase of the standing crop were held to be ancillary operations of an unsubstantial kind conducted under an agreement with the person who raised the crop].

C. S. Rama Rao Sahib for Applicant.

M. Subbaroya Ayyar for Respondent.

K. S. ——— *Reference answered against the assessee.*

Panchapagesa Sastry, J.
20th March, 1951.

Venkataraju *v.* Venkataramana.
Appeal No. 556 of 1948.

Usurious Loans Act (X of 1918) (as amended in Madras)—" Compound interest "—If substantially unfair where defendants claiming to be agriculturists are also traders.

Where the defendants are admittedly persons carrying on business and it could not be contended that the main source of their income was agriculture the mere fact that compound interest is provided for cannot be a basis for drawing the presumption that the transaction was substantially unfair. The Madras amendment to the Usurious Loans Act cannot apply to such a case.

P. Somasundaram for Appellant.

C. V. Dikshitulu for Respondents.

K. S. ——— *Appeal allowed.*

Panchapagesa Sastry, J.
29th March, 1951.

Appa Rao, *In re.*
Appeal No. 315 of 1950.

Court-Fees Act (VII of 1870), section 17—Suit for redemption of four usufructuary mortgages of the same date of the same property by the same set of mortgagors in favour of the same mortgagee—Court-fee if to be the aggregate court-fee as on four distinct subjects or ad valorem *on basis of the total figure.*

Four anomalous (usufructuary) mortgages of the year 1886 for Rs. 8,500, 2,000, 2,500 and 1,500 were executed by the same set of mortgagors in favour of the same mortgagee. In a suit for redemption in the trial Court the court-fee was made up of the aggregate court-fee as on four distinct subjects. In the High Court however the appellant totalled up all the amounts due under the four mortgages and paid *ad valorem* court-fee on that basis of the total figure. The office put up

a note that the four mortgages must be regarded as four distinct subjects within the meaning of section 17 of the Court-Fees Act, and even in appeal the court-fee ought to be paid on that basis.

Held: Though there are four mortgages the transaction was intended to be and was really a single action. They are all of the same date, the property mortgaged is the same property, the mortgagors are all common and the mortgagee is also the same. In these circumstances, this is an exceptional case where it ought to be held on the facts that there is only one subject and not distinct subjects within the meaning of section 17 of the Court-Fees Act. The court-fee paid on the appeal is sufficient and no further court-fee is payable.

Messrs. Y. Suryanarayana and *Y. Suryanarayana* for Appellant.

K.S. ——— *Court-fee paid held to be sufficient.*

Rajamannar, C.J. and Somasundaram, J. Pattammal Arumugam, *In re.*

6th April, 1951. C. M. P. Nos. 1941, 2503 and 2777 of 1950.

Press (Emergency Powers) Act (XXIII of 1931), section 3 (1)—Validity after coming into force of the Constitution of India, 1950.

A provision like section 3 (1) of the Indian Press (Emergency Powers) Act cannot be allowed to remain on the Statute Book after the coming into force of the Constitution. An imposition of a security before the publication of any matter would certainly be an extremely unreasonable restriction on the freedom of speech and expression declared by Article 19 (1) (*a*) of the Constitution.

A. Ramachandran for *Messrs. Row and Reddi* for Petitioners.

The Advocate-General (*V. K. Tiruvenkatachari*) and State Counsel (*V. K. John*) on behalf of the State.

K. S. ——— *Orders quashed.*

Satyanarayana Rao, J. Ambika Palayakat Company *v.* Kannappa Pillai.

13th April, 1951. C. R. P. No. 164 of 1951.

Court-fees—Suit for recovery of price of goods—Defendant claiming damages for breach of warranty as well as damages for loss of reputation—Defendant must pay court-fee on the claim for damages for reputation though no court-fee need be paid on the damages claimed for breach of warranty which can be considered in diminution of the cost of goods claimed by the plaintiff.

In a suit for recovery of the price of goods sold by the plaintiff to the defendant, the defendant claimed damages under two heads: a sum of Rs. 2,274-3-0 as damages for breaches of warranty, namely, that the goods did not answer the description of the goods in respect of which the contract of sale was entered into; and a sum of Rs. 3,000 as damages for loss of reputation. The lower Court held that the defendant was entitled to claim the sum of Rs. 2,274-3-0 without paying court-fee as an amount which could be considered in diminution of the price that was claimed, but not the sum of Rs. 3,000, and therefore it directed that the defendant should pay court-fee on Rs. 3,000 if it intended to prosecute the claim as a set off. On revision it was contended that this sum of Rs. 3,000 is also loss which has directly resulted by the breach of warranty.

Held: The direct loss is loss by reason of breach of warranty in the loss of the value of the goods. The damages for loss of reputation may be further damages which it had suffered but it cannot claim the amount to be taken into consideration in diminution of the price for which the plaintiff instituted the suit and if the defendant wants to prosecute the claim for that amount he must pay court-fee on the same.

M. K. Harihara Aiyar for Petitioner.

The Government Pleader (*P. Satyanarayana Raju*) and *K. Venkataramiah* for Respondent.

K. S. ——— *Petition dismissed.*

Rajamannar, C.J. and *Somasundaram, J.*
23rd February, 1951.

Janakirama Sastri *v.* Jagani Gopalan.
S. A. Nos. 2203 to 2207 of 1945 and C. R. P. No. 1526 of 1945.

Madras Estates Land Act (*I of* 1908) *section* 3 (2) (*d*) *"Any inam village"—Meaning.*

It is well established that any inam village in section 3 (2) (*d*) of the Madras Estates Land Act means ' a whole village granted in inam ', and not anything less than a village, however big a part it may be of that village. The definition of " village " in section 3 (19) cannot be incorporated into the definition of an " estate " in section 3 (2) (*d*) of the Act. Decision of Shahabuddin, J., in C. R. P. No. 1007 of 1942 *overruled*. Decisions of Raghava Rao, J., in (1950) 1 M.L.J. 442 and of Patanjali Sastri and Bell, JJ., in C. M. A. No. 584 of 1944 (reported as a footnote in (1950) 1 M.L.J. 442), *followed*.

(On a consideration of the grant and other documents it was held that the lands under the grant in the suit were not situated in an estate as defined in section 3 (2) (*d*) of the Madras Estates Land Act and that the Revenue Court had no jurisdiction to entertain the suits purported to have been instituted under section 55 of that Act.)

G. Venkatarama Sastri for Appellants.

K. Rajah Ayyar, P. Satyanarayana Raju, P. Somasundaram, M. B. Rama Sarma and *N. Rajeswara Rao* for Respondents.

K. S. ——— *Appeals and Revision Petition allowed.*

Viswanatha Sastri, J.
12th March, 1951.

Ramachandra Naidu *v.* Tulsi Ammal.
App. No. 247 of 1949.

Partnership—Suit for dissolution and accounts—Right to interest.

In a suit for dissolution of an existing partnership and for accounts, the plaintiff is entitled to interest on the amount decreed only from the date of the final decree and not from the date of the plaint.

A. Viswanatha Ayyar and *O. K. Ramalingam* for Appellant.

T. M. Ramaswami Ayyar for Respondent.

K. S. ——— *Appeal dismissed in the main.*

Subba Rao and *Panchapakesa Ayyar, JJ.*
20th March, 1951.

Chinnasami *v.* Veerappa Chettiar.
C. M. P. No. 1819 of 1951.

Civil Procedure Code (*V of* 1908) *Order XLV—Applicability to appeals to Supreme Court from Madras High Court.*

The Adaptation of Laws Order, 1950, made suitable amendments to section 109 and 110 and also Order XLV of the Civil Procedure Code and the Supreme Court by virtue of the rule-making power conferred upon it by the Constitution, in regard to matter pertaining to appeals, have made rules (*vide* Order XII, Supreme Court Rules) applying the provisions of Order XLV of the Civil Procedure Code to appeals preferred under Articles 132 (1), 133 (1), and 135 of the Constitution. It cannot be contended that Order XLV not having been amended by the High Court of Madras has no application to appeals preferred to the Supreme Court of India. Accordingly an appellant cannot file an appeal without furnishing security for costs or depositing printing charges. Where an appellant had failed to comply with the provisions of Order XLV of the Civil Procedure Code the certificate granted to him was cancelled.

D. Ramaswamy Iyengar for Petitioner.

R. Kesava Iyengar for Respondent.

K. S. ——— *Petition allowed.*

Panchapakesa Ayyar, J.
30th March, 1951.

Chandrasekhara Iyer, *In re.*
Cr. R. C. No. 333 of 1950.
(Cr. R. P. No. 316 of 1950).

Criminal Trial—Charge of bribery under section 161 *of the Penal Code* (*XLV of* 1860)*—Evidence of officials who had laid traps and incited bribery—Need for corroboration in material particulars.*

Where officials had laid a trap and incited bribery, in a prosecution for bribery such officials and the bribe-givers would be in the position of accomplices and their evidence requires corroboration in material particulars to establish the crime of bribe-taking.

There are enough real cases of bribery in all conscience, in this land today, for officers to go round tempting people to take bribes and create new crimes. It is one thing to detect a real case of bribery after it has been committed. It is quite a different thing to bring about a new case of bribery by one's own plotting and inciting and trapping. The one leads to greater purity and good, the other to demoralisation and greater corruption. However good the end, the means used to secure it, must also be pure and clean.

K. S. Jayarama Iyer and *C. K. Venkatanarasimhan* for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Iyengar*) on behalf of the State.

K. S. ——— *Conviction and sentence set aside.*

Rajamannar, C.J. and *Balakrishna Ayyar, J.* Raghavalu Chetty *v.* Ramamurthy.
2nd April, 1951. C. M. P. No. 5282 of 1950.

Madras Buildings (Lease and Rent Control) Act (XV of 1946), *section* 10—*Scope of bar of fresh application for eviction.*

In 1946, there was an application for evictian against a tenant on the ground that the landlord was not residing in a house of his own and that he desired to occupy the house himself. This application was dismissed on 3rd September, 1946, on the ground, that the application was not *bona fide*. Three months thereafter there was a partition among the members of the landlord's family and it was said that the house in question was allotted to the person who filed the first application. He filed another application for eviction in 1949 on the ground that he wanted the premises for his personal use and occupation.

Held : Section 10 of the Madras Buildings (Lease and Rent Control) Act is a bar to the petition. Only when there are new circumstances which are material on which a new application is filed, section 10 would not stand in the way

P. Sankaranarayana for Petitioner.

A. Narasimhachariar for Respondent.

K. S. ——— *Order of appellate tribunal quashed.*

Rajamannar, C.J. and *Balakrishna Ayyar, J.* Thippuswami, Petitioner.
20th April, 1951. C. M. P. No. 5771 and 5772 of 1951.

Constitution of India (1950), *Article* 226—*Remedy by way of* mandamus—*When available—If available to litigant who has remedies under the general law of the land.*

Article 226 of the Constitution should not be construed so as to replace the ordinary remedies by way of suit and application for injunction available to the litigant under the general law of the land. Directions in the nature of a writ of *mandamus* should not issue under that Article except to a public or *quasi*-public body or officer who is under an obligation statutory or otherwise, to do or refrain from doing anything which is likely to interfere with the rights of persons. The fact that the District Court in which the suit should have been filed is closed for the summer recess would not render Article 226 applicable. Even if the petitioner cannot have the remedy by way of injunction he will certainly have his remedy by way of damages for any unlawful action that may be done by the respondents in cutting and removing certain trees sought to be restrained.

Nor can the jurisdiction under clause 17 of the Letters Patent be invoked. That clause does not enable the passing of any order against a third party which should ordinarily be passed only in a regular suit or other proceeding instituted in a competent Court.

C. Chinnappa Reddy and *P. Ramakrishna* for Petitioner.

K. S. ——— *Application dismissed.*

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NOTES OF INDIAN CASES.

SIVAPRAKASA MUDALIAR *v.* SAMARAPURI, (1949) 2 M.L.J. 382.

A point of nicety bereft of direct authority fell to be decided in this case. It was held that it would be competent to the Court to appoint a receiver of a going concern like a company not merely in regard to its own business but also in respect of its managing agency of another company. The powers of a Court to appoint a receiver are extensive. The test is whether it is just and convenient that one should be appointed[1]. The Indian Companies Act no doubt contains provisions for dealing with circumstances in which a company is mismanaged. It has therefore given rise to the argument that in view of such special provisions, a Court's power to appoint a receiver in the case of a company under the Civil Procedure Code should be considered to be unavailable. In England, by section 48 of the Supreme Court of Judicature (Consolidation) Act, 1925—15 & 16 Geo. 5, c. 49—it is provided *inter alia* that the High Court may appoint a receiver by an interlocutory order in all cases in which it appears to the High Court to be just and convenient to do so. A similar provision had existed in earlier Acts as well. At the same time, various enactments dealing with companies had also provided for appointments of receivers in certain cases. And it was held that the fact that there were statutory provisions for the appointment of receivers regarding companies did not mean that the ordinary jurisdiction of the High Court to appoint a receiver was ousted, *Russell* v. *East Anglian Railway Co.*[2], *Fripp* v. *Chard Railway Co. etc.*[3]. It would thus seem that in India also the Court's power to appoint a receiver under the Civil Procedure Code will not be affected by reason of the existence of special provisions in the Indian Companies Act to deal with mismanagement of companies. In *Kailash Chandra Datta* v. *Sadar Munsif, Silchar*[4], disputes having arisen with regard to the management of an Insurance Company called Aryan Insurance Company, Ltd., in 1922, one Jogesh Chunder Mazumdar, as a shareholder of the company instituted a suit for a declaration that certain persons were no longer directors of the company, and in the course of the suit applied for the appointment of a receiver to carry on the business of the company. A receiver was accordingly appointed. *Apropos* of this, Greaves, J., remarked: "I must say it is the first time that I have heard of a Court assuming jurisdiction to appoint a receiver to conduct the business of a company, unless the receiver is appointed in a debenture-holder's action when the business and assets of the company have been charged with the payment of claims of the debenture-holders. Apart from that, in my opinion, there is no jurisdiction in a Court to appoint a receiver of a company. If it is necessary to protect the assets of a company, other means must be sought which are provided by the provisions of the Companies Act".

1. Order 40, rule 1, Civil Procedure Code.
2. (1850) 3 Mac. & G. 104, 125, 144: 42 E.R. 201.
3. (1853) 11 Hare 241, 259: 68 E.R. 1264.
4. (1924) I.L.R. 52 Cal. 513.

In so far as the Court's power to appoint a receiver is concerned the observations *supra* have not made due allowance for the very comprehensive language employed in Order 40, rule 1, Civil Procedure Code. Also, there is nothing in the Companies Act repugnant to the exercise of jurisdiction by a Court by appointing a receiver for the company. The decisions rendered in the comparable context of the English Acts suggest that the Court's power is not ousted. The only consideration will be whether it would be just and convenient to appoint a receiver in the case of a company, particularly, in respect of its managing agency on behalf of another company. Section 2 (1) (9-A) of the Companies Act recognises that a managing agent has to act under the direction of the directors except to the extent, if any, otherwise provided for in the agreement between the managing agent and the company. The company stipulates for personal management by the managing agent and delegation of powers would be inconsistent with it. Section 87-B provides in clause (*c*) that a transfer of his office by a managing agent shall be void unless approved by the company in general meeting. This prescription is in full accord with the implication mentioned above. Such being the case, it would be rather strange if a receiver could be substituted for the managing agent without reference to the company which appointed the managing agent and in proceedings to which such company is not a direct party. In the instant case, however, it was pointed out that the receiver was not a substitute for the managing agent but was only to manage affairs. With all respect, it may be stated, that the distinction drawn is rather subtle and refined and that in substance the order appointing the receiver is one of replacement of the old managing agent by a new one.

KALLAMPUDI NARAYANAPPA *v.* KALIGOTLA SURYANARAYANA, (1949) 2 M.L.J. 422.

This case decides that a Court has no power to permit the substitution *in toto* of one written statement for another already filed. Order 6, rule 17, Civil Procedure Code, deals with amendment of pleadings by either party and Order 8, rule 9 with the filing of pleading subsequent to the written statement by way of defence against set-off. It also provides that the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same. In *Kokamal Madhoram* v. *Gulabsingh Gurdaisingh*[1], the Bombay High Court had to consider the question whether one plaint can be substituted for another. There the plaintiff had sued on a contract alleged to have been entered into with him by the defendants for the import of certain goods on *c.i.f.* terms. He later on claimed to sue the defendants as their agent who on receipt of shipping documents had cleared and delivered the goods as their agents. It was observed *inter alia* by Macleod, C.J., "We must consider ourselves whether the plaint could have been amended according to the rules which are usually observed by the Court when an application for amendment is made. The most important rule is that a plaintiff cannot by amendment be allowed to substitute one plaint for another and the plaintiff would have had to do this for an amendment to have been of any use to him." Under the guise of amendment a new plaint cannot be substituted. It is apprehended that the principle operates *mutatis mutandis* in regard to written statements as well. The substitution of a fresh written statement cannot be regarded as an amendment of an existing one and cannot be within the scope of Order 6, rule 17. Nor can the latter half of the provision in Order 8, rule 9, be invoked, inasmuch as, a party is given no rights thereunder.

CHELAPATHI REDDI *v.* PROVINCIAL GOVERNMENT OF MADRAS, (1949) 2 M.L.J. 438.

The fasciculus of sections dealing with repairs to irrigation works in Chapter VIII, Madras Estates Land Act, makes it clear that liability to execute repairs and

1. (1925) 27 Bom. L.R. 277 : A.I.R. 1925 Bom. 248.

foot the bill may be of one or other of three patterns : (i) where the irrigation work feeds exclusively an estate, (ii) where the irrigation work concerned feeds both Government and estate lands, and (iii) where the irrigation work feeds more than one estate. Sections 138, 139 and 140 provide for cases where as between the ryots and the holder of the estate the liability to carry out the repairs is directly or indirectly that of the landholder. The proceedings in such a case are initiated under section 138 and an order specifying the nature of the repairs to be carried out is to issue under section 139. Where there is a dasabandam inamdar whose duty it is to execute the repairs, section 140 gives the landholder the right to call upon him to carry out the repairs set out in the order passed under section 139, and in case of default by the inamdar, to have the repairs done by himself and recover the cost by a suit before the Collector. The remedy is expressly provided. It is in the nature of a special remedy. It is without prejudice to any right which the landholder may have to resume the inam. Board's Standing Order 56 (2) has in clause 2 provided for the landholder resuming the dasabandam inam in case of failure by the inamdar to discharge his duty in the matter of the irrigation work. The reason for granting a special remedy to the landholder is adverted to in the Statement of Objects and Reasons, namely, that with regard to dasabandam inam, the obligation to repair being under the Act cast on the zemindar, he has been given a right of recourse by section 140 against the inamdar. The reason no doubt will equally apply to every other case where as between the holder of the estate and a dasabandam inamdar it is the duty of the latter to attend to the irrigation work, though for purposes of the Estates Land Act the obligation is regarded as that of the estate-holder. Where an irrigation work feeds both Government as well as estate lands, it is stated by section 142 that the Government shall " invariably" execute the needed repair though the obligation is a joint obligation of both Government and the holder of the estate, and recover the proportionate cost that may be payable by the landholder, as if it were an arrear of land revenue. The position will remain the same even if in such a case there is a dasabandam inamdar within the estate who is charged, so far as the estate is concerned, with looking after the irrigation work. The landholder being held responsible to contribute to Government, the question arises whether he in his turn can try to recover such amount from the dasabandam inamdar by a suit in that behalf brought before the Collector. It falls to be noted that while section 140 confers the special remedy in cases where the obligation to repair for purposes of the Act is exclusively that of the landholder, section 142 contains no similar provision in cases falling under it. As observed by the learned Judge, its " locus " as well as " language " would seem to forbid the invocation of section 140 to any but a case where proceedings have been initiated under section 138. This does not however mean that the landholder has no other remedy against the dasabandam inamdar but to exercise his right to resume the inam. A suit for reimbursement under sections 69 and 70 of the Contract could be brought. In *Annamalai Chettiar* v. *Muniyappa Naidu*[1], the plaintiff sued to recover from a dasabandam inamdar the cost of repairs he had been called upon by the Collector to execute under section 14 of the Railways Protection Act. It was argued that a civil suit was barred by reason of section 140 of the Estates Land Act. In repelling that argument, Chandrasekhara Aiyar, J., observed : " It is true that section 140 speaks of the obligation of a holder of a dasabandam inam to maintain the irrigation work in good repair, but the provisions of this section will get attracted only on the fulfilment of the requisites or the conditions laid down in the previous sections, particularly 136-C, 136-D and 138. The jurisdiction of the Civil Courts is ousted only as regards any dispute or matter in respect of which suits or applications might be brought or made of the nature specified in parts A and B of the schedule to the Act. We are not for the present concerned with part A. Part B refers to applications under sections 137, 137-A, 137-C and 138. It is only with reference to these applications that the jurisdiction of the Civil Courts is ousted. . . . . Section 140 applies only to suits brought

1. (1946) 2 M.L.J. 268.

under the circumstances specified in the prior sections of the Chapter". On this line of reasoning, a suit to recover the cost of repairs contributed by the land-holder to Government under section 142 will be outside section 140 and therefore the jurisdiction of the Civil Court will not be ousted and reimbursement could be sought under sections 69 and 70, Contract Act. The case under review has taken this view of the matter.

MT. GOMTIBAI *v.* KANCHHEDI LAL, (1949) 2 M.L.J. 469 (P.C.).

Where a testament duly made is sought to be avoided on the ground of undue influence, it must be shown that such influence amounts to coercion or fraud, *Boyse* v. *Rossborough*,[1] *Wingrove* v. *Wingrove*[2]. The *onus probandi* is on the person setting up undue influence. It is not discharged by merely establishing that a person has the power unduly to overbear the will of the testator : it must be shown that the power was in fact exercised and through such exercise the will was obtained, *Craig* v. *Lamoureux*[3]. Coercion and fraud for this purpose are to be understood with a certain amount of latitude. It need not thus be shown that there was violence, actual or threatened ; it will be sufficient if the circumstances are such as to excite terror even if imaginary. Similarly it will amount to fraud if through falsehoods, prejudices are created in the mind of the testator against those who would be the natural objects of his bounty and the testator is kept from intercourse with them to the end that the prejudices may not be dispelled, *Boyse* v. *Rossborough*[1]. An instructive illustration of the operation of this principle is afforded by the facts and decision in *Govindaswami Naidu v. Kannammal*[4]. In that case the question related to the validity of a will executed while the testator was in hospital as an in-patient. The evidence showed that he always had great affection for his wife and had six children by her. While he had come to Madras for treatment, his wife was at Coimbatore with her parents. His father and brother were attending on him. His wife had just then delivered a child. His father and brother who had been instructed to give her information about his progress purposely refrained from doing so. Nor did they send her any money though directed by the testator. Finding that his wife was not writing to him, the testator thought that his wife did not care for him and made a will leaving a meagre maintenance provision for his wife and vesting the guardianship of his children in his father. In holding the will executed in these circumstances to be invalid, Kumaraswami Sastri, J., observed : "The question is whether where a person who had been enfeebled by a painful illness and has been suffering great pain for some months before the will was executed is led into the belief that his wife was neglecting him and that she and her father are only after his property and where the testator's father and brother in order to mislead the testator into the belief that his wife is neglecting him did not write to her about his health or send her any moneys to come down to Madras though the testator asked them to do so, a will by the testator who conceives an unreasonable dislike to his wife brought about by the machinations of those who were near him can be valid. I am unable to bring myself to hold that such a will is valid. . . . . I have little doubt that they (father and brother of testator) did their best to poison the mind of the testator against his wife and that through no fault of hers. She was the victim of an unreasonable dislike created by the plaintiff. Under these circumstances I cannot bring myself to uphold the will". The instant case constitutes an illustration on the other side of the line. The testator who had a rich and valuable estate made a will without informing his wife anything about it, leaving her a paltry maintenance provision of Rs. 50 per month, bequeathing his properties in favour of his relations in the natural family, he himself having been given away in adoption, and without conferring a power of adoption on his wife though they were childless. The will was executed when he was very ill, when he and the natural father and the members of his family

1. (1856-57) 6 H.L.C. 2, 48.
2. (1885) 11 P.D. 81.
3. (1920) A.C. 349.
4. (1926) 51 M.L.J. 747.

were all living together and at a time when the testator's property was looked upon as if it belonged to the entire family. On these facts the Privy Council observed : " Assuming that his father influenced the testator in disposing of his property in the manner he had done under the will, there is nothing to show that the dispositions were not agreeable to his own wishes in the matter. No doubt the term of the will relating to the maintenance of his wife—the really disquieting feature of the will—looked at from the modern standpoint is not satisfactory. . . . . It is said that the will was executed in great secrecy, but it cannot be said to be executed in a 'hole and corner' fashion. It may be accepted as true that the testator's wife did not know anything about the will ; if this is unnatural her father and brothers must have known all about it, and their Lordships are unable to draw any sinister inference from the circumstance that the wife did not know anything about it." The Privy Council added : " Undue influence, in order to invalidate a will, must amount to coercion or fraud. Its existence must be established as a fact and it must also appear that it was actually exercised on the testator". Though the terms 'coercion' and 'fraud' in the context are not to be taken too strictly, still evidence of mere eccentric acts and conduct on the part of the testator will not suffice to upset his will, *Pilkington* v. *Gray*[1] ; likewise employment of flattery by a person to persuade a testator to make a will in his favour will not *per se* amount to fraud, *Mt. Parbati* v. *Sheo Bali*[2].

FATIMA BINTI HAFIDH *v.* ADMINISTRATOR-GENERAL OF ZANZIBAR, (1949) 2 M.L.J. 484 (P.C.).

This decision considers how far acknowledgment of paternity by a Muslim is proof of marriage. Legitimacy is a status which results from certain facts. Inasmuch as marriage in Muslim law may be constituted without any ceremonial, the existence of marriage in any particular case may often be an open question. One of the ways of affording indirect proof is to show an acknowledgment of legitimacy in favour of a son. Once an acknowledgment is established the onus shifts to those who deny a marriage to negative it in law, *Habibur Rahman Chowdhury* v. *Altaf Ali Chowdhury*[3]. It is, however, to be noted that " the Mahomedan doctrine of legitimacy by acknowledgment does not apply to every case of admission of paternity ; an intention to confer the status of legitimacy must be found or presumed ", *Abdool Razack* v. *Aga Mahomed Jaffer Bindaneem*[4]. Mere admission of paternity establishes no more than a casual union between the parents. More is needed to show the existence of marriage if the bond is to be derived from association alone without any ceremony. For there can be acceptance of parenthood without intending to make the child legitimate. So acknowledgment to prove a marriage must be not merely of sonship but should have been so made as to show that the acknowledgor meant to accept the other not only as his son but as his legitimate son. If, however, a marriage is established independently, an acknowledgment of paternity would raise a presumption of the legitimacy of the child. These propositions are reiterated by the Privy Council in the decision under notice.

SHIBA PRASAD SINGH *v.* SRISH CHANDRA NANDI, (1949) 2 M.L.J. 657 (P.C.).

Under English common law money paid under a mistake of fact is recoverable but generally speaking money paid under a mistake of law is not recoverable—see *Kelly* v. *Solari*[5], *R. E. Jones* v. *Waring and Gillow*[6]. In one case, Lort Williams, J., has laid down that the English common law rule will be equally applicable in India, *Katherine Stiffles* v. *Carr Makertich Martin*[7]. There is in this country a specific

1. (1899) A.C. 401.
2. A.I.R. 1926 Oudh 262.
3. (1921) 40 M.L.J. 510 : L.R. 48 I.A. 114 : I.L.R. 48 Cal. 856 (P.C.).
4. (1894) 4 M.L.J. 131 : L.R. 21 I.A. 56 : I.L.R. 21 Cal. 666 (P.C.).
5. (1841) 9 M. & W. 54.
6. L.R. (1926) A.C. 670, 688.
7. (1935) 39 Cal. W.N. 174.

statutory provision on the matter in section 72 of the Contract Act. The section enacts : "A person to whom money has been paid or anything delivered by mistake or under coercion must repay or return it". The language of the section is general and makes no distinction between mistake of fact and mistake of law. Still there have been divergent interpretations of the word 'mistake' in the section. But as pointed out by the Privy Council in the instant case "the authorities which deal with the meaning of 'mistake' in the section are surprisingly few and it cannot be said that there is any settled trend of authority". Apart from section 72 there are two other sections dealing with the effect of mistake, namely, sections 21 and 22. Section 72 has therefore to be read along with sections 21 and 22. Section 21 states : "A contract is not voidable because it was caused by a mistake as to any law in force in British India, but a mistake as to a law not in force in British India has the same effect as a mistake of fact". And section 22 states : "A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact". In *Wolf and Sons* v. *Dadyba Khimji and Co.*[1], referring to section 72, Macleod, C.J., said that "on the face of it mistake includes mistake of law" but that to so construe would be to neutralise the effect of section 21. A similar opinion is expressed in *Appavoo Chettiar* v. *South Indian Railway Co*[2], where the learned Judges observed : "Though the word 'mistake' in section 72 is not limited it must refer to the kind of mistake that can afford a ground for relief as laid down in sections 20 and 21 of the Act". They added : "The Indian law seems to be clear, namely, that a mistake in the sense that it is a pure mistake as to law in India resulting in the payment by one person to another and making it inequitable that the payee should retain the money is no ground for relief". A different view of the scope of section 72 was expressed in *Pannalal* v. *Produce Exchange Corporation*[3], where it was held by Sen, J., that the rule of English common law is inapplicable in India there being a specific statutory provision in section 72 covering the matter, that as a matter of fact there is no conflict between section 72 and section 21, that they deal with different situations, the former with a case of payment and the latter with the formation of a contract, and that where a payment made under a mistake of law is not the origin of a contract it can be recovered under section 72. The learned Judge observed : "Now if the word 'mistake' in section 72 is given its ordinary meaning, namely, a mistake of any kind—an unqualified mistake—does any conflict necessarily arise between that section and section 21 ? I think not. Section 21 speaks not of payment made under a mistake of law but of 'a contract caused by a mistake of law'. Section 72 does not speak of a contract at all but merely of a payment made under a mistake. . . . . A payment may be made by mistake without there being any contractual relationship at all between the parties. *A* may pay a sum to *B* under the mistaken belief that he is in law bound to maintain *B*. Here there is no contract between the parties, voidable or otherwise. If the law declares such a payment refundable, it does not in any way conflict with section 21 as no contract is involved. Again a payment may be made in the course of a contract under a mistake of law, without such payment being the 'cause of the contract'. In such a case also the refund of the payment would not render section 21 nugatory. That section deals only with mistakes of law which "cause a contract" or which give birth to a contract ; it has nothing to do with any other kind of mistake. If therefore a payment made under a mistake of law is not the origin of a contract such payment would be refundable under section 72. . . . . The Engish common law rule that a payment made under a mistake of law is not recoverable can have no application here, where there is a statute governing the question". The instant decision approves this line of reasoning. It is pointed out that 'payment by mistake' in section 72 must refer to a payment which was not legally due and which could not have been enforced ; the 'mistake' is thinking that the money

1. (1919) I.L.R. 44 Bom. 631.
2. (1928) 56 M.L.J. 269.
3. I.L.R. (1945) 2 Cal. 41.

paid was due when in fact it was not due, that there is nothing inconsistent in enacting on the one hand that if parties enter into a contract under mistake in law that contract must stand good and is enforceable, but on the other hand that if one party acting under mistake of law pays money to another party which is not due by contract or otherwise, that money must be repaid, and that once it is established that the payment in question was not due it is irrelevant to consider whether or not there was a contract between the parties under which some other sum was due. The reasoning of their Lordships makes it clear that in regard to any payment made under mistake, no distinction as such could be made between mistake of fact or mistake of law as to the recoverability of the amount. In that view the decision in cases like *Ramjee Row* v. *Masulipatam Municipality*[1], that a payment made under a mistaken belief in law that the plaintiff was liable to pay a municipal tax cannot be recovered back, will no longer be good law.

SAYYAPARAJU SURAYYA *v.* KODURI KONDAMMA, (1949) 2 M.L.J. 684.

This decision deals with a point of much importance, namely, whether admission of the signature or thumb impression by a party amounts to admitting execution within the meaning of section 35 of the Registration Act. Section 35 enacts *inter alia* that if all the persons executing the document appear personally before the registering officer and are personally known to him or if he be otherwise satisfied that they are the persons they represent themselves to be, and if they all admit the execution of the document the registering officer shall register the document as directed in sections 58 to 61 and if any person by whom the document purports to be executed denies its execution, the registering officer shall refuse to register the document as to the person so denying. In *Bapanayya* v. *Bangararaju*[2], it was observed that if the ostensible executant admits his signature to the document, a Registrar is bound to register the document under section 35. Nothing further need be required by the Registrar. The decision under notice takes a different view. According to it, more than a mere admission of the signature by the executant is needed to amount to admission of execution of the document; it is not enough if the person who is the ostensible executant admits his signature on a paper on which it may be, the document is ultimately engrossed; but he must admit that he signed *the document*, that is, a sale deed or a mortgage deed, or a lease deed and so on. The admission of the signature will have to be accompanied by a consciousness or awareness of the type of transaction engrossed on the paper presented for registration. In *Ratilal Nathubhai* v. *Rasiklal Maganlal*[3] it was held that the expression "person executing the document" in section 34 means the person who actually signed the document whether he is the person who actually incurs the obligation or not. Observations of the Privy Council made in another context in *Puran Chand Mahatta* v. *Monmothanath Mukherji*[4] sound a different note. There it was pointed out that the terms 'person executing' and 'person signing' were not identical and that the former expression signified something more, namely, the person who by a valid execution enters into obligation under the instrument. Decisions rendered on the scope of section 77 throw some light on the question. In *Balambal Ammal* v. *Arunachalam Chetty*[5] it was held that in a suit under section 77 the question to be considered is limited to the factum of the execution of the instrument and the validity of the document is not relevant. In *Guruvayya* v. *Venkataratnam*[6] there is a fuller exposition. Coutts Trotter, C.J., observed: "The Registrar has got to ask himself merely this: Is this document now tendered to be registered actually in the state in which

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1. (1940) 2 M.L.J. 469.
2. (1949) 1 M.L.J. 479.
3. (1949) 52 Bom.L.R. 338.
4. (1927) 54 M.L.J. 473 : L.R. 55 I.A. 81 : I.L.R. 55 Cal. 532 (P.C.).
5. (1894) I.L.R. 18 Mad. 255.
6. (1924) 47 M.L.J. 271 : I.L.R. 47 Mad. 833 (F.B.).

it was executed by the parties to it? In my opinion, he would be exceeding his functions, if he went into a roving inquiry to guess at the probabilities of its provisions; and it appears that in a suit under section 77, the same considerations should guide the Court which should guide the Registrar in considering his duty to register or to refuse registration". It would thus seem that admission of executions involves (i) admission of the signature or thumb impression on the document, and (ii) that the document is in the state in which it was executed. It would follow that where a person admits his signature but states that the signature was affixed on a blank paper it would not amount to admitting the execution of the document. In the case under review the point is expressed in a slightly different way, namely, that the admission should advert to the character of the document signed, whether it was a sale, or mortgage, or lease and so on. Some reliance is placed on the fact that section 35 (1) (*a*) refers not to 'execution' merely but to 'execution of the document'. It is however to be noted that the other limbs of section 35 (1) use both expressions indiscriminately. Be that as it may, it is clear that the decisions have generally taken the view that for purposes of section 35 admission of signature or thumb mark by itself would not amount to admitting execution. The same view as that held in the instant case has been reached in a recent decision in Patna, *Jogesh Prasad Singh* v. *Ramachandar Prasad Singh*[1]. The case points out that 'execution' of a document consists in signing a document written out, read over and understood, and does not consist in merely signing a name upon a blank sheet of paper; that in order that a document may be said to be executed the document must be in existence; that where there is no document in existence there is no execution; and that where the alleged executant says that he signed on a blank paper and that the document found is not the document he contemplated, the statement is a denial and not an admission of execution for purposes of section 35.

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1. A.I.R. 1950 Pat. 370.

YUSOFALLI MULLA NOORBHOY *v.* THE KING, (1949) 2 M.L.J. 461 (P.C.).

Nemo debet bis vexari pro una et eadem causa is a well-known maxim. A man may not be put twice in peril for the same cause. It is not merely the plea of *autrefois convict* but also that of *autrefois acquit* that will be available on this principle. Peril within the meaning of the maxim exists only where there was the danger of the defendant being legally convicted in the first proceeding. In *Rex* v. *Marsham*[1] Avory, J., approved the statement in Chitty's Criminal Law[2], that the plea of *autrefois convict* " will be of no avail when the first indictment was invalid and when on that account no judgment could have been given because the life of the defendant was never in jeopardy ". The rule that no man should be placed twice in peril will be attracted only if it was shown that the first trial was before a competent Court, see *Rex* v. *Bowman*[3], *The King* v. *Bates*[4], *The King* v. *Simpson*[5]. As pointed out in *Reg* v. *Justices of Antrim*[6], by Lord O'Brien, C.J. : " If the case were one where the tribunal was *ex facie* wholly unauthorized and the accusation and the accused plainly *coram non judice*, the matter would be entirely different. In such a case the pretended adjudication of the usurping tribunal would appear to be a mere nullity, not merely voidable but void ". If the earlier proceeding was without jurisdiction and resulted in an acquittal and the Government felt embarrassed thereby, it may apply to the High Court to quash the acquittal, *Crane* v. *Director of Public Prosecutions*[7]. To prefer an appeal is not a matter of obligation but one of discretion with the Government. Failure to appeal will not operate as estoppel in the matter of challenging the validity of the earlier proceeding at any time subsequently. In India, section 403, Criminal Procedure Code, provides *inter alia* that a person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, etc. Trial by a Court of competent jurisdiction is thus a *sine qua non* for bar of second trial. It has been held in *Basudeo Agarwalla* v. *Emperor*[8], that a prosecution launched without a valid sanction is a nullity. It would therefore follow that the protection afforded by section 403 will not be available when the previous trial was one without jurisdiction. This conclusion is stated in the instant decision by the Privy Council, where Sir John Beaumont observed : " The whole basis of section 403 (1) is that the first trial should have been before a Court competent to hear and determine the case and to record a verdict of conviction or acquittal ". Clause 2 of Article 20 of the Constitution of India provides : " No person shall be prosecuted and punished for the same offence more than once ". Literally taken it might signify that unless the first proceeding has ended in a conviction, the second proceeding will not be barred. It is the conjunction " and " and not the disjunctive " or " that occurs in the clause. Such construction will lead to the exclusion of the protection afforded by way of *autrefois acquit*. It is however difficult to believe that the Constitution has intended or contemplated the abridgment of the benefit available under section 403 (1) of the Criminal Procedure Code. Be that as it may, even under Article 20 (2) of the Constitution, it should be taken to be implicit that for attracting the protection afforded by it the first trial should have been before a Court competent to hear and determine the case and to record a verdict of conviction.

SAMBASIVA RAO *v.* VENKATASURYANARAYANAMURTHY, (1949) 2 M.L.J. 543.

The liability of instruments to stamp duty is declared in section 3 of the Stamp Act, which enacts *inter alia* that every instrument mentioned in schedule 1, executed on or after the 1st July, 1899, shall be chargeable with duty of the amount indicated in that schedule as the proper duty therefor respectively. Article 1 of schedule

1. (1912) 2 K.B. 362 (C.C.A.).
2. 2nd edn., Vol. 1, p. 463.
3. (1834) 6 C. & P. 337 : 172 E.R. 1266.
4. (1911) 1 K.B. 964 (C.C.A.).
5. (1914) 1 K.B. 66.
6. (1921) 2 A.C. 299.
7. (1895) 2 Ir. Rep. at p. 636.
8. (1945) 1 M.L.J. 369 : (1945) F.C.R. 93.

I prescribes that the stamp duty on acknowledgment of a debt exceeding rupees 20 in amount or value, in order to supply evidence of such debt is one anna. Section 35 provides that no instrument chargeable with duty shall be admitted in evidence for any purpose unless such instrument is duly stamped. So before the section can operate to exclude the reception of an acknowledgment in evidence it must be apparent that the acknowledgment is one requiring to be stamped under article 1 of schedule I. Liability to stamp duty under that article will arise only where the acknowledgment was intended to supply evidence of the debt. Where, therefore, there was independent evidence to establish the debt and the acknowledgment was relied on only to prove the correctness of the amount, the acknowledgment would require no stamp and it cannot be excluded from evidence. In *Nagappa Chetty* v. *V. A. A. R. Firm*[1], Krishnan, J., observed : " I am inclined to hold that the document does not really require a stamp at all ; for it is not an acknowledgment which, in the words of article 1 was obtained in order to supply evidence of the debt, for there is plenty of other evidence on the plaintiffs' side, their account books. This was clearly an ordinary acknowledgment so that the parties might not subsequently dispute the correctness of the amount which had been arrived at as the balance due on the particular date. It was not a document which was required by the plaintiffs for the purposes of proving the existence of the debt itself" ; see also *Manilal Motiram* v. *Natwarlal Gokhaldas*[2]. The Nagpur High Court has in *Seth Bulakhidas* v. *Ganpatrao*[3] held that where the dominant intention in obtaining the signature of the debtor was that he should not dispute the correctness of the account thereafter, and the claim was not getting barred by time on that date the document does not fall within article 1. It is rather difficult to perceive how the claim not being barred on the date by time has relevance to the question of liability to stamp duty. A later decision of the same High Court, in *Pachkodi* v. *Krishnaji*[4] has indicated that the acknowledgment requires to be stamped only if given with the intention of supplying evidence of the debt but not where it is only to extend the period of limitation. In the instant decision an acknowledgment had been signed by the defendant in an account book of the plaintiff. There was already evidence of the debt in the account books. It was held that it was merely an acknowledgment of the correctness of the account and did not require to be stamped and that an acknowledgment of liability for the purpose of saving limitation may be received in evidence though unstamped.

PARAMBAN MAMMADU *v.* THE KING, (1949) 2 M.L.J. 544.

The value to be attched to the opinion of a footprint expert was considered in this case. And it was stated : " The opinion of a footprint expert is not admissible as evidence ". Thus stated the dictum would appear to be rather wide and in conflict with views expressed elsewhere. Section 45 of the Evidence Act enacts : " When the Court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting, or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger inpressions are relevant facts ". Such persons are called experts ". No doubt some of the matters on which opinion of experts would be relevant are specifically mentioned, such as points of foreign law, handwriting and finger prints. But at the same time other matters are mentioned only in a general way, such as, points of science or art. Again, while in terms the section refers to finger prints there is an absence of mention of footprints. An expert is said to be a person specially skilled in the particular matter. Under the English and American systems of law opinions of experts on footprints have been held to be admissible. In our country, in *Oomayan*, In re,[5] it was observed

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1. (1925) 49 M.L.J. 306.
2. A.I.R. 1947 Bom. 337.
3. I.L.R. (1946) Nag. 21.
4. I.L.R. (1949) Nag. 796.
5. A.I.R. 1942 Mad. 452 (2).

by Horwill, J. : " Experts in footprints are not recognised by the Evidence Act ; but there can be no doubt that a magistrate is entitled to take into consideration the evidence of a person who has seen a footprint and taken the footprints of the accused and found that they are very similar. That evidence is not however sufficient to bring home the offence to the accused in the absence of further knowledge regarding the differences, between one foot and another ". The decision holds that footprint experts are not as such recognised by the Evidence Act but that the evidence given by such persons after seeing the footprint and comparing it with that of the accused will be admissible though it may not carry much weight in the absence of corroboration. The nomenclature is held inappropriate but the person can testify. The Indian practice in regard to admissibility of opinion of footprint experts is stated as follows in *Emperor* v. *Babulal Behari*[1]. It was there said : " It is also to be observed that in India, the opinion of expert illiterate trackers called ' puggees ' has invariably been admitted by Courts in different provinces. . . . . without exception having been taken, so far as I am aware, and has been valued as evidence ". The arguments against the admissibility of the opinions of footprint experts were fully examined in *Sidik Sumar* v. *Emperor*,[2] where Weston, J., observed : " The learned Judge's argument is that, as this section was amended in 1899 to include opinion as to identity of finger impressions but has not been amended to include opinion as to identity of foot impressions, evidence as to the identity of an accused person's foot impression or impressions seen by a witness at the scene of the offence and later in a test is not admissible. We do not think this view is correct. The words ' science ' or ' art ' in section 45, Evidence Act, according to the authorities are to be construed widely. The amendment relating to finger impressions appears to have been made to meet particular decisions which had been given by the Courts, and we do not think that this amendment operates to limit in any way the wide meaning, which should be given to the expressions ' science ' or ' art '. There is no doubt that, particularly in the province of Sind, there are trackers, who, though they may have a difficulty in explaining their methods, have a very high degree of skill in observing, tracking, and comparing the footprints of a person. Whether a particular tracker called upon to assist is an expert in this art or science, is, of course, a matter to be decided by the Judge or Magistrate, before reliance can be placed upon his evidence. But if it is established to the satisfaction of the Court that the tracker is a person capable of distinguishing and identifying footprints, there is no reason why his evidence should not be given such consideration as it may deserve ". It would thus seem that there is no bar *per se* to the admissibility of the opinion of a footprint expert. The value which such opinion is entitled to is however a different matter and would depend on the expert's ability to carry conviction about the efficacy of the tests made and the reasoning applied. The correct position, one may say with respect, is indicated in the judgment of the Court in *Pullayya*, In re[3]. There it was observed : " It is not proper for a Judge to be guided in such matters as this entirely by the evidence of an expert. The expert's opinion is valuable, but it must be supported by statements of fact the accuracy or otherwise of which can be verified by the Judge ". In the light of these decisions it is clear that the observation cited at the commencement of this note about the inadmissibility of the opinion of a footprint expert requires to be qualified and read as merely intended to throw emphasis on its relatively poor probative value, particularly inasmuch as Horwill, J., one of the learned Judges who decided the case under review, had in *Oomayan*, In re[4], held that though experts in footprints are not recognised in the Evidence Act, still the magistrate is entitled to take into consideration the statement of one who has seen the footprint and taken the footprint of the accused and found that they were similar.

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1. (1920) I.L.R. 52 Bom. 223.
2. I.L.R. (1941) Kar. 525.
3. A.I.R. 1941 Mad. 88.
4. A.I.R. 1942 Mad. 452 (2).

ARTHUR PATRICK O'REILLY *v.* CYRIL CUTHBERT GITTENS, (1949) 2 M.L.J. 574 (P.C.).

This is an interesting decision dealing with the jurisdiction of Courts to interfere with decisions of domestic tribunals. The latter term is used to refer to committees of trade unions, members' clubs and of professional bodies established by statute while acting in a quasi-judicial capacity, see *Maclean* v. *The Workers' Union*[1]. A domestic tribunal may be constituted even by the mere convention of a number of persons who have associated themselves for any lawful purpose and have delegated disciplinary functions to a smaller body of select members. The powers of such a body may be so extensive that even " the character and prospects in life of any member of the club may be irremediably blasted " in the words of Jessel, M. R., in *Fisher* v. *Keane*[2], should such person come within its jurisdiction. The tribunal will however have to act so as not to violate the principles of natural justice. The fundamentals of material justice should be duly observed and there must be a consistency about its proceedings. It cannot condemn without enquiry and without giving the concerned party an opportunity of presenting his side of the question. Discretion exercised by it should be " according to the rules of reason and justice, not according to private opinion, according to law and not humour. It is to be not arbitrary, vague and fanciful, but legal and regular " ; *Sharp* v. *Wakefield*[3]. But there are very wide differences between the principles applicable to Courts of justice and those which govern domestic tribunals. As pointed out by Maugham, J., in *Maclean* v. *The Workers' Union*[1] : " In the former the accused is entitled to be tried by the Judge according to the evidence legally adduced and has the right to be represented by a skilled advocate . . . . . A domestic tribunal is in general a tribunal composed of laymen. It has no power to administer an oath and . . . . . no party has the power to compel the attendance of witnesses. It is not bound by the rules of evidence . . . . . It may act and sometimes must act, on mere heresay ; and in many cases the members present or some of them are themselves both the witnesses and the Judges. Before such a tribunal counsel have no right of audience and there are no effective means for testing by cross-examination the truth of the statements that may be made. The members of the tribunal may have been discussing the matter for weeks with persons not present at the hearing, and there is no one even to warn them of the danger of acting on preconceived views ". It is well settled that the decision of a domestic tribunal cannot be attacked on the ground that it is against the weight of evidence since there is no evidence in the proper sense of the term and since the decisions of the tribunal are not open to any appeal unless the rules have provided for one. The only grounds on which a Court of law may interfere with the decision of a domestic tribunal are grounds like (i) lack of jurisdiction, (ii) failure to conform to principles of natural justice, (iii) absence of good faith in regard to the proceedings of the tribunal. The fact that any member of the tribunal was biassed will not *per se* be a ground of interference with the verdict of the tribunal. In every club and even in every profession the tribunal which decides the question of the expulsion of a member is to a certain extent interested in the result of the proceedings but that is not in itself ' bias ' which would invalidate the decision, *George Bell* v. *Royal Western India Turf Club*[4]. In general, it may be stated that a Court will not interfere with the decision of a domestic tribunal acting under the rules of the club unless it can be shown that the rules themselves are contrary to principles of natural justice, *Ezra* v. *Mahendra Banerjee*[5]. In the case under review the Privy Council holds that a person who joins an association governed by rules under which he may be expelled has no legal right of redress if he has been expelled according to the rules, however unjust and unfair the rules, or the action of the expelling tribunal may be provided that it has acted in good faith.

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1. (1929) 1 Ch. 602.
2. (1879) 11 Ch. D. 353, 359.
3. (1891) A.C. 173, 179.
4. A.I.R. 1946 Bom. 881.
5. (1946) 51 C.W.N. 612.

SUNDARAJULU NAIDU *v.* NATESA MUDALIAR, (1949) 2 M.L.J. 593.

The character of the income accruing from the properties of a deceased person in the hands of his heir subsequent to the death of the deceased fell to be considered in this case with reference to the liability of such income to be attached and proceeded against in execution of a decree debt of the deceased. It was held that such income would be property of the deceased liable to satisfy his debts under section 52, Civil Procedure Code. It is true that income from the deceased's estate in the hands of the heir could be spent away without the judgment-creditor being able to follow it even as the corpus itself could be so dissipated. It will also be a debatable point as to how far any property purchased by the heir out of the income which accrued subsequent to the death of the deceased could be regarded as the property of the deceased for any purpose. But at the same time it falls to be noticed that the very theory of inheritance in almost every system of law is that what the heir takes is only the assets minus the liabilities of the deceased. In English law income accruing from the estate of a deceased person in the hands of his successor is regarded as property liable to satisfy a decree debt of the deceased. In In re *Hyatt, Bowles* v. *Hyatt*[1], Chitty, J., observed : " Assets by accretion are known to the Common Law. The real estate is made an asset from the time of the debtor's decease, not merely the corpus but the fruit ; the rents and profits are necessarily included. That is shown by the constant course of the Court in administration suits "; see also In re *Moon, Holmes* v. *Holmes*[2]. The matt r was considered in Madras by a Full Bench in *Kadiveluswami Naicker* v. *Eastern Development Corporation, Ltd., London*[3], where it was held that the income arising subsequent to the death of a judgment-debtor from his estate in the hands of his heir could be attached as property of the deceased for the satisfaction of his decree debt. In *Sharaf Jahan Begum* v. *Mahomed Sadiq Ali*[4] it was pointed out that rents and profits being incidents of immovable property must bear the same character as the property itself and though the income may have accrued subsequent to the death of the deceased, it will be liable for the satisfaction of a decree passed against the estate. The view expressed in these cases was approved by the Lahore High Court in *Mansur Hussain* v. (*Firm*) *Ram Rattan*[5]. It was there stated that where the estate in the hands of the heirs of the original debtor against whose estate a decree was passed is liable for the satisfaction of the decree, the produce and income of that estate which has accrued after the death of the original debtor is liable to attachment and sale for satisfaction of the decree. The principles underlying these rulings has been applied in the present case in holding that the crops raised by the heir on a portion of the estate of the deceased judgment-debtor can be attached in execution of a decree against the estate of the deceased.

GHULAM SARWAR KHAN *v.* ABDUL WAHAB KHAN, (1949) 2 M.L.J. 722 (P.C.).

This decision of the Judicial Committee holds that a mortgage security is single and indivisible and the integrity of it cannot be split except by agreement between the mortgagor and the mortgagee and that the principle will equally apply whether the mortgagee himself sells away his rights or his rights are sold by paramount authority. In Englnd the integrity of the mortgage security had been long recognised. In *Hall* v. *Heward*[6], it was observed by Lindley, L.J., that " a person who has any right to redeem has a right to redeem the whole of the mortgaged property and not a part of it, unless there is a special bargain ". It was accordingly stated that inasmuch as the owner of the equity of redemption of one of two estates comprised in the same mortgage cannot insist on redeeming that

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1. (1888) 38 Ch. D. 609, 621.
2. (1907) 2 Ch. 304.
3. (1923) 46 M.L.J. 261 ; I.L.R. 47 Mad. 411 (F.B.).
4. (1928) I.L.R. 2 Luck. 408.
5. A.I.R. 1936 Lah. 236.
6. (1886) 32 Ch. D. 430.

estate separately he cannot be compelled to redeem it separately, his right being to redeem the whole subject to the equities of the other persons interested. See also *Pearce* v. *Morris*[1]. In *Huthasanan Nambudri* v. *Parameswaran Nambudri*[2], Subrahmanya Ayyar, J., observed apropos of this question: "A mortgage for an entire sum is from its very purpose indivisible. . . . . This character of indivisibility exists not only with reference to the mortgagee, who may more generally be benefited thereby, but also with reference to the mortgagor. And save as a matter of special arrangement and bargain between all the persons interested, neither the mortgagor, nor the mortgagee, nor persons acquiring through either a partial interest in the subject, can, under the mortgage get relief except in consonance with the principle of indivisibility referred to". In accepting the principle of law so stated, the Judicial Committee has observed that the position would not in any wise be altered whether the mortgagee's right is sold away by the mortgagee himself or by a paramount authority as at a revenue sale.

BHARADRAJULU *v.* LAKSHMINARAYANA, (1949) 2 M.L.J. 744.

This is a decision dealing with the award of compensatory costs. Section 35-A provides for the award of such costs in respect of false or vexatious claims or defences. For such costs to be awarded (i) the claim or defence must be false or vexatious to the *knowledge* of the party by whom it is put forward, (ii) such claim or defence should have been subsequently *disallowed* against the objector, (iii) objection should have been taken to the false, etc., nature of the claim or defence at the *earliest opportunity*, and (iv) the Court should be satisfied about the *justice* thereof. The costs so awardable are compensatory and not penal, *Mt. Mughaljan* v. *Mirza Shaukat Ali*[3], *Gaya Prasad Shastri* v. *Ramji Lal*[4]. Also it is incumbent on the Court awarding compensatory costs in any case, to record its reasons for holding the defence or claim to be false or vexatious, *Swarnam Iyer* v. *Veeragu Ammal*[5]. The true significance of the provision in section 35-A is thus stated by Horwill, J., in *Meenakshi* v. *Ayyamperumal Udayan*[6]: "Section 35-A is clearly not intended to be read alone. It is as it were an appendix to section 35 and is intended to deal with some exceptional cases for which the exercise of the ordinary discretion of the Court under section 35 would not afford a sufficient compensation". The learned Judge also held that compensatory costs could be awarded against the next friend of a minor. In *Kotturuswami* v. *Viravva*[7], it is pointed out that neither the past activities of the plaintiff in filing suits nor his propensity to file suits for getting properties should be considered for the purpose of awarding compensatory costs in a suit which had involved arguable and complicated questions of fact and law any more than the bad character of an accused can be considered for convicting him when there is no other evidence. The ruling in the instant case is in accord with the line of exposition set out supra and holds that before awarding compensatory costs under section 35-A the Court has to satisfy itself that the claim was false or vexatious to the knowledge of the plaintiff, that the interests of justice require compensatory costs to be awarded and that the defendant had put forward his objection that the suit was false or vexatious at the earliest opportunity.

DURGA PROSAD CHAMRIA *v.* SEWKISHENDAS BHATTAR, (1949) 2 M.L.J. 760 (P.C.).

It is an interesting question as to whether and if so when an arbitrator's award on a point of law can be set aside by the Court. It is settled law in England that if a mistake of law appears on the face of an award of the arbitrator that makes

1. (1869) 5 Ch. App. 227.
2. (1898) I.L.R. 21 Mad. 209.
3. A.I.R. 1931 Lah. 509.
4. I.L.R. (1949) All. 135.
5. (1943) 1 M.L.J. 41.
6. (1943) 2 M.L.J. 30.
7. (1949) 2 M.L.J. 582.

the award bad. It is equally well settled that where a *specific* question of law is referred to the arbitrator, then his decision is final and does not admit of being set aside, *Stimpson* v. *Emmerson*[1]. Referring to this decision, in *Adams* v. *Great North of Scotland Railway Co.*[2], Lord Halsbury said : " In the Court of Common Pleas, forty years ago, in a case in which the arbitrator had a question of law submitted to him according to the ordinary forms of pleading, the Court having come to the conclusion that the decision of the arbitrator was, in the sense in which they understood the words, erroneous in deciding upon a question of law on demurrer, nevertheless held that, the parties having submitted that question to the arbitrator, it was for the arbitrator to determine it in their own language, the parties had agreed to accept the arbitrator's decision upon the question of law, as well as his decision upon the facts". The matter fell to be decided directly in *King and Duveen*, In re[3], where after stating that if a mistake of law appears on the face of the award, it would be bad, Channel, J., went on to observe : " But it is equally clear that if a specific question of law is submitted to an arbitrator for his decision, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside. Otherwise it would be futile ever to submit a question of law to any arbitrator ". All the decisions emphasise that for the arbitrator's award to be final it is a specific question of law that should have been referred to him. The point is clearly brought out in the judgment of Lord Russell of Killowen in *F. R. Absalom, Ltd.* v. *Great Western (London) Garden Village Society*[4]. In the course of his speech the noble Lord remarked : " It is, I think, essential to keep the case where disputes are referred to an arbitrator in the decision of which a question of law becomes material distinct from the case in which a specific question of law has been referred to him for decision. . . . . The authorities make a clear distinction between these two cases, and as they appear to me, they decide that in the former case the Court can interfere if and when any error of law appears on the face of the award, but that in the latter case no such interference is possible upon the ground that it so appears that the decision upon the question of law is an erroneous one ". What exactly the expression " specific question of law " signifies is explained by Lord Wright in the course of his speech in the same case thus : " To be contrasted with such cases there is the specific type of case where a different rule is in force so that the Court will not interfere even though it is manifest on the face of the award that the arbitrator has gone wrong in law. This is so when what is referred to the arbitrator is not the whole question, whether involving both fact or law but only some specific question of of law in express terms as the separate question submitted ; that is to say, where a point of law is submitted as such, that is, as a point of law, which is all that the arbitrator is required to decide no fact being *quoad* that submission in dispute ". It was also pointed out that such a case was *Government of Kelantan* v. *Duff Development Co.*[5]. In that case Lord Cave, L.C., had observed : " But where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the Court only because the Court would itself have come to a different conclusion ". The principles applicable in India are not different. Section 16 of the Arbitration Act provides that the Court may remit the award to the arbitrators for reconsideration upon such terms as it thinks fit, where, for instance, an objection to the legality of the award is apparent on the face of it. Section 30 mentions the circumstances under which an award may be liable to be set aside. That a Court may not interfere with an award where it is a specific question of law that is referred to the arbitrator for decision is pointed out in the case under notice by Lord Radcliffe who observed : " Their Lordships are satisfied that the two points of law as to which it is said that the arbitrator's error vitiates the award were *specifically* referred to him to decide :

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1. 9 L.T. (O.S.) 199.
2. (1891) A.C. 31, 39.
3. (1913) 2 K.B. 32.
4. (1933) A.C. 592.
5. (1923) A.C. 480.

and, if this is so, it would be contrary to well established principles . . . . . for a Court of law to interfere with the award even if the Court itself would have taken a different view of either of the points of law had they been before it."

VENKATARAMA AYYANGAR *v.* THULASI AMMAL, (1949) 2 M.L.J. 802.

An observation in this case is apt if viewed in isolation and dovorced from other facts, to be somewhat disturbing. On an application under section 25 of the Guardians and Wards Act by a mother for the recovery of the custody of her minor daughter from the minor's paternal aunt's husband, it was observed by the learned Judge in the course of his judgment : " Even assuming that a minor has a will of his own which must be respected in such a matter, the preference expressed by a boy or girl of 13 of 14 is not . . . . . entitled to much or any weight at all ". It is no doubt true that in *Rama Iyer* v. *Nataraja Iyer*[1], on an application under section 491, Criminal Procedure Code, it was held by Yahya Ali and Govinda Menon, JJ., that a minor under 14 years of age has no will of his own and his detention against his father's will is unlawful and that the attitude of the minor boy in preferring to stay with his maternal grandfather is not entitled to any weight. But in that case as in the case under notice it was found on the facts that the attitude of the minor had been the result of inducement or influence exercised by interested parties and could not be regarded as an expression of free opinion. It is well settled that in applications under section 25 the welfare of the minor would form the paramount consideration. It is not a mere matter of legal rights, *Abubacker* v. *Mariyumma*[2]. In a decision of the Court of Appeal in England, *Queen* v. *Gyngall*[3], Lord Esher, M. R., considered that child of 6 or 7 years may not know its own mind but it would be different with a girl of 14. In *Ponniah Asari* v. *Suppiah Asari*[4] Beasley, C.J., observed : " The minor girl has herself clearly shown where her preference lies and it is useless to contend that a girl of 13 years of age is not capable of forming a good opinion on such a matter ". In *Dakshayani* v. *Brahmayya*[5], it was held that it is a salutary practice for a Judge sitting on the Guardians and Wards side to examine all minors and interrogate them before directing their return or being handed over to any custody, even that of the legal guardian. The decided cases thus seem to establish that in applications under section 25 the welfare of the minor being the main factor to be taken into accont, an ascertainment of the wishes of the minor by examination by the Judge is desirable, that a minor of 13 years of age may be taken as capable of forming a rational judgment, and the expression of preference by such minor is to be taken into account except where it is clear that such preference was not free but induced or where it would be against the welfare of the minor to give effect to the preference. The observation in the instant case cited at the outset will therefore have to be taken in the light of the considerations adverted to.

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1. (1948) 1 M.L.J. 125.
2. (1945) 2 M.L.J. 463.
3. (1893) 2 Q.B.D. 232.
4. (1935) 68 M.L.J. 213.
5. (1949) 2 M.L.J. 303.

MURUGAPPA MUDALIAR *v.* DASAPPA NAYANIM VARU, (1950) 1 M.L.J. 1.

Apropos of minors it is stated in the Infants Lawyer : " The law protects their persons ; preserves their rights and estates, excuses their laches, and assists them in their pleadings ; the Judges are their counsellors, the jury are their servants and the law is their guardian." It was an interesting point concerning the extent of the protection afforded by law to minors that fell to be decided in the above case. It held that a decree-holder is under no obligation to have it declared that an erstwhile judgment-debtor has attained his majority after the filing of the execution petition and that a sale held without notice to such judgment-debtor as major will not be invalid. There is nothing in the Civil Procedure Code which would apply to the above situation. In *Sheomangal Singh* v. *Birendra Bahadur Singh*[1], it was held that there was no provision of law requiring notice to the guardian of a minor or the minor defendant or respondent attaining majority before discharging him. That case did not however touch the point under discussion. In *Jagannadham* v. *Seshagiri Rao*[2], the learned Judge had remarked : " We think that we are bound . . . . . to hold that a Court auction sale held without notice to the judgment-debtor whose interests were to be directly affected by the sale (as in the present case) without notice to a major judgment-debtor who was wrongly treated as a minor is vitiated by such a grave and material irregularity that the judgment-debtor is entitled to bring a suit to set aside the sale on that sole ground." This is because in such a case the person affected by the sale cannot be said to have been a party at all to the sale inasmuch as he being a major at the time the sale proceedings were initiated was never treated as one, was in fact wrongly described as a minor and on the latter footing only everything was done. It would be analogous to the case of a suit against a major described wrongly as a minor. There would be no jurisdiction acquired against him. In *Raghunath Das* v. *Sundar Das Khstri*[3], after an order for a sale in execution made at the instance of an attaching creditor, the defendants had applied to be adjudicated as insolvents and an order had been passed vesting the property in the Official Assignee. The attaching creditor thereupon applied and got an order for the issue and service on the Official Assignee of a notice calling upon him to show cause why he should not be substituted in the suit for the judgment-debtors. Though served with that notice, the Official Assignee took no notice of it and on the expiry of the time fixed for showing cause, the creditor applied and got an order not merely substituting the Official Assignee as a party in the place of the judgment-debtors but also directing the sale to proceed. The sale was accordingly held and subsequently its validity was questioned. The Privy Council held that the sale was altogether irregular and inoperative inasmuch as the notice was not a proper notice under section 248, Civil Procedure Code, which requires that the notice should have called upon the Official Assignee to show cause why the decree should not be executed against him, and therefore the sale was one without jurisdiction. In the case under review, there was no such lack of jurisdiction. At the time the execution petition was filed the defendant was admittedly a minor. If subsequently he had become a major he could have invited the attention of the Court to that fact. The proceedings having been competently instituted there was no question of lack of jurisdiction in regard to the holding of the sale or of its affecting the erstwhile minor.

VENKATESWARA ETTU NAICKER *v.* AYYAMMAL, (1950) 1 M.L.J. 22.

This case decides that where a substantial provision of law like Order 21, rule 66, Civil Procedure Code is violated and there was no due proclamation of sale, the sale held should be regarded as illegally conducted and therefore void. Order 21, rule 66, directs that when any property is to be sold by public auction

1. A.I.R. 1949 All. 169.
2. (1916) 20 M.L.J. 479.
3. (1914) 18 C.W.N. 1058 (P.C.).

the Court shall cause a proclamation of the sale to be made in the language of the Court, and under rule 67 the proclamation shall be made and published as nearly as possible in the same way as that prescribed in the case of an attachment under rule 54 (2). Looking at the latter rule, it is found that the order shall be proclaimed at some place on or adjacent to the property concerned, by beat of drum or other customary mode. There is nowhere laid down any general rule distinguishing between an illegality and an irregularity and the distinction between them is really one of degree. It might however be said that where there is no effective publication or conduct of the sale, the sale should be regarded as illegal. This is essentially a question of fact. The object of the provisions is to assure security for the fairness of public sales and to see that the publication attracts purchasers as far as it reasonably can. It would follow that where the provision violated has impaired such security the sale should be set aside. In *Basharatulla* v. *Uma Charan Dutt*[1], the sale had been conducted an hour before the time specified in the proclamation of sale and that was held to vitiate the sale. Petherum, C.J., observed : " By section 287 of the Code, it is provided that, when any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court. Such proclamation shall state the time and place of sale, and shall specify fairly and accurately certain other things. There is then a provision in the Code that before a sale takes place, the time and place of sale shall be advertised. It is perfectly true that there is no provision in the Code that the sale shall take place at the time and place advertised, but it is clear that such a provision must be implied and that consequently no sale can take place under the Code except at the time and place advertised under the Code. As a matter of fact, the sale in this case did not take place at the time advertised. When the time advertised arrived, the property had been sold and the whole thing was over ; and when persons came for the purpose of attending the sale at the time advertised, they found that the property had been sold, and that they were too late. Under these circumstances, it seems to us that there was no sale within the meaning of the Code at all, and that this proclamation of the time and place of sale and the taking place of the sale at the time and place advertised are conditions precedent to its being a sale under the Code at all ". The view of the Judicial Committee in *Naganna* v. *Venkatrayulu*[2], is consistent with this approach. There Sir Madhavan Nair, J., observed that the omission to affix the sale proclamation in the Collector's office as prescribed in rule 54 (2) read with rule 67 would ordinarily be deemed a material irregularity as it is a non-compliance with a procedure prescribed by law but was not so in the circumstances of the particular case where the Collector's office and the District Judge's Court were in the same compound and a copy of the proclamation had been duly affixed in the District Judge's Court. In *Nripathi Nath Bhattacharjee* v. *Jatindra Kumar Das*[3], it was observed by Greaves, J. : " We must accept that there was, in fact, no publication of the sale proclamation. Now, is this an illegality as is suggested on behalf of the appellant or is it merely an irregularity ? I feel myself no doubt that it is not an illegality but it is an irregularity which can be waived by the judgment-debtor." That, however, was a case of a sale without a fresh proclamation and not a case where even *ab initio* there was no proper proclamation. The decision in *Subbanna* v. *Satyanarayanamurthi*[4], was also of that kind. Somayya, J., observed : " If there was a proper proclamation to start with and the only ground of attack is that the total period of adjournments exceeded the thirty days fixed in the Madras rule as amended in 1936 and that the sale was held without a fresh proclamation, it appears to us that the sale cannot be held to be an illegal one or a nullity and the sale will set aside only if substantial loss is proved." The question was fully considered in *Jayarama* v. *Vridhagiri Aiyar*[5]. There the sale proclamation had stated that the sale would take place at Cuddalore before the Central Nazir. The proclamation

1. (1889) I.L.R. 16 Cal. 704.
2. (1945) 2 M.L.J. 259 (P.C.).
3. A.I.R. 1926 Cal. 577.
4. (1945) 2 M.L.J. 295.
5. (1920) 39 M.L.J. 188 : I.L.R. 44 Mad. 35.

was not actually published in the village where the lands were situated and the process server entrusted with the duty of publishing it had announced in the village that the sale would take place at the District Munsiff's Court, Villupuram. It was held that if a sale is held at a place to which the proclamation at the village makes no reference and *per contra* invites the bidders to go to another place, there is no proclamation at all leading up to the sale. Seshagiri Ayyar, J., remarked : " I am clear that where a substantial provision of law has been violated, and that has the effect of not attracting persons who could be expected to be present for the purpose of bidding at the sale, the sale should be regarded as having been illegally conducted." It was also stated that failure to proclaim in the village is violation of the most important part of the procedure relating to proclamation. In the instant case it was found that there was no due proclamation and that there was no publication of the sale proclamation as required by Order 21, rule 67, read with rule 54 (2). It was accordingly held that the sale could not be regarded as valid and was void.

MUHAMMAD USSAIN SAHIB *v.* ABDUL GAFFOOR SAHIB, (1950) 1 M.L.J. 81.

Where the method of winding up a partnership is not the subject of any specific provision in the partnership agreement, the rule generally applied is to convert the partnership property into money and to divide the money among the partners in the shares in which they may be entitled to it, after having paid in the first instance the partnership debts. In other words the partnership profits fall to be determined. It is an important question as to the basis on which the assets are to be valued. Under English law, in the absence of specific provision in the partnership agreement, it is the fair value and not the value of the assets appearing in the books that is to be taken. In *Cruikshank* v. *Sutherland*[1], it was held that where the share of a deceased partner was to be ascertained by reference to a general account made up after his death, in the absence of any usage to the contrary the assets were to be taken at their fair value and not at the value appearing in the books of the partnership. In *Coventry* v. *Barclay*[2], the partnership agreement had provided for an account being taken annually and a rest made of the joint stock and the value thereof and for such rest or account being signed by all the partners and for its becoming conclusive when so signed. The book value was thus to be taken. It was so done for a number of years and the valuation had been arrived at by the partners themselves without any appraisement by skilled surveyors. One of the partners died without having signed or being present at the last preceding rest but after having seen and retained the balance sheet sent on to him without raising any objection to the valuation. It was held that the mode of valuation adopted having been in the course of usage had rendered it binding on all the partners. It is to be noted that annual accounts are taken only for the definite purpose of assessing the profits at the end of the year and so long as the partnership enures it would be immaterial if the book value or even a notional value of the assets is taken. The assets continue to belong to the firm as such and any fluctuations in the value of the assets affect the entire firm and not any particular individual. The situation assumes a different complexion when there is a dissolution of the firm or when a partner is retiring. Then it is the real value of the assets that will have to be ascertained, so that every partner may have the advantage of any appreciation of the assets. Therefore it is that the assets have to be valued on the basis of their market value at the time of the dissolution or retirement as the case may be. The case under review applies these well established principles.

PARISA MUDALIAR *v.* NATARAJA UDAYAR, (1950) 1 M.L.J. 90

In deciding that an alienation of the properties of the last full owner by a limited owner for the purpose of meeting the marriage expenses of a daughter's

1. (1922) 92 L.J. Ch. 136 (H.L.). 659.
2. (1863) 3 De G. J. & Sm. 320 : 46 E.R.

son of the full owner will be binding on the reversioners irrespective of whether the father of such person was in indigent or affluent circumstances, provided the limited owner has not acted with extravagance, the law has been taken a step forward from the principles regarded as settled hitherto. In the *Collector of Masulipatam* v. *Cavaly Venkata Naranappah*[1], the Judicial Committee had observed "For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she (the widow) has a larger power of disposition than that which she possesses for purely worldly purposes." In *Sardar Singh* v. *Kunj Behari*[2], the religious acts which may justify an alienation by the limited owner were recognised as divisible under two categories: (i) the actual obsequies of the deceased and the periodical performance of rites prescribed in the Hindu religious law as essential for the salvation of the soul of the deceased and (ii) acts which though not essential or obligatory are still pious and if performed are meritorious and conduce to the spiritual benefits of the deceased. The distinction is relevant in the sense that in the former case even the entirety of the property may be alienated and in the latter case a reasonable portion only could be bound. What were the acts of a spiritual character that would fall within the rule has not anywhere been definitely elucidated. Apropos of this, in *Tatayya* v. *Ramakrishnamma*[3], it was remarked by the learned Judges: "Their Lordships in (*Cavaly Venkata's case*), did not attempt to further define the spiritual purpose. We have endeavoured to suggest the further limitation that the spiritual purpose should be such as is regarded by the Hindu community as reasonable and proper though not absolutely necessary." It was further remarked that if the limited owner was a daughter, "If the expenditure by the daughter is for the spiritual needs of the father's soul it stands on the same footing as the expenditure by the widow for the spiritual needs of her husband." Among the purposes for which a Hindu female limited owner may alienate are mentioned: "To provide for the maintenance of dependent members of her family whom her husband or the other last full owner (as the case may be) was legally or morally bound to support and for their marriage or other necessary religious ceremonies, on a reasonable scale, having regard to the amount of property and the position of the family".[4] It had been held from early times that the limited owner may alienate validly for meeting the expenses of the marriage of the daughter's daughter of the last full owner where the father of the girl was indigent. Thus is *Rustam Singh* v. *Moti Singh*[5], it was said: "The father was unable out of his resources to effect the marriage of his daughter and thereupon Alaf Kuar the mother of the girl, was obliged to have recourse to the property that came from her father to her. There is no doubt of its being the pious duty of the father to effect the marriage. He was unable to do so; so under these circumstances we think that the money, the consideration of this mortgage was borrowed for necessary purposes, namely, the marriage of the daughter". The question seems to have neen regarded as a matter of concern to the limited owner more by virtue of the inability of the girl's father to discharge his obligation by her than as the doing of an act conducive to the spiritual bliss of the last full owner. This decision was followed in *Chudammal* v. *Nadamuni Naidu*[6], which was exactly similar in facts. In *Mt. Narainbali Kumari* v. *Ramdhari Singh*[7], it was observed: "Outside Bengal, expenses for the marriage of a daughter's daughter whose father's father is alive and is in a position to arrange for the marriage do not constitute such a legal necessity as will bind the estate left by a maternal grandfather". It falls to be noted that it is the inability of the relations on the paternal side to get the girl married that is emphasised as the factor imposing any obligation on the maternal grandfather's estate. In *Jai Ram* v. *Bhagat Ram*[8], in holding that an alienation by a widow to meet the expenses of the marriage of her daughter's daughter was justified where the girl was an orphan and there

1. (1861) 8 Moo.I.A. 529, 551 (P.C.).
2. (1922) L.R. 49 I.A. 383: I.L.R. 44 All. 503 (P.C.).
3. (1910) I.L.R. 34 Mad. 288.
4. Trevelyan's Hindu Law, 3rd edn., p. 592.
5. (1896) I.L.R. 18 All. 474.
6. (1909) 3 I.C. 77.
7. (1916) 20 C.W.N. 734.
8. A.I.R. 1935 Lah. 440.

was none else to assume the burden, Monroe, J., said : " It is not by virtue of her own relationship to the girl who is being married that she has any power, but because she is fulfilling a legal or moral obligation which would have affected the deceased owner ". The test thus is whether there was legal or moral obligation affecting the last full owner. Consistently with that, it was pointed out that the duty of marrying a relation does not depend on the question whether that relation is next in succession. The decisions so far had not emphasised that the celebration of the marriage of the daughter's daughter of the last full owner was an act redounding to the spiritual bliss of such owner if the expenses had been met out of his estate, except in the general sense that the celebration of the marriage of a virgin girl is among Hindus a meritorious act. This aspect of the matter received prominence in a decision of Venkataramana Rao, J., in *Srinivasa Rao* v. *Seshacharlu*[1], where in holding that an alienation of a reasonable portion of property by the daughter of a propositus to defray the marriage expenses of her own daughter's daughter whose parents were indigent was valid, the learned Judge observed : " The question . . . . is whether the marriage of a daughter's grand-daughter could be said to be a pious and meritorious act which would conduce to the spiritual benefit of the deceased parents of the first defendant (the daughter). Shastras recognise the gift of a destitute virgin in marriage as a very pious and meritorious act that will confer spiritual benefit, *Ramaswami Ayyar* v. *Vengiduswami Ayyar*[2]. Much more so it must be in the case of a daughter's grand-daughter whose parents are indigent. According to the prevalent Hindu notions the propositus would be morally bound to perform her marriage ". In this case the mother of the girl was dead and her father was poor and the girl and her father had been living with the first defendant, the limited owner. It is noteworthy that here also the obligation is regarded as arising only if the father of the girl was indigent or poor or destitute. The position of the daughter's son has evoked conflicting judicial opinion. In *Rajagopalachariar* v. *Sami Reddi*[3], it was held that under Hindu law a daughter who inherits the property of her father is not entitled to alienate the same for the purpose of getting one of her sons married. Devadoss, J., observed : " It is one of the duties of the father to get his daughter married. In the case of a mother there is no obligation at all to get any of her sons married by borrowing money on the security of the property inherited by her from her father. In *Rustam Lall* v. *Lalla Ganpat Lal*[4], the alienation by the mother was held to be good on the ground that the father was too poor to provide for the marriage of the daughter, and the mother was obliged to find the money for celebrating the marriage of her daughter. This is quite inconsonance with the principle of Hindu law that a daughter should be married before she comes of age and it is the duty of the father to see that she is married. If the father is too poor to do his duty the mother could under the circumstances alienate her property for the purpose of getting the girl married. This would not support the contention of the respondent that the mother could also do the same thing for the son ". According to the learned Judge, the position of the daughter's son is different from the case of a daughter's daughter in this matter and the difference is due to the special outlook of Hindu law that a girl should be married before she comes of age. The same result was reached by Anantakrishna Ayyar, J., in *Anandarao* v. *Venkatasubba Rao*[5] where he pointed out that the daughter's son is not a member of the maternal grandfather's family but is a member of his own father's family, that in that case he had not been a dependent member of the grandfather's family and that the alienation of property by the limited owner for meeting the expenses of the marriage of the daughter's son was for " no purpose connected with the husband's spiritual welfare". A contrary view was taken by Venkatasubba Rao, J., in *Mallayya* v. *Bapi Reddi*[6] in considering the same question. The learned Judge held that a Hindu is morally bound to get his daughter's son married where the boy's father is poor and hence the limited owner taking his property may justifiably alienate it for that purpose.

1. I.L.R. (1942) Mad. 42.
2. (1898) I.L.R. 22 Mad. 113, 115.
3. (1925) 50 M.L.J. 221.
4. (1896) I.L.R. 18 All. 474.
5. (1929) 58 M.L.J. 127.
6. (1931) 62 M.L.J. 39.

It was pointed out that in such circumstances the daughter's son is really a dependent member of her family. Also he occupies in the Hindu system and under the Hindu law a special and privileged position and the reasoning preferring the daughter's daughter to a daughter's son in regard to the defraying of the expenses of the marriage is faulty, that while the daughter's daughter has undoubtedly a special claim, a daughter's son by reason of the privileged position assigned to him in the Hindu system stands on an even higher footing and it was also to be remembered that the daughter's son should he survive his mother is the very person that would eventually take the estate. At this stage, it may be pointed out that the last consideration was considered irrelevant to the issue in *Jai Ram* v. *Bhagat Ram*[1], and the preference accorded to the daughter's daughter was regarded in *Rajagopalachariar's case*[2] as arising by virtue of the Hindu law rule that a girl must be given in marriage before she attains age. It is however noteworthy that according to Venkatasubba Rao, J., even in the case of the daughter's son the alienation by the limited owner would be justified only if the father of the boy was poor. The view taken by Venkatasubba Rao, J., as to the daughter's son was approved by Jackson and Butler, JJ., in *Venkatasubba Rao* v. *Ananda Rao*[3]. Following a text of Brihaspati that " a widow inheriting her husband's estate should honour with food and presents . . . . . a daughter's son ", the learned Judges held that if the expenditure involved was reasonable according to the common notions of the Hindus that would be sufficient justification for the impugned sale. In this case the father of the boy had been a man of means. But that consideration was presumably not regarded as making any difference as to the result. Anyway the instant decision treats that consideration as having no significance. It is there observed : " It is however for consideration whether an alienation for the marriage expenses of a daughter's son only where the father is poor could be said to be for a pious or religious act and be held to be for legal necessity or whether a borrowing for the marriage expenses of a daughter's son irrespective of whether the father of the boy was poor or affluent could be supported as being for legal necessity . . . . . The marriage of a son in a Hindu joint family has been held to be as much a samskara as that of the marriage of a daughter . . . . . If a daughter's daughter's marriage expenses could be said to be necessary, *a fortiori* is the case of a daughter's son. . . . . We are therefore of opinion that an alienation for purposes of meeting the marriage expenses of a daughter's son will be binding on the reversioners irrespective of the circumstance whether the father was in a position or not to meet the expenses of the marriage, provided it is shown that the limited owner acted not with extravagance but with the best of motives ". It may, with respect, be pointed out that the remarks that fell to be made against the decision in *Mallayya* v. *Bapi Reddi*[4] are equally applicable here. Also the present case has more or less assumed the question of the indigence or affluence of the father of the boy as not having any significance though all the previous decisions have uniformly taken that factor into account except for the case of *Venkatasubba Rao* v. *Ananda Rao*[3].

LAKSHMIDHAR MISRA *v.* RANGALAL, (1950) 1 M.L.J. 100 (P.C.).

This is a highly instructive decision of the Judicial Committee. It points out that a claim as to the legal status of the disputed piece of land as being in law a cremation ground of the village by long user cannot be laid either in dedication or on the theory of a lost grant. The true basis of such a claim can be in custom only. Dedication and lost grant are words of art in English law and cannot be invoked to determine legal rights in India and yet released from their essential terms. Dedication in English law is broadly speaking equal to an irrecoverable license granted by the owner of the soil to the use of the public. There can be no dedication where the use is limited to a section of the public only, such as the inhabitants of a village. In *Poole* v. *Huskinson*[5], it was observed by Parke, B., :

1. A.I.R. 1935 Lah. 440.
2. (1925) 50 M.L.J. 221.
3. (1934) 67 M.L.J. 204 : I.L.R. 57 Mad. 772.
4. (1931) 62 M.L.J. 39.
5. (1843) 11 M. & W. 827 : 152 E.R. 1039.

"there may be a dedication to the public for a limited purpose, as for a footway, horseway or driftway; but there cannot be a dedication to a limited part of the public". This view was accepted in *Hildreth* v. *Adamson*[1]. In *Vestry of Bermondsley* v. *Brown*[2], in holding that the dedication by the owner of the soil of a right of way from continuous user can only be presumed in favour of the public but not in favour of the inhabitants of a particular parish, Sir John Romilly, M.R. said: "A dedication to the parish by the owner of the soil cannot be presumed; a dedication from user can only be presumed in favour of the public generally and not in favour of the inhabitants of a particular parish. This is laid down in *Poole* v. *Huskinson*[3] and is unquestionable law. That case also establishes this proposition, that not only cannot such dedication be presumed, but that if actually made it is simply void". It follows that evidence limited to special user cannot justify a finding as to dedication. It is difficult to regard to cremation ground in a particular village as being dedicated to the general public or as being subject to the rights of the general public. Nor can the theory of lost grant be invoked. That theory in English law is a technical device to enable title o be made by prescription in spite of the impossibility of proving immemorial user, which in English law has to be taken as far back as 1189. If the user is shown in fact to have originated subsequent to 1189 the title by prescription would fail. It was to get over the inconvenience so resulting that resort was made to the theory of a lost grant in the case of ancient user which however was less ancient than 1189. But such a right had to be attached to and descend with an estate; also its owners, whether original or by devolution, had to be such persons as could be recipients under a grant. In the case of a right exercisable by the inhabitants of a village there is no estate to which the right is attached nor are the grantees ascertained persons but are a fluctuating body. In *Asrabulla* v. *Kiamatulla*[4], B.K. Mukherjea, J., observed: "No lost grant could be presumed in favour of a fluctuating and unascertained body of persons who constitute the inhabitants of a particular village". It was held that where rights of pasturage are claimed by the whole body of villagers on the ground of presumption of lost grant of such rights, no presumption of such grant by mere long user in case of such rights can be drawn in favour of the villagers. In England, the Courts have recognised many customs in different parts of the countryside which have had the effect of binding some piece of land to the perpetual service of the village or district. In *Fitch* v. *Rawling*[5], the Court were unanimously of the opinion that "an ancient and laudable custom used and approved of in the said parish, that is to say, that all the inhabitants for the time being of the parish aforesaid, have during all the time aforesaid, used and been accustomed to have and of right ought to have had, and still of right ought to have the liberty and privilege of exercising and playing at all kinds of lawful games, sports and pastimes, in and upon the said close every year at all seasonable times of the year at their free will and pleasure" was good. Thus a custom to dance in another's ground at all times of the year was upheld in *Abbot* v. *Weekly*[6]. Similarly a custom to enter upon a piece of land, erect a maypole and dance was upheld in *Hall* v. *Nottingham*.[7] In *Lancashire* v. *Hunt*[8], the right of the inhabitants of Stockbridge to ride and drive over the down and use it for all lawful games and recreations including the right to erect tents and other lawful and necessary accessories was upheld. But as pointed out in *Edward* v. *Jenkins*[9], by Kekewich, J., where a custom is asserted as regards the inhabitants of a particular parish, and the evidence goes to show that the privilege has been exercised by the inhabitants of other parishes, the proof being inconsistent with the allegation, the case will fail on that ground. Much to the same effect is the observation of Sir George Jessel, M. R., in *Hammerton* v. *Honey*[10], in reference to a claim of custom to use a green as a place of recreation and amusement. The learned Master of the Rolls said: "What must be the usage proved? It must

1. (1860) 8 C.B. (N.S.) 587.
2. (1865) L.R. 1 Eq. 204.
3. (1843) 11 M.W.N. 827: 152 E.R. 1039.
4. I.L.R. (1937) 2 Cal, 86.
5. (1795) 2 Hy. Bl. 393.
6. (1665) 1 Levins 176: 83 E.R. 357.
7. (1875) 1 Ex. D. 1.
8. (1894) 11 T.L.R. 49.
9. (1896) 1 Ch. 308.
10. (1876) 24 W.R. 603.

not only be consistent with the custom alleged, but, if I may use the expression not too wide. For instance, if you allege a custom for certain persons to dance on a green and you prove in support of that allegation not only that some people danced, but that everybody else in the world who chose danced and played cricket, you have got beyond your custom". It is thus clear that the proof should not be inconsistent with the allegation in the case and though a customary right can exist in respect of the inhabitants of a village it cannot be claimed by the public at large. In the instant case, the finding was that the suit lands were used for generations as cremation ground, that there was no proof that other plots had at any time been used for the purpose and that the user had never been abandoned. It was held that from this finding it would be reasonable to infer the existence of a village custom to which the law could attach legal sanction.

GANGALAMMA *v.* VENKATARAMI REDDI, (1950) 1 M.L.J. 75 : SUBBAMMA *v.* VENKATA REDDI, (1950) 1 M.L.J. 158.

These were cases of claim of maintenance by Hindu wives against their husbands under the provisions of section 488, Criminal Procedure Code. In both cases there was deliberate attribution of immorality to the wife. And in both cases the learned Judge quoted Chanakya, the great Prime Minister of the Mauryas as having proclaimed more than 2,200 years ago in the Artha Sastra the principle that deliberate attribution of immorality falsely to a wife is legal cruelty sufficient to entitle the wife to live separately from her husband and yet claim maintenance. In law, however, the position does not seem to be so clear. Among Muslims, the doctrine is that way. In *Mt. Maqboolan* v. *Ramzan*[1], it was held that an unfounded accusation of adultery by a husband against his wife is certainly a violation of marital rights, justifying the wife in resisting restitution. In *Jaun Beebee* v. *Sheik Moonshee Befaree*[2], it was held that a charge of adultery by a Muslim against his wife, if false, might be an item of ill-usage towards making up a sufficient answer to his claim for restitution of conjugal rights. In English law, at any rate during the early times, the position does not seem to have been very clear. Anyway in *Bray* v. *Bray*[3] it was considered that a false charge of incest against the wife will amount to legal cruelty and in *Milner* v. *Milner*[4], the treatment of the wife as a common prostitue was regarded as legal cruelty. One thing is clear. The most relevant consideration would be the notions of the particular community concerned. There is at least one decision with reference to Hindus were attribution falsely to the wife of acts of immorality was held as not amounting to legal cruelty and not being a defence to a suit for restitution of conjugal rights by the husband. In *Yamunabai* v. *Narayan*[5], the husband had sued for restitution of conjugal rights. It was shown that he had filed a complaint before the Magistrate charging his wife and another as having committed adultery and that he had been disbelieved. It was also found that the plaintiff had repeatedly aspersed his wife's character. Melvill and West, JJ., held : "But we do not think that we should be justified under Hindu law, any more than under English law, in holding that an unfounded imputation, upon a wife's chastity, however gross an outrage, is by itself sufficient to constitute legal cruelty". The suit was accordingly decreed. The *raison d'etre* seems to be that mere pain to mental feelings such as would result from an unfounded charge of infidelity, however, wantonly caused or keenly felt, would not come within the definition of legal cruelty and that the Court can have no scale of the sensibilities by which it can gauge the quantum of injury done and felt and that the resulting position is not due to any inherent notion of justice but is due to the difficulty of practically administering the opposite rule of regarding the mind the same as the body. Anyway having regard to the important character of the question involved it is desirable that the validity of the view taken by the Bombay High Court is examined fully particularly in the light of the conditions prevailing in Hindu society at the present time.

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1. (1927) I.L.R. 2 Luck. 482.
2. (1865) 3 W.R. 93.
3. 1 Hagg Eccl. 163.
4. 4 Swab & Trist 24.
5. (1876) I.L.R. 1 Bom. 164.

BAPAYYA *v.* BHUSHAYYA, (1950) 1 M.L.J. 196 (F.B.).

It is decided in this case that an agreement by a guardian *ad litem* of a minor withdrawing an application under Order 21, rule 90, Civil Procedure Code, to set aside an execution sale does not fall within Order 32, rule 7 and no leave of Court is necessary. Clause 1 of Order 32, rule 7 provides: No next friend or guardian for the suit shall without the leave of the Court expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian. The words "with reference to the suit" have often come up for elucidation. In *Virupakshayya* v. *Siddappa*[1], it was considered that proceedings in execution are proceedings in suits and a compromise of such proceedings will be a compromise with reference to the suit. Following this view it was held in *Muthalakkammal* v. *Narappa Reddiar*[2] that the provisions of Order 32, rule 7 will apply to execution proceedings and would govern the adjustment of a decree which has to be certified under Order 21, rule 2. In *Govindarajulu Naidu* v. *Ranga Rao*[3], it was pointed out that a decree passed in a suit is *property* and therefore the transfer of a decree by the next friend of a minor is a transfer of property and not an agreement with reference to the suit and would not be affected by the provisions of Order 32, rule 7. This conclusion was approved in *Venkatakrishnayya* v. *Ranakayya*[4], where the next friend of minors had transferred to a third party, for consideration, a decree in their favour and objection had been raised that the transfer should not be recognised for allowing execution inasmuch as the sanction of the Court under Order 32, rule 7 had not been taken. It was observed by Sir Lionel Leach, C.J., that "the transfer of this decree by the mother of the minor was something entirely outside the suit, and in our opinion she had full power to effect the transfer without leave of the Court." Varadachariar, J., added: "As regards rule 7 . . . . . the natural construction of the words used there, namely, "agreement or compromise" appears to be that the agreement or compromise is one between the parties to the suit as contemplated by Order 23, rule 3 or Order 21, rule 2. . . . Rule 7 deals with the conduct of a next friend as such . . . . and the principle underlying rule 7 is that whenever he proposes to do anything beyond the normal conduct of the suit, he has to obtain the leave of the Court to do so. But when a decree passed in favour of a minor is sought to be assigned, the person making the transfer acts not in the capacity of next friend but in his capacity as guardian of the minor's estate." In *Jitendranath Roy* v. *Samarendra Nath Mitter*[5], another aspect of the words "with reference to the suit" was brought out by the Privy Council. It was observed by Lord Atkin: "In the rule (Order 32, rule 7) in the phrase 'agreement or compromise with reference to the suit' the words mean agreement with a party to the suit: and do not cover a transfer of a decree to someone then unconnected with the suit even assuming that such transfer (transfer of a decree by guardian on behalf of minor to third party for consideration) could properly be described as an agreement. They express their agreement on this point with a decision of the Full Bench of the Madras High Court in *Venkatakrishnayya* v. *Ranakayya*[4], which is precisely in point. It appears to their Lordships that it cannot have been intended to require the leave of the Court to an agreement, for example, made with a non-party to finance a suit, whether with a stipulation to receive part of the proceeds or not. The conjunction of the word 'agreement' with the word 'compromise' appears to indicate the kind of agreement intended." These decisions make it clear that sanction under Order 32, rule 7 will be necessary only if (i) the agreement is between the parties to the suit and not where it is with a non-party, and (ii) relates to a dealing *qua* next friend and not *qua* guardian. Applying these tests it is clear that the withdrawal of an application to set aside a sale under Order 21, rule 90, though it may indirectly affect the entire or partial

1. (1902) I.L.R. 26 Bom. 109.
2. (1933) 64 M.L.J. 537: I.L.R. 56 Mad. 430.
3. (1921) 40 M.L.J. 124.
4. (1938) 1 M.L.J. 775: I.L.R. (1938) Mad 819 (F.B.).
5. (1943) 2 M.L.J. 78: L.R. 70 I.A. 68 (P.C.).

satisfaction of the decree cannot be regarded as an agreement dealing with or regulating the nature and extent of the rights and liabilities arising under the decree; nor is the agreement with a stranger auction purchaser to withdraw that petition an agreement with a party to the suit. The decision of the Full Bench that no leave of Court is necessary for the agreement to withdraw the petition so as to bind the minor is thus in accord with the previous decisions on the matter.

JAYANABIBI *v.* JAYARABI, (1950) 1 M.L.J. 209.

In Muslim law a gift cannot be implied. It must be express and unequivocal. The intention of the donor must be manifested by delivery of possession of the thing given. It is a general requirement for the validity of a gift that there should be delivery of possession by the donor to the donee. To this rule certain qualifications have been made. One is the case where the donor and donee are related as husband and wife or *vice versa*. In *Sheikh Muhammad Mumtaz Ahmad* v. *Zubaida Jan*[1], it was stated by Sir Barnes Peacock that "a declaration by the donor in the deed of gift that possession has been given binds the heirs of the donor." The declaration by the donor as to delivery has thus great efficacy and is *prima facie* proof of delivery. The handing over of the deed of gift by the donor to the donee as soon as it is registered was also considered to be a very significant fact for this purpose in *Mirza Mohammad Sadiq Ali Khan* v. *Fakr Jahan Begam*[2]. In *Sheik Ibrahim* v. *Sheik Suleman*[3], West, J., had stated that "when a person is present on the premises proposed to be delivered to him a declaration of the person previously possessed puts him in possession". This view had been accepted in a number of cases, *Bibi Khaver Sultan* v. *Bibi Rukhia Sultan*[4], *Humera Bibi* v. *Najm-un-nissa Bibi*[5], *Sharifa Bibi* v. *Mahomed Dastagir Khan*[6], *Kandath Veetil Bava* v. *Musaliam Veetil Pakrukutti*[7], *Mather Sahib* v. *Hossain Saheb*[8]. The applicability of the test propounded by West, J., as well as certain other aspects of the rule relating to delivery of possession fell to be reviewed by Sir George Lowndes in *Mirza Mohammad Sadiq Ali Khan* v. *Fakr Jahan Begam*[2], where it was stated: "It is not disputed that a gift of immoveable property must ordinarily be completed by a transfer of possession; and there seems to be no difference between Hanafi and Shiah law. The Chief Court thought it was clear that Fakr Jahan had taken actual possession but it is pointed out that this was only after her husband's death. So long as Baqar Ali was alive she merely resided there with him and no change seems to have been made in the method of their joint occupation. But in the first place the deed contains the statement 'I deliver possession of the gifted property to my said wife' and this as a declaration of fact must be regarded as binding on the heirs of the donor . . . . . In the second place, the deed of gift was handed over to the donee as soon as it was registered. In the case of a gift by the husband to his wife, their Lordships do not think that Mahomedan law requires actual vacation by the husband and an actual taking of separate possession by the wife. In their opinion, the declaration made by the husband, followed by the handing over of the deed are amply sufficient to establish a transfer of possession". Apropos of the test propounded by West, J., the Privy Council observed: "It is not necessary for their Lordships to decide in the present case whether this principle is of universal application between Mahomedan donors and donees, but they think that as between a husband and his wife who are living together it is undoubtedly a reasonable interpretation of the requirements of the law, and they adopt it as applicable to the case before them." It is thus clear that in a case of gift by the husband to his wife there need be no actual vacating by the husband and the statement as to delivery of possession by the husband is absolutely binding on his heirs. In the instant case the document recited "I have delivered possession

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1. (1889) L.R. 16 I.A. 205 : I.L.R. 11 All. 460 (P.C.).
2. (1931) 62 M.L.J. 320: L.R. 59 I.A. 1: I.L.R. 6 Luck. 556 (P.C.).
3. (1884) I.L.R. 9 Bom. 946.
4. (1905) I.L.R. 29 Bom. 468.
5. (1905) I.L.R. 28 All. 147.
6. (1892) 3 M.L.J. 15 : I.L.R. 16 Mad. 43.
7. (1907) I.L.R. 30 Mad. 305.
8. (1912) 23 M.L.J. 734.

of the property to you even now." Standing by itself this recital would place the case within the scope of the Privy Council ruling. The learned Judge, however, thought that the observation of the Privy Council in *Mirza Mohammad's case*[1] must be understood in relation to the facts of that case and the fact that in the instant case the settlor had reserved to himself the right to receive the rents during his lifetime and had undertaken to pay the municipal taxes made a difference. In *Ma Mi* v. *Kallandar Ammal*[2], a gift had been made by the husband to the wife, and the wife's name had been duly entered into the public registers as proprietrix. It was held that the fact that the husband had continued to live in the house or to receive the rents after the gift will not militate against the validity of the gift. The husband according to the Judicial Committee will in such cases be presumed to act as the agent of the wife. In this view it is conceivable that in the case under notice the husband's reservation of a right to receive the income and pay the municipal taxes was only by way of agency and was not in derogation of the gift.

CHANDU LAL AGARVALLA *v.* KHALILUR RAHMAN, (1950) 1 M.L.J. 241 (P.C.).

The doctrine of *res judicata* finds a place in section 11 of the Civil Procedure Code. The statement of it there is not, however, exhaustive, *Kalipada De* v. *Durjapada Das*[3]. In English Law it is settled from early times that there may be *res judicata* as between co-defendants and the conditions of its operation were set out by Wigram, V.C., in *Cottingham* v. *Earl of Shrewsbury*[4], thus: "If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the Court will try and decide that case and the co-defendants will be bound, but if the relief given to the plaintiff does not involve or require a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains". These principles are equally operative in India, *Ahmad Ali* v. *Najabat Khan*[5] and *Magniram* v. *Mehdi Hossein Khan*[6]. In *Mt. Munni Bibi* v. *Triloki Nath*[7], the position was stated by Sir George Lowndes in the following terms: "It is, in their Lordships' opinion, in accord with the provisions of section 11, Civil Procedure Code, and they adopt it as the correct criterion in cases where it is sought to apply the rule of *res judicata* as between co-defendants. In such a case three conditions are requisite: (*i*) There must be a conflict of interest between the defendants concerned, (*ii*) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims, and (*iii*) the question between the defendants must have been finally decided." Applying these tests, in *Mahomed Saadat Ali Khan* v. *Wiquar Ali Beg*[8], where a plaintiff claimed to be entitled to a charge on an estate left by a testator and the defendant pleaded that certain other villages in another's hands were also charged and that other person should be impleaded and he was so impleaded and the question as to the existence of the charge on that person's property was finally decided by the appellate Court, Lord Russell of Killowen held that the question of the existence of the charge on the other villages was directly raised and fell to be decided before the Court could determine what relief could be given to the plaintiff and hence such a decision would operate as *res judicata* in any subsequent suit between the defendants. In *Radharani Dassi* v. *Binodamoyee Dassi*[9] Nasim Ali, J., pointed out that for the doctrine of *res judicata* among co-defendants to operate it is necessary that the co-defendants were necessary or proper parties in the former suit; see also *Fateh Nasib* v. *Swarup Chand Hukum Chand*[10]. The instant case adopts the statement made by Sir George Lowndes in *Mt. Munni Bibi's case*[7]

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1. (1931) 62 M.L.J. 320 : L.R. 59 I.A. 1 : I.L.R. 6 Luck. 556 (P.C.).
2. (1926) 52 M.L.J. 362 : L.R. 54 I.A. 23 : I.L.R. 5 Rang. 7 (P.C.).
3. (1930) 58 M.L.J. 171 : L.R. 57 I.A. 24 (P.C.).
4. (1843) 3 Hare 627.
5. (1895) I.L.R. 18 All. 65.
6. (1904) I.L.R. 31 Cal. 95.
7. (1931) 61 M.L.J. 198: L.R. 58 I.A. 158 : I.L.R. 53 All. 103 (P.C.).
8. A.I.R. 1943 P.C. 115: I.L.R. (1943) Kar. (P.C.) 123.
9. I.L.R. (1942) 1 Cal. 169.
10. (1941) 73 Cal. L.J. 475.

as to the conditions to be satisfied for the doctrine of *res judicata* to apply between co-defendants. Lord Simonds proceeded to make certain further remarks which also are very significant. He said : " It may be added that the doctrine may apply even though the party, against whom it is sought to enforce it, did not in the previous suit, think fit to enter an appearance and contest the question. But to this the qualification must be added that, if such a party is to be bound by a previous judgment, it must be proved clearly that he had or must be deemed to have had notice that the relevant question was in issue and would have to be decided. In Madras the conditions on which the decision on a question arising between co-defendants can operate as *res judicata* in a subsequent suit had been stated on the same lines in *Mangamma* v. *E. P. R. Chettiar Firm*[1]. Though it lays down no new principle of law, the instant case is valuable as affording an illustration of circumstances where the conditions for attracting the doctrine of *res judicata* among co-defendants are not satisfied.

MAHANT SUDARSAN DAS *v.* MAHANT RAM KIRPAL DAS, (1950) 1 M.L.J. 243 (P.C.).

This is an instructive decision on the operation of Article 134-B of the Limitation Act. It holds that that Article cannot apply to an execution sale of debutter property. It points out that the appropriate Article would be Article 144 and that adverse possession would start from the date of the sale (if possession has followed). Article 134-B which was inserted into the Limitation Act in 1929 prescribes that for a suit by the manager of a Hindu, Muhammadan or Buddhist religious or charitable endowment to recover possession of immoveable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration the period of limitation is twelve years from the death, resignation or removal of the transferor. In regard to the meaning of the words " transferred . . . . . for a valuable consideration" in the Article, one may follow the meaning given to those words in the comparable context of Article 134. It may also be taken that if Article 134-B applied, limitation would run only from the death of the transferor and not from the date of the involuntary sale. It would be rather incongruous and unnatural to construe a transfer under a Court sale as a transfer by the manager of the endowment. In *Ahmed Kutti* v. *Raman Nambudri*[2], a Full Bench of the Madras High Court had held that the auction purchaser at a sale in execution of a money decree of immoveable property of the judgment-debtor cannot be regarded as a purchaser from the judgment-debtor and that Article 134 is intended solely to apply to cases in which a person disposes of property voluntarily. The same view has been taken in *Kalidas Mallick* v. *Kanhai Lal*[3], *Seonath* v. *Mahi Pal*[4], *Kannusami* v. *Muthuswami*[5], *Charu Chandra* v. *Nahush Chandra*[6]. In *Subbayya Pandaram* v. *Muhammad Mustafa Marcayar*[7], the disposition of property was by way of sale of land devoted to a charitable purpose, under an execution decree against the person who was the trustee of the charity. The appellant had become the trustee under a deed executed by his grandfather in 1890 endowing a chatram with immoveable property. In 1898 in execution of a decree against the appellant's father, the then trustee, for debts incurred by him, the first respondent had purchased a part of the trust property and had been in possession from then. In 1904 the appellant got a decree declaring the validity of the trust in a suit to which the first respondent was a defendant. In 1913 the appellant brought a suit against the respondent for recovery of possession of the property he had purchased in execution in 1898. It was held by Lord Buckmaster that the argument that limitation runs afresh as each new trustee succeeds to the office has no relation to the case, where, as

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1. (1943) 1 M.L.J. 36 : I.L.R. (1943) Mad. 477.
2. (1900) 11 M.L.J. 323 : I.L.R. 25 Mad. 99 (F.B.).
3. (1885) L.R. 11 I.A. 218 : I.L.R. 11 Cal. 121 (P.C.).
4. (1905) 2 All. L.J. 334.
5. (1917) Mad. W.N. 5.
6. (1922) I.L.R. 50 Cal. 49.
7. (1923) 45 M.L.J. 588 : L.R. 50 I.A. 295 : I.L.R. 46 Mad. 751 (P.C.).

here, property has been acquired under an execution sale and possession retained throughout. He held that the suit was barred either under Article 134 or 144, but went on to add : " This is not, in fact, a transfer by the trustee for a valuable consideration, though there is little difference in principle between a transfer under an adverse execution and a sale by the trustee himself, but disregarding that Article, Article 144 covers the exact case." Referring to this decision, in *Mahant Ram Charan Das* v. *Naurangi Lal*[1], Lord Russell of Killowen spoke of it as holding that " the purchaser's possession was adverse from the date of the sale." Likewise in *Babu Mahadeo Prasad* v. *Karia Bharti*[2], it was held that the possession of an assignee would become adverse from the moment of the attempted assignment where the assignment is void and passes no title. These views are followed in the instant case. In holding that Article 144 alone will apply and that possession became adverse from the date of the alienation (when accompanied, of course, by possession) Lord Radcliffe draws pointed attention to Lord Buckmaster's remarks in *Subbayya Pandaram's case*[3], which were as follows : " Though he is at liberty to dispose of it during the period of his life and a grant made for a longer period is good, but good only to the extent of his own life interest. It follows, therefore, that possession during his life is not adverse, and that upon his death the succeeding trustee would be at liberty to institute proceedings to recover the estate, and the statute would only run against him as from the time when he assumed the office. Such an argument has no relation to the case where, as here, property has been acquired under an execution sale and possession retained throughout."

TIRTHA LAL DEY *v.* BHUSAN MOYEE DASI, (1950) 1 M.L.J. 249 (F.C.).

It is well settled that a submission to arbitration is not revoked by the death of one of the parties to the submission where the intention is clear that not merely the parties but also their legal representatives should be bound by the award of the arbitrator, *Manindra Nath* v. *Mohanunda Roy*[4]. It is also the law that in case a party to the arbitration dies pending the reference a valid award cannot be made so as to bind the estate unless the legal representatives are made parties to the reference. Where the reference is not through Court this can be done by notice to the concerned persons. This is on the analogy of the principle that in a pending suit all parties must join in the reference. Also ordinarily, if there are two or more legal representatives of a deceased person all of them must be impleaded. In *Muhammad Hassan* v. *Inayat Hussain*[5], apropos of the meaning of the term " legal representatives," it was observed by Sir Shadi Lal, C.J. : " These words mean the representation before the Court of the plenary interest of the deceased party. Sometimes that interest may be represented by a single individual but it may also be represented by a number of persons as the case may be. But there should be a complete representation of the interest of the deceased person, whether through a single individual or through a number of persons so that there cannot be a partial representation of that interest. In other words the expression ' legal representative ' means and includes one person as well as several persons according as they represent the whole interest of the deceased person." The underlying idea is that there should have been a proper hearing of the matters in dispute if the award is to bind. In *Amir Begam* v. *Badr-ud-din Husain*[6], there was a private arbitration in disputes which arose concerning the will of a Muslim. An application was made under section 20 of the Civil Procedure Code for filing the award and passing a decree in accordance with it. An objection was taken *inter alia* that the proceedings in the reference had been conducted in such a way that the matters in dispute had not been properly tried. The allegation was that the parties had not been properly summoned to appear before the arbitrator and the appellant had not had an oppor-

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1. (1933) 64 M.L.J. 505 : L.R. 60 I.A. 124 : I.L.R. 12 Pat. 251 (P.C.).
2. (1934) 68 M.L.J. 499 : L.R. 62 I.A. 47 : I.L.R. 57 All. 159 (P.C.).
3. (1923) 45 M.L.J. 588 : L.R. 50 I.A. 295 : I.L.R. 46 Mad. 751 (P.C.).
4. (1911) 13 I.C. 161.
5. A.I.R. 1927 Lah. 94.
6. (1914) 27 M.L.J. 181 : I.L.R. 36 All. 336 (P.C.).

tunity of meeting the case set up by respondent 1. It was found that the alleged irregularities were without any foundation. It was observed by Lord Parmoor that "if irregularities in procedure can be proved which would amount to no proper hearing of the matters in dispute there would be misconduct sufficient to vitiate the award without any imputation on the honesty or impartiality of the arbitrator." It was recognised that though an inquiry in a private arbitration should conform generally to proceedings in a Court of law the arbitrator is not bound to observe the strict rules of procedure laid down in the Civil Procedure Code. Similarly it would seem that the rule that in case of death of a party a valid award cannot be given so as to bind the estate unless the legal representatives are made parties to the reference will be satisfied if the estate of the deceased is sufficiently represented by one or more of his representatives substituted in his place provided the substitution has been *bona fide* and the proceedings had been continued without fraud, and the omission of the others has not caused any real prejudice. In *Khairajimal* v. *Daim*[1], one *N* had mortgaged his share in a certain property. The mortgagee sued on his mortgage. The suit was referred to an arbitrator. Pending the disposal of the reference, *N* died. His heirs were his two widows, a son and a daughter. The widows and the son were brought on record but not the daughter. The arbitrator made an award by which the plaintiff was to recover a certain sum from the share of *N*. The Court passed a decree in terms of the award and in execution of the decree the property was sold. Subsequently the heirs of *N* brought a suit for the redemption of the mortgage impugning the earlier decree and the sale. It was held by the Judicial Committee that *N*'s estate had been sufficiently represented in the earlier proceedings although the name of his infant daughter had been omitted and therefore the decree and the execution in the earlier proceedings will bind the estate. It was also recognised that the position would be altogether different if the estate of the deceased had no representation at all. In *Binayakdas Acharjee Chowdhury* v. *Sashi Bhusan Chowdhury*[2], there was an agreement to refer to arbitration and during the course of the hearing some of the parties died. The representatives of the deceased did not take any action though they were called upon to do so. It was held that the award cannot be deemed to be invalid. The learned Judges observed: "It is true as a general principle that a person who is not a party to or properly represented in any proceedings should not be bound by those proceedings. But proceedings before arbitrators are not intended to be carried on according to the rules of procedure contained in the Civil Procedure Code. If there is a binding reference to arbitration all that is necessary to be seen is that there is a substantial representation of the different interests before the arbitrators. If we were to hold that the arbitrators could not go on with the arbitration as the representatives or some persons on their behalf did not choose to come before the arbitrators, the result would be that although the reference would not abate on the death of a party under the law, the arbitrators would, in fact, be unable to make an award and the arbitration would come to an end . . . . . The question whether the award would be binding or not must depend on the circumstances of each case". In the case under notice, three brothers governed by the Dayabhaga law had by a registered instrument referred to an arbitrator the partitioning of their family properties. The reference paper recited that none of the parties nor their legal representatives would object to the arbitration. The arbitrator was empowered to make his award in instalments. It was also provided that the award was to be made within six months but if further time was needed the arbitrator was authorised to extend the time by giving the parties intimation or notice. One of the brothers died while the reference was pending. He left behind him five sons and a widow. By virtue of the Hindu Women's Rights to Property Act, 1937, the latter had become entitled to a share of the estate. That she was an heir was not known to the parties or to the arbitrator till the last meeting before the award. She had not been served with any notice and her views were

1. (1904) L.R. 32 I.A. 23: I.L.R. 32 Cal. 296 (P.C.).
2. A.I.R. 1922 Cal. 226.

not represented. Her sons were heard and had notice of all the happenings. It was apparent that her interest was adverse to that of the sons. It was however shown that she had throughout knowledge of the arbitration. In these circumstances four of the Judges of the Federal Court held that the widow's interest had received no representation at all and that the award will not bind. One learned Judge dissented and held that the estate of the deceased party had been substantially represented and therefore the outcome of the arbitration will bind also the person who was not brought on record as a legal representative. The entire matter in the result took on the character of a question of fact as to the effectiveness of the representation.

COMMISSIONER OF INCOME-TAX, MADRAS *v.* RAJASUNDARAM CHETTY, (1950) 1 M.L.J. 283.

The question that had to be decided in this case was whether the share income of a minor illegitimate son of the assessee who had been admitted to the benefits of a partnership was liable to be included in the income of the assessee, the father, for the purpose of assessment under section 16 (3) (*a*) (ii) of the Income-tax Act as the income of a "child". In English law the word "child" had been the subject of construction in regard to its use in several statutes. In an early case, *Reg* v. *Maule*[1], in connection with the Poor Law Amendment Act, 1834, it was held by Wightman, J., that the word 'child' in that Act had reference to a legitimate child only. In *The Queen* v. *Totley*[2], Lord Denman, C.J., observed generally: "The law does not contemplate illegitimacy. The proper description of a legitimate child is child". See also *R.* v. *Inhabitants of Wyke*[3], *R.* v. *Inhabitants of Birmingham*[4]. In *Dickinson* v. *The North Eastern Railway Co.*[5], Pollock, C.B., construing the word 'child' within the meaning of the statute 9 and 10 Vic., c. 93, section 2 said: "But beyond all doubt in the construction of this Act of Parliament the word 'child' means legitimate child only". In *Woolwich Union* v. *Fulham Union*[6], in holding that the proviso to section 1 of the Poor Removal Act, 1846, as amended by the Poor Removal Act, 1848, does not apply to illegitimate children, Vaughan Williams, L.J., said: "It is of course true that that is only *prima facie* the meaning to be given to the word and that a wider meaning may in the case of some statutes, be given to it, so as to include an illegitimate child or illegitimate children, where that meaning is more consonant with the object of the statute". In *Morris* v. *Britannic Assurance Co., Ltd.*[7], Mackinnon, J., observed: "Does the word 'child' in section 8, sub-section (1) (*b*) of the Friendly Societies Act, 1896, and the word 'child' in the Act of 1923, section 3 mean a child born in lawful wedlock, or does it also include a child that is illegitimate? . . . . . *Prima facie* I agree that when in legal documents the word 'child' is used it means a legitimate child, but no doubt a consideration of the context may require one to give it a wider meaning so as to include both legitimate and illegitimate children". It would thus seem that ordinarily the term child means a legitimate child only. A wider meaning may be given if the context justifies. Looking to the Indian Income-tax Act the first fact to be noticed is that it applies to all persons irrespective of their faith or religion. An illegitimate son no doubt is entitled to a share of the inheritance on the death of his putative father, but this is a special rule under special conditions applicable in the case of Sudras only. The right flows from special texts of Hindu law and therefore cannot be pressed into service in regard to the interpretation of an enactment which must be construed as to carry a uniform meaning with reference to all the persons to whom the Act applies. As pointed out by the learned Judges:

1. (1842) 2 Dowl. (N.S.) 58.
2. (1845) 7 Q.B. 596: 115 E.R. 614.
3. (1746) Burr. S.C. 264, 265.
4. (1846) 8 Q.B. 410.
5. (1863) 2 H. & C. 735: 159 E.R. 304.
6. (1906) 2 K.B. 240 (C.A.).
7. (1931) 2 K.B. 125.

"Whether you have to construe a will or deed or the language of a statute, the word 'child' taken simpliciter means a 'legitimate child', but this meaning can be qualified or extended by other suitable words or by the context or by the object and purpose of the statute or document in which the expression occurs". In the absence of a contrary intention therefore all provisions respecting 'children' contained in any laws or instruments having legal operation must be understood as applying to legitimate children alone.

SANMUKH SING *v.* THE KING, (1950) 1 M.L.J. 286 (P.C.).

An interesting point concerning section 195 (1) (*c*) of the Code of Criminal Procedure was elucidated by the Judicial Committee in this case. Under that provision, a Court is barred from taking cognisance of any offence described in section 463 or punishable under section 471, section 475 or section 476 of the Indian Penal Code, when the offence is alleged to have been committed by a party to any proceeding in any Court in respect of "a document produced or given in evidence in such proceeding" except on the complaint in writing of such Court or some other Court to which such Court is subordinate. In *King-Emperor* v. *Shankari Baksh Singh*[1], it was held that the words "produced or given in evidence" in section 195, Criminal Procedure Code, refer to the production of the *original* and not to the production of a copy. This is so, for the very sound reason that the Court before which a copy of the document is produced is not in a position to express any opinion whatever about the genuineness or otherwise of the original. Thus if the words of section 195 are literally construed they can refer to the production of the original only. This view was reiterated by the Oudh Chief Court in *Girdhari Lal* v. *Emperor*[2]. In the instant case the Privy Council in adopting the view observed: "They concur in the opinion expressed . . . . . in *Girdhari Lal* v. *Emperor*[2], that the section can only refer to the document alleged to be forged, not to a copy of it. This view which accords with the plain grammatical meaning of the words is supported by the practical common sense of the matter . . . . . It was suggested that a forged document might at least be said 'to be given in evidence' if a copy was produced, but it appears to their Lordships that, though by production of a copy secondary evidence of the contents of a document might be said to be given, the forged document itself would not thus be given in evidence."

NAGARMAL *v.* BAJRANGLAL, (1950) 1 M.L.J. 289 (P.C.).

This is a copy book decision which cuts no new ground. It however deals with a point of frequent occurrence. It holds that the manager of a joint family is not competent to bind the other members of the family by paying a debt already statute barred. In *Chinnayya* v. *Gurunatham*[3], it was observed by Turner, C.J.: "A manager has authority to make payments for the family; he has the same authority to acknowledge as he has to create debts, but he has no power to revive a claim barred by limitation, unless he is expressly authorised to do so." This view has been taken in a number of cases, *Kumaraswami Nadan* v. *Pala Nagappa Chetti*[4], *Sobhanadri Appa Rao* v. *Sriramulu*[5] and *Dinkar* v. *Appaji*[6]. The case under notice points out that a manager has general authority to keep alive by acknowledgment a debt which is not yet barred but this principle cannot avail unless the acknowledgment is such as to satisfy the conditions of section 19 of the Limitation Act.

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1. (1905) 8 O.C. 313.
2. A.I.R. 1925 Oudh 413.
3. (1882) I.L.R. 5 Mad. 169 (F.B.).
4. (1878) I.L.R. 1 Mad. 385.
5. (1893) I.L.R. 17 Mad. 221.
6. (1894) I.L.R. 20 Bom. 155.

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